DIRECTORS ROUNDTABLE

# WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

## Leslie M. Turner

General Counsel of the Hershey Company

## THE SPEAKERS

**Leslie M. Turner**
*Senior Vice President, General Counsel & Secretary, The Hershey Company*

**Sean G. D'Arcy**
*Partner, Akin Gump Strauss Hauer & Feld LLP*

**J. Steven Patterson**
*Partner, Hunton & Williams LLP*

**Michael S. Burkhardt**
*Partner, Morgan Lewis & Bockius LLP*

**William F. Cavanaugh, Jr.**
*Co-Chair, Patterson Belknap Webb & Tyler LLP*

**Thomas P. Desmond**
*Chair, Corporate Practice, Vedder Price PC*

(The biographies of the speakers are presented at the end of this transcript. Further information about the Directors Roundtable can be found at our website, www.directorsroundtable.com.)

## TO THE READER

General Counsel are more important than ever in history. Boards of Directors look increasingly to them to enhance financial and business strategy, compliance, and integrity of corporate operations. In recognition of our distinguished guest of honor's personal accomplishments in her career and her leadership in the profession, we are presenting Leslie M. Turner, General Counsel of The Hershey Company, with the leading global honor for General Counsel. Hershey is a global manufacturer of quality chocolate and other confections. Ms. Turner's address will focus on "Key Issues Facing General Counsel in the New Global Realities." The panelists' additional topics include employment, M&A, IP, antitrust, executive compensation, and the impact of Washington on Boards of Directors.

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

## Leslie M. Turner

*Senior Vice President,*
*General Counsel & Secretary,*
*The Hershey Company*

Ms. Turner has oversight for Hershey's legal, government relations, corporate security, and corporate secretary functions. She is a member of Hershey's Global Leadership Team and the executive sponsor of Hershey's Abilities First Resource Business Group.

Prior to joining Hershey in 2012, Ms. Turner served first as Associate General Counsel for The Coca-Cola Company's Bottling Investments Group and then as Chief Legal Officer, Coca-Cola North America. She previously was a litigation partner in the Washington, D.C. office of Akin, Gump, Strauss, Hauer & Feld.

Ms. Turner began her legal career in 1985 as law clerk to the Honorable William C. Pryor, former Chief Judge of the District of Columbia Court of Appeals. In 1986, she joined Akin Gump's litigation practice group. In 1993, she accepted the U.S. Senate-confirmed position of assistant secretary for the Office of Territorial and International Affairs, U.S. Department of the Interior. In that role, she managed the office that oversaw U.S. relations with such territories and federated states as American Samoa, the Commonwealth of the Northern Marianas, the U.S. Virgin Islands, Micronesia and Palau. In 1995, Ms. Turner became counselor to then-Secretary Bruce Babbitt and director of the Office of Intergovernmental Affairs, U.S. Department of the Interior.

Ms. Turner is the recipient of numerous professional awards, including the Lifetime Achievement General Counsel Recognition Award from the NYSE Governance Services; Legends in the Law Award from The Burton Awards; Wiley A. Branton Award from Washington Lawyers' Committee for Civil Rights and Urban Affairs; M. Ashley Dickerson Award from the National Association of Women Lawyers; and a Diamond Award from the Corporate Counsel Women of Color. Ms. Turner was also featured as one of *Savoy Magazine*'s 2015 Most Influential Black Lawyers.

Ms. Turner received a Bachelor of Science degree from New York University, a J.D. from Georgetown University Law Center and a Master of Laws in Law and Government from American University, Washington College of Law. She is a member of the Board of Visitors, Georgetown University Law Center; and a Trustee, Washington Lawyers' Committee for Civil Rights and Urban Affairs.

## The Hershey Company

The Hershey Company, headquartered in Hershey, Pa., is a global confectionery leader known for bringing goodness to the world through its chocolate, sweets, mints and other great-tasting snacks. Hershey has approximately 22,000 employees around the world who work every day to deliver delicious, quality products. The company has more than 80 brands around the world that drive more than $7.4 billion in annual revenues, including such iconic brand names as Hershey's, Reese's, Hershey's Kisses, Jolly Rancher, Ice Breakers and Brookside. Building on its core business, Hershey is expanding its portfolio to include a broader range of delicious snacks. The company remains focused on growing its presence in key international markets while continuing to extend its competitive advantage in North America.

At Hershey, goodness has always been about more than delicious products. For more than 120 years, Hershey has been committed to operating fairly, ethically, and sustainably. Hershey founder, Milton Hershey, created the Milton Hershey School in 1909, and since then the company has focused on giving underserved children the skills and support they need to be successful. Today, the company continues this social purpose through "Nourishing Minds," a global initiative that provides basic nutrition to help children learn and grow. From neighborhoods across the United States to the streets of Shanghai and Mumbai, and villages of West Africa, our goal is to nourish one million minds by 2020.

**JACK FRIEDMAN:** Welcome. I am Jack Friedman, Chairman of the Directors Roundtable, we are a civic group and have never charged anyone to attend 800 events globally in 24 years. We have programming all over the world, and our mission is to do the finest programming for boards of directors and their advisors.

There's a general issue of not understanding what companies really do and the conscientiousness which their people have towards their responsibilities. Boards have told us that companies are not sufficiently recognized for their accomplishments.

We have organized this programming for both the executive side and the General Counsel side on a global basis. Today, we are privileged to present the leading World Honor for General Counsel to Leslie Turner of Hershey.

Leslie is very respected in the profession. Her company is not only a household word in terms of their products, but is also noted for special projects and activities that they do, and the care with which they render business. It's very fitting that we are presenting this world honor to her today.

Leslie has had many responsibilities and achievements during her career, including her position as the General Counsel at The Hershey Company. She is a graduate of the Georgetown Law School. In every domain of activity, she has contributed.

The five Distinguished Panelists will each introduce their particular topics following Leslie's comments, and then we will have a roundtable discussion with Leslie and questions from the audience. Our Panelists today are Thomas Desmond of Vedder Price, Mike Burkhardt of Morgan Lewis, Steve Patterson of Hunton & Williams, Bill Cavanaugh of Patterson Belknap, the Co-Chair of the firm, and Sean D'Arcy of Akin Gump.

Following today's event, we will prepare a full-color transcript which will be made available electronically to about 150,000 leaders on a global basis, so they will be able to share the wisdom and comments that are made here today.

I would now like to have Leslie come up and make her address. Thank you.

**LESLIE M. TURNER:** Thank you, Jack. I really appreciate the time that you've set aside to come here today. It's an honor to participate in the Directors Roundtable. I would like to recognize all our panelists; they will introduce themselves later, as they provide us with information on various topics. I have worked with each of them; they are people whom I can really lean into and rely on for counsel and advice — sometimes advising what it is that you should be doing, what you shouldn't be doing, and always having that courage to speak out and say, "Stop for a moment and reflect" on what's the best approach for the company.

I also would point out that Sean D'Arcy and I were baby lawyers together at Akin Gump. And we learned how to deal with so many situations during the development of our professional skills.

I want to call out two people in the audience for special recognition — actually, there are a lot more than two faces here that I see — but first, Kathleen Purcell, who traveled with me from the sweetest place on Earth (from Hershey); she's the Assistant Corporate Secretary; she's part of my leadership team, and she's here with me today. I also see Mark Woolley in the audience. He's the Deputy General Counsel for the Hershey Trust Company. Thank you, Mark, for attending this session. Also, I would like to make a special call-out to Jeff Horwitz and his colleagues. I met Jeff when he was GC at the White House. He's now — I'm going to have to read this long title that you now have, Jeff — Director of Development and Alumni Relations, Penn State Law and School of International Affairs. I just wanted to say a special "hello" to all of you.

I'm going to start out with a little bit of background on The Hershey Company, and then talk about globalization, and how it impacts the daily lives of General Counsel.

As many of you might know, The Hershey Company incorporated in Delaware in about 1927, as a successor to the company that Milton Hershey established in 1894. We have about 22,000 employees worldwide. When you think about The Hershey Company, you may think about Hershey's Milk Chocolate Bar and Reese's. We also have other chocolate and sugar confectionery items. And we have pantry items, like bakery goods, baking ingredients, toppings, beverages and syrups; and gum and mint refreshment products. We are expanding our portfolio into a new area which we call "snacking." I'll talk about the snacking area shortly.

The slides show some of the brands that are important to us. We have more than 80 brands around the globe. You can recognize some of the iconic brands — I pulled out a few of them (Reese's, Kisses, Jolly Rancher, Ice Breakers, and Brookside). There's the Hershey's Milk Chocolate Bar — we are such a part of the history of our country. During World War II, every soldier could have a Coca-Cola® and a Hershey Bar. That Hershey Bar was configured so that it would not melt as fast, because of the inclement climate they had to deal with. We configured it so it wouldn't taste as good, so they wouldn't eat it so fast, and they'd be able to store it. [LAUGHTER] Now, if you go down to the Pentagon, there's a mural that actually has a parachute scene that shows Hershey Bars that were dropped to the soldiers. We are proud to be a part of this country.

Reese's is actually our most popular brand here in the United States. I also point out Lancaster; it's the first of our major brands that we launched outside of the United States — we launched that brand in China just last year.

Outside, on the front view of the slide, is Brookside, a Canadian company that we acquired. One of our panelists will talk about cross-border acquisitions and some challenges that counsel face in that regard. Krave is in the meat snack area that we recently entered to expand our profile in response to consumers' interest in snacking options.

We have all these brands and we're in all these countries, and we always say that with our more than one hundred years of existence, the most important thing, really, is our people. Our people are our greatest asset. We strive to operate fairly, ethically, and sustainably to make a positive impact on the community. That focus on having a positive impact flows from our founder, Milton Hershey. He and his wife, Catherine, didn't have children. They established The Milton Hershey School in 1909 to care for orphan boys. Subsequently, Mr. Hershey donated almost his entire fortune to the

> "Our people are our greatest asset. We strive to operate fairly, ethically, and sustainably to make a positive impact on the community. That focus on having a positive impact flows from our founder, Milton Hershey." – *Leslie M. Turner*

Milton Hershey Trust to administer the school. Today, that Trust administers a co-educational, residential program for a little under 2,000 children. The children receive residential care in home settings in Hershey, Pennsylvania and a first-rate education. The Trust is the largest shareholder of The Hershey Company, so the kids are direct beneficiaries of what we do.

We're one of those unique publicly traded companies where we have a single shareholder that also has a majority voting block in the company, as well.

So, you see our footprint. We're a company that's grown beyond the boundaries of Hershey, Pennsylvania — into China, India, and Latin America. We're steadily moving toward becoming a multinational company. We export, market, sell, and distribute products in Central America, the Mideast, Europe and Africa regions. That global footprint really has an impact on how we do business.

Our customers are primarily wholesalers. Think about places like your chain grocery stores; chain drugstores, wholesale club stores, dollar stores, and vending companies. They are the customers of The Hershey Company. With the exception of our wholesale distributors, our customers then resell the products to the end consumer in the retail environment worldwide. That's how we operate.

Our organization — I'll take just a few minutes to talk about the Law Department. The Law Department at Hershey is a combination of a number of groups. We have our legal or "law" group — the lawyers and paralegals. Also included in the Law Department are Ethics & Compliance, Corporate Secretary's Office, and Global Security. Global Security is not just the protection of assets or people any more. They're very involved in the protection of our intellectual property and sit at the center of our crisis management and emergency preparedness activities. We have about 63 lawyers worldwide; a third of those lawyers are outside of the United States, and it benefits the Company for them to be embedded in the business. It's really important that we utilize locally trained and experienced lawyers where we have our business.

I want to point out, we use a unitary structure where everyone in the Law Department — whether they support Government Relations, Ethics & Compliance, or our Global Security, all roll up into the Law Department, all report to the General Counsel's office, and then we report directly into the CEO's office. The reason for our unitary structure is to enable our people to have the ability to retain their voice to the organization without concern of retaliation. When the team sometimes has to give advice or guidance that may be difficult or challenging to implement in the business setting, the unitary structure allows them to maintain their integrity and be able to provide courageous counsel.

I'll tell you a lesson that I've learned over the years — regardless of whatever setting you're operating in — the success of a leader really depends upon the success of the team. I have such a fabulous team at The Hershey Company. When one considers all the things that are done, by the General Counsel's office; there are a whole lot of people responsible for and delivering the outcome.

Walking into the room now is someone I want to acknowledge: our Lead Director of The Hershey Company is here — Jim

Nevels — thank you for being here. I want to recognize that he is also traveling from the sweetest place on Earth to be here with us.

Let's move to my topic. You know a little bit about The Hershey Company. When I considered the global footprint for The Hershey Company, I thought, "What should I talk about?" I was reading, and I also heard commentary on NPR about Justice Breyer's new book. I've been carrying it around with me; it's *The Court and the World: American Law and the New Global Realities*. I got a hardcopy as opposed to an e-copy, so I could keep track of where I am and what I'm doing. It's a really great book, and I encourage you to take time out to read it.

In his book, Justice Breyer provides a "report from the front." He talks about the globalization of the Supreme Court's docket, and the complexities facing the judicial system. Justice Breyer says the Court must respond by expanding its consideration and understanding of laws and practices outside the United States. He examines how the transformation is already underway, and is going to accelerate because of the global interconnectedness within which we live and operate. I think about our business, and that parallel, that interconnectedness; is a daily reality for The Hershey Company. It's a reality for General Counsel, from the time that we wake up to the time that we sleep. We talk about the 24/7 nature of our roles in our Law Dept. — that by four, five, six o'clock in the evening on the U.S. side, the Blackberry (I still use a Blackberry) starts whirring. We always say, "Yup — the other side of the world is awake." I was just in China last week, and for their four o'clock, five o'clock, six o'clock in the evening, we have the same commentary, "The other side of the world is awake!" As General Counsel we have an interconnectedness on an ongoing and daily basis. I imagine that probably all of us in this room, maybe more than anyone else, can validate Justice Breyer's observation, that "something important is going on when 15–20% of the cases on the Supreme Court's docket


require knowledge of matters outside the United States." For most General Counsel, we are dealing with the complexities and the ambiguities of cross-border matters in a way that we never had to before.

To hear a Supreme Court Justice acknowledge the increase of and rising legal complexities and ambiguities of cross-jurisdictional matters makes me feel better. Someone's got it — somebody understands our pain on a day-to-day basis.

Some commentators have oversimplified Justice Breyer's perspective on the globalization of the courts. I believe his view is more thoughtful than some may be giving credit. He contends — I really resonated with this — our courts have to expand their consideration and understanding of foreign laws if our judiciary is going to maintain its legitimacy.

There's a business parallel to that pronouncement, when you consider the interconnectedness of the world. If we're going to offer products and services; we have to understand how those products and services are accepted, how they're viewed and how they're preferred by our consumers around the world. What we do in one place, we may not be able to do in another. As we provide services and produce goods globally, we have to figure out how to do so in a way that maintains the integrity of our own values, while addressing the laws and regulations of those countries where we do business.

Make no mistake: maintaining the balance is not always easy — but it is necessary.

For example, think about the principles of ethics and laws that we strive to comply with at The Hershey Company. We believe in fairness and equal access in the workplace, regardless of whether the workers are in the United States, China, or India. Different local laws may provide different status recognition on issues concerning gender, sexual preference, or disability. How do you balance those tensions on a day-to-day basis? That's an example of the things that in-house counsel have to deal with on a day-to-day basis, and it really can become a very complex situation.

Justice Breyer acknowledges this constant tension in our interconnected legal system. Internal counsel, like courts, must, as the Justice observes, "... increasingly consider foreign and domestic law together, as if they constituted parts of a broadly interconnected legal web." Confronted with this web of laws, he states that courts [have] increasingly sought interpretations of domestic law that would allow it to work in harmony with foreign laws, so that they can more effectively achieve common objectives. He also says there is no Supreme Court of the world so all these national courts are acting in piecemeal addressing these increasingly complex cases with ambiguous jurisdictional boundaries. How do you find that natural balance?

On a simpler level, Justice Breyer notes that about a third of what the consumers spend goes for goods that are produced outside of the United States. The number seems low to me. Whatever the percentage, I'm sure we all agree that the number will only grow.

As that percentage grows, the challenge becomes clear: one size doesn't fit all. To avoid choking on complexity, we have to

harmonize our products and services to the extent possible to meet global demand and comply with the "interconnected legal web."

Some people might say that Milton Hershey was the Henry Ford of chocolate; we say that Henry Ford was the Hershey of the automobile industry. [LAUGHTER] Milton Hershey was mass-producing chocolate bars long before Ford began mass production of the Model T automobile. Milton Hershey was able to mass produce chocolate at a low cost, and provide this special treat to the everyday person. That approach served us well in our home North American market.

As we began the movement for products across borders, we encountered a new level of complexity and challenge, that one size doesn't fit all.

I mentioned earlier the favorite product in the United States — Reese's. However, it had a little slower start in Europe because there was a time when having peanuts in the product wasn't preferred. Now that's changed. As you see in the slide for China, we faced a different complexity for Reese's. The preference was for single, individual foil wraps as opposed to the standard cup configuration we use in the U.S. Interconnectedness requires us to have a broader perspective.

The complexities for a company like Hershey just aren't related to taste or cup size. The challenges are multi-dimensional and overlapping. The consumer's relationship with food is changing. There is a likely irreversible shift away from meals to snacking. This shift is driving a consumer demand for "better-for-you" snacks and products high in protein. Today's global consumer also seeks transparency — they care about what's in their food and how it's made. These shifts change everything: what we sell, how we sell and how we produce.

But that also involves a level of complexity. Think about the supply chain. A global supply chain is most effective and competitive when the business can harmonize the products and services.

Some have talked about the challenge that we face in this increasingly complex world as if you're trying to change a tire on a car while it's in motion. Then as this complexity continues to move, it's like building the car while it's in motion. The most extreme is that you're trying to redesign the vehicle while it's in motion, and it's rolling down the road at warp speed. We talk about being agile and nimble, trying to respond to our consumers and engaging in some form of transformative change. We're all asking how to disrupt, without being disruptive.

It's a challenge, and Justice Breyer cautions us that it is important to be mindful of the speed of change and complexity, but not lose sight of the periphery. That's why books like Justice Breyer's are so important. His report "from the front" is more than a report on the current state of affairs. It puts into perspective how courts have been addressing cross-border complexity and how it will continue in the future.

I'll just mention briefly Volkswagen as a company that is dealing with a whole host of cross-border issues. When General Counsel see the news reports on companies that are dealing with such cross-border issues, I'm sure we all consider how we might address a similar situation; how to avoid some of the challenges that have arisen, and how to focus resources.

I would like to spend a little time identifying some of the things that General Counsel might focus on in an interconnected world, the regulatory environment, a little about cybersecurity, compliance and corporate social responsibility.

On the regulatory front, the complexities of our world are really challenging. Consumers now are showing their preferences and sensitivities across cultures. We've got to deal with issues like GMO and non-GMO, a cross-border issue. You may be familiar with the conversations that are going on in the different states concerning the labeling of ingredients. We're in the midst of an evolution of labeling and nutritional information requirements — what needs to be on the package, from back to front; what's acceptable in one jurisdiction may not be in others.

The food industry has been facing significant labeling change issues over the past couple of years. There's a real tension in dealing with these issues. Consumers want to know what's in the products, they want to know where their food's coming from; they want their individual preferences addressed. That requires a level of complexity and the regulatory environment isn't always in harmony. Justice Breyer reminds us, as we're dealing with cross-border regulatory issues, there's no such thing as "their laws" and "our laws." We've got to figure out, how do we harmonize the laws across the border in order to serve our clients.

On the cybersecurity front, someone described it as reaching a new level of weirdness where, in the U.S., Seth Rogen can lampoon and write about the assassination of the North Korean leader. It was reported in *Vanity Fair* that the head of Sony, for the first time in its history, actually intervened in the making of the film to talk about, "Is this something that we want to do?" But Seth Rogen prevailed, and his vision led the day.

I raise this because we, as General Counsel, have people like Seth Rogen in our organization. People who want to push the

envelope. If you put aside the whole issue of cybersecurity for a moment, you've got to figure out with soft skills, how you deal with such people. You can't, as the General Counsel, stand as the vice president of discipline. [LAUGHTER] You've got to figure out how to engage with them at the outset so that they will have conversations with you. How do you balance that conversation with smart risk-taking? At the end of the day, our obligation to them is to talk about understanding the risk profile, and particularly understanding the risk profile as you're moving across different jurisdictions. Certainly, there is an obligation for law schools these days, for all of us that are in the midst of mentoring and training lawyers coming to the profession, that regardless of where you practice, you've got to look across the border now. You just can't say, "Here's what's happening at home," and not be concerned about the global impact.

On the compliance front, it's been about nine years since Siemens broke. For those of you who remember, it was one of – it may have been *the* largest – of the anti-bribery schemes in the world. Siemens ended up paying about $1.6 billion in fines, among other things. Often not mentioned are the in-house costs or outside counsel fees. It was reported that Siemens had a line item in its P&L for all the graft and stuff that purportedly was occurring.

Compliance remains at the forefront for General Counsel. In legal conferences, it doesn't seem to matter what type of presentation is occurring or where the presentation is occurring jurisdictionally. The topic of compliance inevitably arises. I actually am really pleased to say things are at a point now where we see a level of maturation in this area. Most business people have a good sense or at least a recognition that they are accountable for the integrity of business dealings. These business people accept that they have to understand who their business partners are and how these partners are doing business. We need to live by our codes of ethics.

> "The reason for our unitary structure is to enable our people to have the ability to retain their voice to the organization without concern of retaliation. When the team sometimes has to give advice or guidance that may be difficult or challenging to implement in the business setting, the unitary structure allows them to maintain their integrity and be able to provide courageous counsel." – *Leslie M. Turner*

In discussing enforcement mechanisms around the globe, Justice Breyer raises the interconnectedness of the "cooperation agreement." He discusses it in the context of competition law as opposed to anti-bribery, but it's the same notion. As we move into this new phase of compliance, interconnectedness and compliance have to be at the forefront for all of us serving in the legal profession. Consider the ongoing FIFA investigations. There's the real evidence of what interconnectivity and cooperative activity is all about today. There really is no place to hide, and as General Counsel, we have to be hyper-vigilant, as reputations are at stake these days as well as fines and personal liability.

On the M&A side – you see the comment on my slide, "Can't live with it; can't live without it." One of our panelists, Steve Patterson, will talk more about M&A. Statistics show that most acquisitions actually fail; the majority of them fail. When you hit one, you can hit gold. I think about The Hershey Company's Brookside acquisition – true growth to the bottom line. But the key for General Counsel in addressing M&A, is not the due diligence – that's table stakes. The focus needs to be on properly identifying the risks of any acquisition: correctly discounting price for risk and frankly discounting the value for post-acquisition damages inadvertently inflicted by the parent, particularly if the acquired enterprise is smaller. Often such companies don't spend the time and resources on quality or compliance issues as a larger company might.

The panelists will provide more detail on the complexity of handling cross-border transactions, but I just wanted to flag the point that cross-border M&A issues will likely increase for counsel as we increase the global nature of our businesses.

On the CSR side – corporate social responsibility – it's become a core component of the enterprise's identity. In fact, it's almost a point of entry in interacting with consumers and employees. With the current state of technology, it's so easy for a consumer to understand inputs into a product much more so than the manufacturer. Sourcing of ingredients and supply chain, where it's coming from, how it's being managed, are key concerns.

One area that seemed pretty straightforward was entity formation and governance. We're supposed to be advancing shareholder value – but there's a funny thing about CSR. CSR initiatives can create a tension: can corporate resources be directed at something other than maximizing value for shareholders? Is that appropriate?

There have been a variety of legal changes that allow for public benefit corporations to form and allocate resources to a stated social objective; it's okay to allocate resources for a particular social good. Think about Patagonia; think about Kickstarter, who are doing those things. These public benefit corporations stand in between the for-profit and the non-profit entities. Certainly, this trend is going to grow even further. Millennials strongly identify with brands that have a social purpose and identity.

Even investors are looking for opportunities to align with consumers through the CSR connection. U.S.B. is running a campaign that asks investors: "Can I make a difference? Do I invest in the world I'm in? Or the world I want?" Think about that from a General Counsel perspective.

There's a lot in Justice Breyer's book about global complexity that I think you'll find really interesting. One other piece I will end on before we go into our panel discussion, is Breyer's analysis of disputes involving the War Powers, Presidential authority in the age of constant conflict and the Alien Tort Statute. The Alien Tort Statute reminds me of another issue in the law that seemed so archaic at the time that I was taking my Property Law class. In law school today, you still learn about the Rule against Perpetuities. [LAUGHTER] When I took Property I thought, "Who the heck needs to know about the Rule against Perpetuities?"

Well — I did. My first trial, when I was at Akin Gump, involved a case on the Rule against Perpetuities. It was a real estate matter. [LAUGHTER] So, this issue on the Alien Tort Statute — an over 200-year-old statute — is also relevant for lawyers today. The complexity of doing business around the world means that we, as General Counsel; we, as corporate counsel, need to be familiar with the cross-border risks that our companies face.

I also think about what's going on in the growing number of failed states in North Africa and the Middle East or other places with political strife. We have to ask ourselves, how we counsel business colleagues on conducting business in such places. What's the risk profile? Do you go or do you not? It really requires a much broader consideration of global interconnectedness than we imagined in the past.

With all the conversation about global connectedness and the need to make sure that we're looking around corners; giving advice and being the counsel that our companies need — I wanted to share a story with you that a CEO shared with me once. He said, "All that talk about lawyers being business partners, being embedded in the business being at the table, it's really wonderful; I think it's a really good thing." But he said, "What concerns me is when I look around the table of people who are advising me, and they're sitting there, and I can't tell the lawyers from the business people." It's really important, as lawyers, not to lose our voice. So get embedded in the business, learn the business, but don't forget that we need to retain the voice that we, as lawyers, bring to our corporate clients.

I'm going to end with yet another book recommendation. It's one that's written by Michelle Coleman Mayes and Kara Sophia Baysinger. It's about General Counsel of Fortune 500 companies, and they happen to be all women and they talk about the need to provide courageous counsel. For me, the role of being a lawyer in an organization, being General Counsel, means that we have knowledge, insight, and advice to provide; but most of all we have to have that courageous counsel voice for our clients.

I'm going to stop there. Jack, I know that you want to go on with the panel. I also recognize and thank Sam Koda (Global Supply Chain Counsel, The Hershey Company) for his insight, keen wit and assistance with my presentation for the Roundtable session today.

**JACK FRIEDMAN:** Thank you. I'm going to ask a question or two of Leslie, and then we'll continue on. First of all, how does the company know what's going on around the world in their own operations? How do you know whether they're being compliant?

**LESLIE M. TURNER:** I think of it as involving all the eyes and ears around the organization as much as you can. There's so much information coming in during the course of the day, sometimes it's really more information than you need, quite frankly. Whether it's through media with people who are reporting in on the ground, or who are in the operations who come back with information; you get information through public

relations; you get it through your business people. Most companies have competitive knowledge and insights groups that are good at bringing information to you. The issue these days is not so much access to information, but filtering information. Do you have the *right* information that you need to make the kind of decisions that are important to your organization. That is the challenge that we face, and that businesses face, as well.

**JACK FRIEDMAN:** There are internal controls and also outside experts who come in and look at it. In a situation like the Siemens case, how would you keep on top of things? If I'm not mistaken, the Indian subsidiary said, "We're an Indian company, although you own us, and we're not reporting as part of your wrongdoing investigation. Indian law permits us not to report to you." Their Brazilian operation tried a similar technique. People have ways of keeping information from the people who need it.

What types of resources do people have, specifically — is it internal auditors, or people who report to the CFO or you?

**LESLIE M. TURNER:** Yes, I use a combination of both, including the Internal Audit Department; their mission is auditing risks for the company. Again, you have to identify what kind of risks that you face. Internal Audit supports the development

and maintenance of the standard controls to ensure that the operations are compliant with all of our regulatory parameters.

From an enterprise risk assessment perspective, we also consider business risks in all the geographies where we operate.

We have now embedded our assessment of risk issues into the business and it's supported by the Ethics & Compliance and Global Security functions within the Law Dept. If we're having a discussion on talent, for example, there's a conversation around what are some of the risks and issues involved in the talent organization. Who do you have in the organization with skills right in place? In a conversation around strategy; you're talking about risk. You're identifying risk profiles. But everybody owns this issue of risk. The core internal audit with financial controls has to be done. Then you layer on top of that an enterprise risk profile assessment structure.

**JACK FRIEDMAN:** We had a program some years ago with the Head of Risk of one of the three or four largest banks in the world. I asked him, "Do you gather up the risk analysis from the different units and aggregate them?" and he started laughing. He said, "We do assessments and filter them up, but if we waited to aggregate them, we'd never get anything done. What we do is start at the top with mega-issues, like real estate or Latin America." Does this sound familiar?

**LESLIE M. TURNER:** Yes.

**JACK FRIEDMAN:** The General Counsel relationships with boards are getting closer, deeper, more intense, maybe because of the risk profiles and enforcement issues. Could you comment a bit on the relationship of the General Counsel interacting with the board meetings?

**LESLIE M. TURNER:** Yes. We were talking about risk earlier, and more robustly as evidenced by the Directors Roundtable. These risk discussions are occurring in the

context of public and even private corporations. It really does roll up to your board of directors, your committees. Some companies have audit committees responsible for risk oversight, others may use a finance and risk management committee structure or a combination of the two structures. There has to be that close connectivity in a company, between your legal team, your management team, and the board, so that you're all on this destination together. You've got to be clear on what the destination is; you've got to understand the challenges of that destination. So the role and the relationship between General Counsel and the board, when it works well, it's really seamless and it's a really sweet place to be. But you have to have that connectivity. It's more than just the table stakes of technical expertise; you're at a point, now, where it's about being able to filter information the board needs to address strategy. It's about having good judgment to advise management and the board. Think about how the world is opening up. Recently, there's a lot of conversation about companies wanting to expand their footprints. "Oh, we want to go to Cuba, we want to go to Iran, we want to sell a product here, we want to do this." Well, there's a whole risk profile involved for that. Boards are engaging with management at that level of understanding. What's the risk profile of the country, how does it fit in with their strategy? The sessions that we have with them at the committee level, at the board level, really involve a substantive dialogue on managing strategy for the company.

**JACK FRIEDMAN:** Moving ahead to our distinguished panel, Tom Desmond of Vedder Price will be our first speaker. Each one will make a brief introduction on their special topic, and then we will discuss it more.

**THOMAS P. DESMOND:** Thanks, Jack. I'm happy to be here. I'm Tom Desmond from Vedder Price in Chicago.

I'm going to talk a little bit today about executive compensation. There is a document on your chairs that outlines my thoughts. The notion of what I want to talk about today is government efforts to curtail executive compensation. When the government or regulators get into the game on how companies compensate their executives or how they compensate their people generally, they end up with unintended consequences. Today, the involvement is all about risk and risk control — that's where the game is today — all the Dodd-Frank legislation and mandated disclosures that affect executive pay, and how companies report or structure their executive compensation, are all around risk. But, before going there, let's take one big step back, back to 1984 when merger mania is going on and the press is upset about all the big golden parachutes executives are getting when their company merges with the next company. Boards put those golden parachutes in place for a reason, and the reason was to make their executives neutral to a deal — in other words, you're going to be protected if you're the loser — we do the deal, and you're the odd person out. The golden parachutes protect you if you are not the continuing General Counsel, or not the continuing CFO. You have protection so that when you're advising the board on the deal, you're neutral.

What happened was a law was passed — to tax golden parachutes, to limit deductibility to curtail golden parachutes. The limit was set at 2.99 × average pay. What did a lot of

companies do? Immediately increase their severance benefits to 2.99 × pay on the theory that Congress just blessed 2.99 × and said that was okay. If you want to bring that current, go look at the 8K that Staples filed about three days ago. They filed an 8K saying they won't permit a payment of severance pay to an executive of more than 2.99 — this is now 30 years later — unless the shareholders approve it. I didn't go back to look to see if their severance benefits were less than 2.99 before they put that in. But the result was that instead of curtailing compensation, we ended up with more comp, different design; and a lot of tax planning around §280G, including gross-ups.

The same impact came with the million-dollar deduction limit that Congress adopted in 1993. Companies promptly designed their executive compensation programs to get around the million-dollar deduction limit. How did they do that? They used stock options, because stock options were always outside that deduction limit. What happened in the '90s? A lot of people made a lot of money on stock options.

Now, we're rolling the tape all the way forward; you get to the recession, or whatever you want to call what happened in 2008 and 2009, and we get the Dodd-Frank Act. The whole focus of the executive compensation provisions there, and the focus of the executive compensation provisions that were in TARP for the financial institutions that took support from — or were forced to take, in some instances — support from the government, were all around executive compensation and what the government believed would reduce the risk that is inherent or embedded in executive compensation programs.

In the government's view, if you have an executive who's sitting, or perhaps an entire cadre of the top 200–400 people at the company sitting on stock options, they are inclined to take very risky behavior, because stock options only have value if the stock price goes up. From the regulator's view, if my stock price is currently below my stock option exercise price, then I'm gambling. I'm doing that acquisition that maybe I shouldn't do. I'm doing the big reduction in force, or I'm doing things that perhaps really don't or may not make sense in the long run, because I'm trying to goose that stock price in the short run. In other words, I take additional risk.

I'm not going to concede that is what people do, but that's the theory. The regulators apply the same theory to annual bonus plans or a cash incentive plan — that if I get a bigger bonus by reaching the next hurdle, the next dollar or next 10 cents of earnings, I'm going to be inclined to cook the books.

I don't buy that assumption, either, but that's the general gist of these anti-risk, if you will, rules and disclosures the Dodd-Frank Act introduced. And Dodd-Frank also adds with respect to risk, the notion that *excessive* pay is, in and of itself, risky. In other words, their rules suggest that a financial institution could actually pay somebody too much. Now, there are very few bankers or others who believe they're being paid too much, or that they could be paid too much. The regulatory scheme is that companies are supposed to have rules; you're supposed to make disclosures and are supposed to report in their proxy statements that they reviewed their incentive programs and whether they present a material risk to the company.

Where do we get to, or where do we think the regulators are driving people to? Where they're driving them to is where the FSA in the United Kingdom is driving compensation programs there. The whole notion that if you're eligible to receive a bonus and you're above a certain level, fifty percent of that bonus can't be paid to you today; it's going to be paid to you three years from now; and it's all subject to adjustment if, in fact, the company's earnings go down or if changes due to a loan they were based on went bad, or the acquisition which was the underpinning of why you earned the bonus

turns out to not generate the results. In other words, bonus compensation becomes risk-adjusted pay on the back end.

Tell that to an American executive, that the bonus he or she earned today, or the compensation he or she earned today, is subject to reduction, clawback or delayed delivery. Tell that to your best salesperson that their sales commissions are going to be held back to see if those clients have stickiness — do they stay? Nobody likes that idea.

But a lot of these rules, and *all* of the Dodd-Frank rules tie to the fact whether or not you're a public company. So what are we seeing as the effect of these regulations intended to govern pay and reduce risk? We're seeing several things. First, we are seeing fewer and fewer IPOs, fewer and fewer companies willing to go public, because they don't want to be subject to these rules. They're concerned about attracting and retaining talent; and they're concerned about being able to compensate that talent using what I call the "PE model": "When we get all our money out, then you, the executives, can share in the upside." That is what institutional investors want at the end of the day. They want executives aligned to when the stock price and shareholder returns increase, then the executives

get paid. The best vehicle for that is stock options, compensation that has a one-way adjustment. But the regulators, the financial regulators, the Fed, the OCC, absolutely do not like stock options, and absolutely tell those entities not to grant them, because they believe they incentivize risky behavior due to their asymmetrical design.

The second thing that happens is companies end up with a lot of what I call "fixed pay" or "time-vested pay." The message to the executives and employees is all right — you stay here you get paid. There are a lot of people who would say that time-vested pay, restricted stock, things like that, engender bunker mentality — people won't take risks. "I'm going to protect my stock price at $95; I'm not going to do that acquisition because if it goes the wrong way, the stock price might go to $85." I will tell you, institutional investors do not like that thought process. They do not like that failure to take risk.

Then the last piece of this puzzle is that under the Dodd-Frank mandated clawback, Dodd-Frank has a no-fault clawback rule that applies broader and deeper than the Sarbanes-Oxley clawback that applied only to the CEO and the CFO — Dodd-Frank basically covers the executive suite — anybody who files a Form 4, anybody who's a senior executive officer. When you tell executives *that*, if we have a no-fault financial restatement, if we had to restate our financials because somebody has just made an honest error — we're not cooking the books, we're not doing anything wrong — we can come back and take incentive compensation you earned three years ago away from you — you would have a lot fewer folks who'd want to work for public companies.

The interesting thing about the rule that's proposed, is that compensation which is completely discretionary — in other words, the board can decide at the end of the year how much bonus to hand out, and that amount might be based upon the number of red cars in the parking lot; or whether the Cubs won the World Series or not (maybe we'll actually get some bonus this year, if that's the reason!)

— then that's not subject to a clawback, because that's discretionary — it's not based on financial performance. Again, you tell an institutional shareholder, or you write in your proxy statement that "our bonus is decided by our comp committee based on other than objective standards," they're going to go crazy. They're going to say, "No, that doesn't work; that's not what we want."

But if a company does switch to fully discretionary bonuses to avoid the possibility of the clawback, the company is going to run into reputational risk. Someone is going to say, "You designed your program to avoid the statutory mandate that if you restate financials, you have to clawback compensation." That's where tension is going to be in the boardroom; that's where the tension is going to be with management; and that's where the tension is going to be with the compensation committee. Do we design programs that enable us to attract and retain the best of the best? To not lose them to private equity, not lose them to private companies, but at the same time, run the reputational risk of "we've designed things to get around rules."

Now, no one here would ever advise a client to do something to get around a rule! (Maybe you would!) [LAUGHTER] But for example, tax avoidance is legal; tax evasion is not. From that perspective, companies and executives are going to face difficult questions. That's where the unintended consequences come from when we have regulatory schemes and things that are designed to limit compensation.

**JACK FRIEDMAN:** One of the heads of the FASB had auditing experience, both in England and in the United States. He said that in England they use "principles-oriented rules" for financial reporting of reserves, mark-to-market, and all these sorts of things, for two reasons. One is, they don't have many lawsuits, so personal judgment is less risky. Secondly, almost everybody who has any power in the area is in London. If there's a problem, you just get together at lunch and hammer it out. But in the United States, you can't simply hammer it out face-to-face. The American system, basically, is that CFOs will say, "Don't give me any discretion; I do not want to have people criticize me for my judgment." I don't know if the other speakers agree, but in general, we're very risk-adverse from that point of view, because they don't want to be sued.

Next, we have Mike Burkhardt of Morgan Lewis.

**MICHAEL S. BURKHARDT:** Thanks, Jack. I wouldn't worry about those bonuses, Tom — I don't think the Cubs are doing so

well! [LAUGHTER] I know you're praying for it, and we all pray for you, but don't worry about those bonuses.

I'm an employment litigator. I'm based here in Philadelphia, and I deal with that little piece of what Tom referenced — when companies want to engage in reductions in force or want to think about workforce change. Aside from dealing with the after-effects of those decisions, or decisions that went wrong, we get the advantage of oftentimes working with companies to help them, guide them through that process of workforce transformation. There are a thousand different consultant phrases you could imagine and hear about what — there are some cases out there about the rejuvenation project, about how we're going to transform ourselves. What does that translate to in my world? Oftentimes it translates to litigation for companies — age discrimination claims; other types of discrimination claims — related to the decision process; what you were doing, how you did it. The craze all around the country — I see lots of you in the audience — of hiring millennials, and thinking about how many of our clients, many in the tech industry — we want to get younger; we want our workforce to look more like what our consumer base is. We need to bring millennials in who are tech-savvy, who can help us think about how we transform our products, how we deliver our products. What our new audience, 10 years out, is really going to want, and do they have the same desires for services and/or careers — even thinking about in law firms, and how people have different visions of what they want their careers to be and how you manage that.

The challenges for companies — particularly global companies — around dealing with workforce change are the myriad of laws and regulations that exist around exiting individuals, hiring individuals, and the litigation that oftentimes follows from those transactions.

These are things to think about, that companies often think about. Do we just do a reduction in force? We are eliminating positions. What's the rationale? I mean, Tom referenced the theories behind what might be some improper rationales. But if you take that and put it aside from this, from the executive comp perspective, and think about what's the business rationale for the client, and what are they trying to accomplish, because it affects everything you do in that process. Is it truly a cost-savings mechanism? If so, are you eliminating jobs that you're not going to fill? Ninety percent of the time, you actually see the opposite. You see changes to the structure of a company, but then there are tons of open positions that are being filled — ironically, in some cases, by much younger employees — that leads to the types of arguments you might face in litigation.

> "What we do in one place, we may not be able to do in another. As we provide services and produce goods globally, we have to figure out how to do so in a way that maintains the integrity of our own values, while addressing the laws and regulations of those countries where we do business."
>
> *– Leslie M. Turner*

What are options for clients to think about? Think about doing a voluntary severance, or early retirement program. There are risks; there are specific rules associated with that. If you do it, and you do it right, you mitigate risk for the company. But it's got to be truly voluntary. What you'll often find in those circumstances are clients will purport to do a voluntary reduction; they will create a plan; and then there's the whisper-down-the-lane approach where the managers are running around to all the people that they really want to keep and saying, "No — don't take the voluntary; you're fine; you're not going to get caught up in whatever the next stage is." It undermines the true voluntariness of that program. If it's not voluntary, then you are exposing yourself to potential litigation risk.

Of course, there are ways of mitigating that by trying to obtain releases from people, by having severance plans and providing health benefits to people who might take an exit incentive plan. But there are very strict rules about how you design a release, the information you need to provide to individuals that are taking a severance package; and if you don't get that right — and it's very hard to get it right — then you have spent millions or tens of millions of dollars in exiting people on the theory that you're saving millions and millions of dollars over here, by transforming your business. Yet you may have releases that are completely invalid and facing litigation, litigation costs, the risk to the brand of being that company that theoretically discriminated against an older workforce or is engaged in some type of broad, sweeping discriminatory practice.

Getting that part of it correct at least mitigates that risk for most clients, and it also creates opportunities for many companies to do what they want to do, anyway, which is create a path for employee soft landings — a great phrase you might hear — creating rich severance packages. Someone else is doing the math, right? Someone on Finance or whatever is telling you the math works; that you spent all this money on severance, and you're getting all these savings at the back end. You're really transforming what your workforce looks like by doing a voluntary reduction.

One of the things that I, as an alternative, have talked to a lot of clients about, that would want to be, quote, "younger," or "we want to add to our millennial population and build the next generation," and we looked at a lot of data for the clients, and what was interesting about it was the attrition rate for millennials was about double what you saw in the other generations of employees. By simply trying to address that


component, they would naturally transform their business. It's a longer runway; it's a longer period of time to get there; but there's going to be natural attrition as the baby boomer generation is exiting the workforce. If you don't address what is the root cause for that attrition problem, then you can hire as many people as you want, but you're going to have massive turnover *and* massive business disruption.

We talked about what is the root cause of that? How do you deal with that? What do you see? We see here — we have seminars all the time now, how to manage millennials, or what are the things to think about with that workforce, and how to do a better job to attract and keep that talent. Leslie made the point earlier about talent and some of the risk that comes from talent decision. It's a giant issue for every company: how do you manage your talent? How do you attract and retain the talent that you want, and how do you performance-manage out the folks that you don't, and do it in a way that is the least risky?

Massive restructurings create lots of potential risk, but they also have massive benefits of large transformations at one time. That's the put-and-take for most clients: how do you manage the pros and cons of doing it on a large scale versus over time? Maybe there is no one-size-fits-all approach to deal with those workforce changes. The other thing that many of the other folks on this panel will speak to, as well, is what is the impact, ultimately, to the business of doing those restructurings, principally dollar-wise, experience-wise? It sounds great to say, "We need a more flexible, nimble business model, and we need to inject youth into our workforce," although no one's really saying that directly, because that would be bad! [LAUGHTER] That would be bad for the employment litigator if that were on an email somewhere, so let's not have any of that!

But the reality is, you lose a tremendous amount of experience and knowledge from your business. One of the things that HR functions all over the world with clients have to think about is, "How do we manage that part of it?" Because the thing that Leslie said really resonated with me as I think about doing restructuring: it really *is* like changing the tires while the car is moving; the business still needs to function. Chocolate still needs to be made; it needs to be distributed; people need to get product on the shelves; and you lose large chunks of your workforce. There's no time-out; there's no "let's take a break — let's not sell chocolate for a month while we get all of our new faces into places."

You really have to do it while it's moving, and there's a lot of moving parts within the company that need to coordinate with Legal around. Here's the legitimate steps we have to take, and the timing of all of this. Now, how does that jibe with what you need to do from a business perspective? When you want to exit people, how much time you have to give them to consider whether to take a severance plan? Then who's going to do the work after the fact, and you're not just hiring someone who's 25 immediately after the day you say that the job was eliminated for the individual who was formerly in the role.

**JACK FRIEDMAN:** It seems to me that there must be an infinite number of mistakes someone could make, including the whispering program.

**MICHAEL S. BURKHARDT:** There are lots of potential pitfalls. The other thing is, you can't control everything that everyone does. The more process you have, and structure around those decisions, it's going to go a long way to mitigating the risk for the client. Also, frankly, educating that population — whether it's HR, it's business leaders — up front, before you launch down this process, here are the things you have to avoid, and why. You explain those things to the business, they embrace the fact that they understand a little bit more what the risk is, and it has a greater impact on trying to change that behavior.

**JACK FRIEDMAN:** Our next speaker is Steve Patterson of Hunton & Williams.

**J. STEVEN PATTERSON:** Thank you, Jack. And thank you, Leslie and Jack, for inviting me to be a part of this panel today, and I will add my congratulations to Leslie for this wonderful honor. You're a great example, not just to women, but to all lawyers, in-house or outside, and I enjoy working with you.

I'm based in the Washington office of Hunton & Williams, and I'm a co-head of the Corporate Finance and M&A practice group within the firm. In my practice, I work mostly with retail and consumer

products types of companies. In my 20+ years of doing M&A, I've worked with both domestic and international companies. To the extent that I'm working on the international front, it's with domestic companies who are seeking to expand internationally. The issues that companies deal with on the domestic level are intensified on the international front. International expansion has become a key strategic objective for many businesses; they see it as a way to grow, and they see the profit margins for international business being much better, or the opportunity for them being much better in certain markets abroad, both in emerging markets and developed countries.

When carefully diligent and approached the right way, international expansion for a company can be a great success. But without careful planning, without understanding the market you're going into, and without working with the business people ahead of time to think about the way you're going into a market, international expansion can be a disaster.

Building on what Leslie spoke about earlier, in connection with the globalization of companies and the issues that General Counsels face when their companies become global, I wanted to touch on two main topics.

One is deal fever, and the role of the General Counsel and other in-house lawyers when deal fever hits. When international expansion is important enough to a company's strategy, certain business people will be put in charge of that international expansion; sometimes they are senior vice presidents or executive vice presidents of strategy or of business development. Sometimes, those people are compensated based on getting their deals done. When a deal hits and discussions start, there can be a lot of pressure on the business people to get a deal done. Who's going to slow down the pace of a transaction when deal fever hits? It's usually the lawyers, and it's often through the process of due diligence. Lawyers can be an effective counterbalance to deal fever by ensuring thorough and effective due diligence in international transactions and communicating the results of that diligence to the business people early and often.

This brings me to the second point, which is understanding the country that your company is going into; understanding your target company; and understanding not just the legal framework of the country the target company is in, but understanding the customs and the culture.

Leslie mentioned that 70% to 90% of mergers fail, and the fact is that they usually fail because of cultural conflicts — a failure to integrate the cultures of the two companies. You may say, "What can lawyers do to help identify the cultural issues?" I believe that if the in-house lawyers develop trusted relationships with the international M&A business people, the business people feel comfortable involving the lawyers early on in transactions, which puts the lawyers in a very good position to help the business people think about the cultural compatibility of the two companies. My biggest takeaway for you in the area of international M&A is to develop your relationships with the business people early on. Those who are running the deal should be talking to you very early in the transaction. The lawyers, and particularly the General Counsel, should have a very good relationship with the CFO.

In the process of identifying issues during diligence, you don't want the law department to be the department of "no." You want the law department to be focused on the business objectives of the company. You want the law department to be a strategic partner to the business people by working with them early to figure out what the company's objectives are in this country, what the company's objectives are with this target, and what are the metrics you're going to use to figure out whether to do the deal. Those metrics can allow the lawyers to be objectively focused on the company's business objectives in a particular transaction.

If there are issues that arise in diligence, the law department doesn't have to say "no," but working with the CFO, the finance department, the bankers (if you can get them to slow down), you can identify the issues, and you can put a value on those issues. You can say, "Okay, I'm not saying we shouldn't do the deal; I'm saying if we do the deal, these are the financial adjustments that need to be made to your valuation assessment."

The biggest takeaway is developing those relationships with the business people who are most important to the deal — the people running the deal, the strategy or development people, and the CFO — and remaining that objective, even-keeled, rational voice who can provide perspective.

At the end of the day, if deal fever is driving a deal to get done fast — such as in the HP Autonomy transaction in 2011, where we're just hearing that the chairman of the board and the CFO had doubts about the deal, but they ended up doing the $11 billion deal anyway and taking an $8.8 billion write-down on the transaction after it was done. The lawyers become the objective voice, and they provide the basis, the foundation, for the CFO, the CEO and the board to make their decision. If the lawyers can get that objective information to the business people, you have a chance to not squash a deal, but to get a deal done on financials that make sense.

**JACK FRIEDMAN:** Thank you very much. Bill Cavanaugh of Patterson Belknap will introduce his topic.

**WILLIAM F. CAVANAUGH, JR.:** Good morning, everyone.

Leslie mentioned the importance of ethics and compliance. I'm going to talk briefly this morning about one aspect of that, which is antitrust compliance programs.

Let me start with: what do art posters, public foreclosure auctions, devices used to heat cars while they're in "park," spark plugs, and liquid crystal panels for televisions have in common? What they have in common is that some individuals in those businesses discovered whether they look good in orange. [LAUGHTER] That is the orange jumpsuit provided by the Federal Bureau of Prisons — on average for 26 months. Consumers and businesses which utilize those products and services were victims of conspiracies to fix prices, intended by the participants to distort the competitive process.

The cost to a company whose employees engage in this type of conduct can be enormous. Last year, the Department of Justice alone collected $1.3 billion in fines and penalties, and other countries' enforcement agencies may tack on their own fines and penalties. In the U.S., government enforcement is followed by the private lawsuits, typically class actions, seeking treble damages that will last years. And then there is the distraction and the reputational hit to a company.

Antitrust enforcement is growing on a global scale. The Department of Justice has spent many years encouraging countries around the world to enact rigorous antitrust enforcement statutes. When I was at DOJ in 2010, we spent two weeks in China, along with a few federal judges and officials from the FTC, teaching new judges in China how to properly enforce their new anti-monopoly laws.

Quite simply, the cost and scale of a company's potential exposure for violating the antitrust laws is growing. A robust antitrust compliance program can help minimize the risk of such exposure. How can it help? One, it may prevent the problem. Two, it

may help to detect the problem, if one exists. And three, to some extent, it may mitigate a problem once it's been discovered.

Let's start with prevention. The first thing you try to do is educate individuals on the personal consequences. How will they look in orange? That serves as a deterrent. But more importantly, what you're trying to do with an antitrust compliance program is to develop a culture, because there will always be some individuals willing to take risks so they can meet achieve a short-term business objective by eliminating the threat of competition. A robust antitrust compliance program can help foster a culture in which someone will not feel comfortable doing that, because others with whom they work will not be complicit in it or be willing to look the other way. If you develop a business culture over time in which everyone understands the law and consequences of ignoring the law, employees should not be comfortable looking the other way, let alone engaging in that kind of illicit conduct.

Detection is another goal. Educate your employees to be sensitive so that you can learn about a problem before it goes too far. The benefits of detection are significant. The Department of Justice Antitrust Division has a leniency program; the first one in the door to notify DOJ of a potential violation receives a pass on criminal prosecution. The company has to fully cooperate and it has to be before the DOJ learns anything about the conspiracy from other sources. It's been debated how appropriate that program is, because it's somewhat unique under the criminal laws. But it is indisputable that it has been enormously effective. DOJ is prosecuting dozens of individuals a year and imposing billions of dollars in fines often based on information initially gleaned from amnesty applicants. Consumers also benefit by eliminating price fixing and providing a more competitive environment.

The third goal is mitigation. An effective compliance program will not deter the government from prosecuting. As Bill Baer, currently the head of the Antitrust Division has said, "If you had an effective compliance program, why is there a problem?"

But an effective compliance program may provide some benefits at the time of sentencing. For example, if a rigorous compliance program is in place the government may not insist on a monitor. I don't know if any of you have followed the *Apple* case. *Apple* was a civil enforcement matter, but at the government's urging, a monitor was appointed by the district court. It has been enormously contentious between the monitor and the company. If you can convince the government that you have an effective compliance program, the government may not seek to appoint a monitor, thereby reducing the costs and potential disruption to the business.

What are the elements of an effective compliance program? The initial step is to establish written standards and procedures. But you can't just put that document on the shelf and say, "We've got a compliance document. Everyone has signed a form indicating that they have read it and have agreed to comply with the antitrust laws." That's not going to get you very far. You need to invest the time and resources necessary to train and provide sufficient guidance on an ongoing basis. For example, how many companies have folks who go to trade associations on a regular basis, where they mix and mingle with their competitors? How should an employee conduct herself at a trade association? What kind

of meetings should the employee attend, and what types of meetings should the employee avoid? Is it okay to be in a room with competitors? Is there a formal agenda? What topics are they talking about and do any of them create any antitrust risks?

In developing a compliance program, companies need to think about whom within the company may deal with competitors, regardless of whether they have ultimate responsibility for pricing or other strategic decisions.

You need a confidential reporting mechanism. People *have* to feel comfortable that they can report a problem, and that it can go to a senior-level person, typically in the law department, and the person in the law department has access to the appropriate levels within the company in order to report a potential problem and have it addressed.

Finally, you need enforcement and discipline. A compliance program is not particularly effective if a company is going to investigate and, in the end, not do anything because the employee involved is too important to the company. If people think that the enforcement is only going to work at the lower levels of the company, you're not going to have an effective program.

Let me touch on one final topic. Can a company keep its compliance program protected from disclosure under the attorney-client privilege? There was a recent decision by a judge here in Philadelphia that found that a company's compliance program was not privileged, for two reasons. First, the judge concluded it was just a business policy. There was no legal advice being provided. Second, it had been widely distributed. The guidance from that case — and there's not a lot of case law on this — is you really want to embed in your compliance program, and in your policies, legal advice.

You may say, "What's the value, Bill — wouldn't you want your compliance program to be public and to be usable in defending an antitrust case? In some cases that may not be necessary." Here is the downside to that. Let's assume your company is in an antitrust trial. Your compliance standard is introduced into evidence. Now, the standards set forth in your program become the standards by which a jury determines whether you complied with the antitrust laws. Not the law, but your compliance standards. If you have a rigorous compliance standard, suddenly you have raised the bar. That's why, as a general matter, the advice should be to try to tailor your program to your business, embed it with legal advice — as granular as possible — in order that the company has the ability to decide whether disclosure is appropriate.

> "There is a likely irreversible shift away from meals to snacking. This shift is driving a consumer demand for better-for-you snacks and products high in protein. Today's global consumer also seeks transparency — they care about what's in their food and how it's made."
>
> *– Leslie M. Turner*

**JACK FRIEDMAN:** Thank you. Our next individual speaker will be Sean D'Arcy of Akin Gump.

**SEAN G. D'ARCY:** Thank you, Jack. My name's Sean D'Arcy; I'm a partner at the Akin Gump law firm based in Washington, D.C. Jack had asked me to speak about why corporate boards need to pay attention to policy-making activities in Washington, D.C. I would add that at a variety of international governmental levels, it is appropriate, given the manner in which Hershey and a number of other companies have been expanding their global footprint over the past number of years.

If you pay much attention to Washington or read the papers, you've seen that there's been a lot going on lately. We had the government pass yet another short-term continuing resolution to keep the government operational until a few weeks from now. Speaker John Boehner announced that he was stepping down from his role as Speaker of the House and was going to resign once an appropriate replacement was found (we're still waiting for that). [LAUGHTER] Former Secretary Clinton will be testifying before the House Benghazi Committee this Thursday. They will be selling popcorn outside for that hearing.

There's a lot going on. The Administration just finished the Trans-Pacific Partnership Trade negotiations; there will be a lot of discourse about that over the next few months. I will say this — I think the biggest thing to happen in Washington for some time was the visit by Pope Francis a few short weeks ago. He captivated the country during his visits to Washington, New York and here in Philadelphia. In Washington, the glow of Pope Francis lasted about 12 hours, as Speaker Boehner announced he was going to step down the next morning.

There are a whole host of reasons why boards need to pay attention to what's going on in Washington and other international policy-making regimes. I'd like to boil it down to three of them that are quite important.

Number one, boards are increasingly on the line for activities that relate to policy-making decisions in Washington, Brussels, or Basel, Switzerland.

Someone mentioned cyber earlier, which is a very good example. Last summer, SEC Commissioner Aguilar said boards ignore their cyber oversight responsibility at their own risk. If you look at some of the situations that have taken place — I don't really mean to pick on any particular companies — but the CEO and the CIO at Target resigned. ISS, the advisory firm, went after some members of their Audit and Social Responsibility Committees basically for dereliction of duty.

When you have situations like that, where boards are increasingly on the line for these activities, it gets a board's attention quickly, as you might expect.

The second thing I would like to talk about is that you just cannot cede the field to your competitors and your detractors, in terms of federal and international policy-making. I'll use, as an example, the financial meltdown of 2008 and the resulting enactment of Dodd-Frank and follow-on regulation, both here and internationally.

That was the type of situation where — let me talk about detractors first. You had any number of progressive interest groups that were out for blood; and frankly, the entire American electorate was out for blood at that particular time. Now some people were concerned about which scalps were going to be taken, but some were not. When you're in an environment like that, it's completely impossible for even the most dedicated, objective, and smart lawmakers to draft a huge bill like Dodd-Frank and get it all right.

Let me use an example. Almost 16 *years ago*, Congress passed the Gramm-Leach-Bliley Act, and the President signed the bill into law in November of 1999.

So say you're a Fortune 200 insurance company, and at that point in time, if you remember, becoming a "financial supermarket" was the flavor of the day; everybody wanted to cross-sell. You're on the board of that Fortune 200 insurance company, and you don't bite. You don't bite because you don't know those other businesses. What you do know is property and casualty insurance. Instead of trying to be a financial supermarket, you decide that you are going to sell property and casualty insurance all across the globe, wherever there's an emerging middle class where people need to insure against loss of their home or automobile.

Fast-forward a decade later, and you're now a Fortune 100 company, and you're selling in many overseas markets, while

also expanding market share in the United States. The financial meltdown happens. Dodd-Frank happens. It's a feeding frenzy in Washington from 2009 until the law is passed in July 2010.

The company didn't do anything wrong. They weren't within four time zones of the cause of the financial meltdown. If you're on that board, and you see what happened, you know that. You know you don't sell credit default swaps; you're not over-leveraged; you don't own a thrift; you're simply a successful, now global P&C insurance company. It would be malpractice if you're a board member of such a company, and you don't recognize that your business risked collateral damage in the policymaking process.

What do you do? You don't cede the field to your competitors and detractors; you get in there and you educate policymakers. Let's say lawmakers are creating a Financial Stability Oversight Council, and there are factors that FSOC needs to take into account to determine whether a company is designated as systemically important. You *don't* deserve to be designated. You have to make sure that they take into account not only, for lack of a better phrase, incriminating factors, but also non-incriminating factors. You had better make sure the law and regulations get that right.

Let's fast-forward after that, and this brings in the international piece. Policymakers *do* get it right. FSOC looks at you and says, "What are you here for? You're not risky; you're not systemically important; goodbye." You, a board member of that company, are on the Metro-North down to New York, and you're reading the *Financial Times*, and you see an article about this Financial Stability Board. It meets in Basel, Switzerland. It was created by the G20 to foster international regulatory cooperation. Again, you're getting off that train — you might not wait to get off that train — and you are calling somebody in management, saying, "Are we paying attention to this FSB?" Here's why, and this is where your competitors come into play: The EU, after a decade, passes what's known as "Solvency II," and they set up a uniform system of capital requirements for insurance companies. You know this because you operate in a lot of the European markets.

The difference is this: the European regulatory regime for insurers is entirely different than the U.S. regulatory regime. Here in the United States, the focus is on protecting policyholders by ensuring their claims get paid. If a company goes down, nobody cares; competitors take up the business, pay the claims, and everything is fine. Europe's different; they have what I will call more of a "going concern" system of regulation. That means that they require companies to hold more capital, to put more capital on the shelf, quite frankly, to protect not just policyholders — which is the only thing this country cares about — but also shareholders of the company, creditors, bondholders, other claimants, and in some instances, even national governments. That's a lot more money.

When you see the FSB getting together, then your first thought ought to be: those same European regulators *and*, frankly, European competitors of yours, are going to try to use the FSB process to export *their* type of regulatory regime onto the U.S. and other markets. So when you, as a board member, read an article about the FSB when you're on the

Metro-North down to Manhattan, you need to understand what that means. If you *don't* know what it means, you need to find out.

So, number one, boards are on the line more and more. Number two, your competitors and detractors are out there, and you can't cede the field. You're not going to like the results if you do.

The third thing that I'll finish with is reputation. No offense to BASF, but since they used to say it in their commercials, I think it is all right to use them as an example. Nobody knows what they make; they just make other products better. [LAUGHTER] That doesn't work for Hershey, Colgate-Palmolive, or Comcast across the street. If you're an iconic brand, the most important thing you have is your reputation.

I read an article in *Forbes* about three or four years ago. It said that three decades ago, ninety-five percent of a corporation's value consisted of tangible assets. Now, seventy-five percent of a corporation's value consists of intangible assets. I don't remember who wrote the article; or the evidence used to support it. I do think that everyone here would agree that if you're an iconic brand — like a Hershey, like a Colgate-Palmolive — and you damage your brand, it takes a long time to repair that damage. In politics, if you lose control of your image, it's very difficult to get it back. It is the same thing with brand recognition in the corporate sector.

From a federal policymaking perspective, you can do a lot of damage to your brand by getting hung up on the shoals of Washington investigative issues. Bill talks about some of the Justice Department antitrust issues and the damage to the brand. I'll just use one other example, and then we can stop.

In the congressional investigatory process, every year companies and their executives become targets of oversight investigations that, if not handled well, can do significant damage to the corporate brand. It's incumbent upon boards and senior management to, one, do the types of things that Leslie was talking about, in terms of risk profile, to protect against anything like that from happening. Two, like you said, you can't keep control of every single person who works for your company; if something does happen, treat it seriously. Three, understand that congressional oversight is not litigation, and it's not lobbying. It is an area that requires special skills to navigate to a successful conclusion.

To sum up: Boards are increasingly on the line for Washington policy directives; your competitors and detractors are at it — you can't cede the field; and you don't want to get caught up in a congressional investigation or, in Bill's world, a Justice Department investigation.

**JACK FRIEDMAN:** Thank you very much. I would like to get some remarks from Jim Nevels.

**JAMES E. NEVELS:** Good morning everyone, and it's great to be here, and Leslie, congratulations — you do us proud.

**LESLIE M. TURNER:** Thank you, Jim.

**JACK FRIEDMAN:** Jim, by the way, is the Independent Lead Director for Hershey.

**JAMES E. NEVELS:** Right. I'm from the South, from Alabama, and I love to tell stories, because Southerners love to do that. [LAUGHTER] I'll let you guess where in the South I'm from. Roll Tide. [LAUGHTER]

I've had the pleasure, prior to being the lead independent director of the greatest confectionery company in the world — and yes, that's puffery, but in this case, it's the truth — of being its chair for several years. I'm now its Independent Lead Director. The story goes like this: There's a board several years ago that determines that it wants to distinguish itself in a way that will allow it to survive, and it is confronted by a really strong challenge from a competitor. That competitor is going to, essentially, purchase an asset, a coveted asset, in its industrial space.

What happens in a board room? What happens during a time of crisis, a time requiring action, a time requiring decisiveness? What happens is, hopefully, in a board room, we do something that our friends in Congress don't do very well any more, and that is to drive a consensus. What happened in this instance was there was a coalescence of the board around three essential tenets, and they are as follows.

Number one, we're a North American company that will strengthen its border in North America. It is the engine that drives the motor that drives the business.

Number two, we won't focus on succession planning, and we will stay out of trouble, as the employment lawyers tell us, to avoid that trouble.

Finally, there is internationalization. What does "internationalization" mean? It means expanding the business footprint and expanding the portfolio of business, geographically, throughout the world, because there are some places where confection may not be deemed that hospitable, in a hospitable way. If you eat too many candy bars, you might get a little fat, like me. You might get sick. It might not be just the right place to be, particularly, when your primary customer may be constrained economically.

That's what happens in the board; that happens around the notion of globalization; it happens around coordination of what are those things we'll coalesce around. This is a context, and that context is, there's a line.

Above the line is governance; below the line is management. The hard part is making sure that you stay above the line if you are a board member, because ultimately, you are charged with the vision and the outlook for the business, and your management is responsible for the day-to-day. That sounds so eminently simple. But the second you get below that line, you are inviting disaster.

So the consequence, one would hope, is that you would have the wisdom to deal with the hard questions: where will we be one, three, five, ten years out? And do that in conjunction with management. Versus the easy path, which, you know as a financial guy, "I'm going to look at the pension fund." You gravitate towards what you think you know. No, you don't do that.

With that said, globalization, contextual, relying upon management, but setting the goal and being directly responsible. You told me that in the case of the Foreign Corrupt Practices Act, I can be in an orange jumpsuit individually, and that does it for the good of all! [LAUGHTER]

**JACK FRIEDMAN:** How do you manage your whole department and deal with the board and the government? Can you talk about the modern General Counsel's scope, and everything involved in being a General Counsel today?

**LESLIE M. TURNER:** I often tell people if they can figure out how to put more hours in the day, to let me know, because we all would like to crack that secret. We all, whether we're General Counsel or outside counsel, just have so many things on our plate. From a General Counsel perspective, it's beyond just the technical expertise, and the role of General Counsel. As we all have noticed, it has changed so much, where we need to be that trusted advisor to the board; we need to have that business savvy for our colleagues; we need to maintain a voice of encouraging counsel when we're dealing with things, and they have to do with the FCPA or antitrust and such.

> "...the key for General Counsel in addressing M&A, is not the due diligence — that's table stakes. The focus needs to be on properly identifying the risks of any acquisition: correctly discounting price for risk and frankly discounting the value for post-acquisition damages inadvertently inflicted by the parent, particularly if the acquired enterprise is smaller."
>
> *– Leslie M. Turner*

I think that role is one that is very broad. Coming to it with a variety of experiences and exposures is helpful; as I'm not sure anything can prepare you for what actually happens. I think it can be tremendously rewarding. One of the pathways to move into this role is being manager of self, being manager of others. Developing the expertise in the area of leading teams and providing appropriate advice to different stakeholders are very helpful experiences.

In the General Counsel role, technical expertise is just table stakes. You've got experts, people around you that you need to rely on, and you add your own judgment to provide advice. As a General Counsel, you're a trusted advisor when you have a company where the board management and the strategy are so clear and aligned, the role of General Counsel can be an awesome experience. I would have to say, for The Hershey Company, where we really do live by the motto of "doing well by doing good," leading the Law Department is terrific. The lack of sleep is secondary.

**JACK FRIEDMAN:** I'd like to ask the panel, as a whole — including Leslie — how you talk to your bosses, whoever it is, to give them advice that's counter to what their present thinking is. You were talking about deal fever as one example. What are examples of what, in the course of a career, a General Counsel may be called on to say that the executives don't really want to hear?

**LESLIE M. TURNER:** Do you guys want to talk a little bit about some of the issues that you have to counsel on with General Counsel? That would be helpful from your perspective.

**MICHAEL S. BURKHARDT:** I would just say, obviously, from the employment perspective, we are often, unfortunately, called upon to advise boards, General Counsel and others about bad acts by executives, bad acts in the employment context. You can use your imagination on what some of those things include.

But oftentimes you're dealing with individuals who are very good at their jobs, are on a succession plan to be the CFO or another senior vice president job. The CEO loves the person, doesn't want this person to exit, but the risk from the behavior that was created or that was engaged in was just too much for the company to bear, and shouldn't bear, but that's a difficult conversation sometimes. How you traverse that and how you provide advice — and you're not perceived as *too* risk-adverse — but you *are* doing the right thing for the company. You have to juxtapose that with "What are the company's policies?" They're not just for the regular employees; they're for everyone. If you ignore those at the top, and ignore that conduct, you undermine the integrity of your policy and the credibility of it for all of your employees. But they can be difficult conversations.

**JACK FRIEDMAN:** Isn't the problem partly that you have to remind people that you are employed by the company and not their personal attorney?

**LESLIE M. TURNER:** Sure. For lawyers, you always have to make sure to keep in mind who's your client, who are you representing. When you are General Counsel,


you're always keeping in mind the interests of the company and the shareholders, and that's the focus that you have to have. It can cause tension. There are ways to support and facilitate lawyers in the organization in making decisions and providing advice the organization needs. I talked about the unitary structure that we have at Hershey to ensure that the legal department can provide solid advice to speak up about concerns.

For effective compliance in companies, I believe it's really about the people that you have around you. Everyone talks about the tone at the top. What about the tone at the middle or the tone at the bottom? In all those places, you have to have the right kind of talent, the right people in place for the organization to run effectively.

There's a real broad perspective to how lawyers serve and support their clients, whether it's a law firm or corporations, it's a matter of people.

**JACK FRIEDMAN:** I'd like to ask about your department. How many lawyers do you have on an overall basis?

**LESLIE M. TURNER:** We have about 32 lawyers overall. About half of those lawyers or a third are outside the U.S.

**JACK FRIEDMAN:** What is your approach, generally, to in-house versus outside law firms; and secondly, your view about negotiating fees?

**LESLIE M. TURNER:** First, on what we do in-house, what we do with outside counsel. That changes as the company grows and strategies change. It's important to keep in mind the internal expertise we have. We're talking now about things like e-commerce; social media; privacy rights in the technology age — all skill sets that we didn't need when I started practicing law. It's important to decide what skills you want from the in-house team and what you can get from outside counsel.

Now, you really need to have, at any company where you're doing marketing and branding work or selling products in brick-and-mortar stores, it's helpful to have the requisite legal expertise in-house. So we look at what are the core skill sets that we need to have in-house, and make a decision on how to build or buy resources. You can go either way. Some companies do it the other way, but we look at what are the core skills that we need in-house, and build on that.

You could commoditize, you might actually move some needs outside of the corporation; you don't want to spend time on that. Do you want in-house experience, where it can grow and develop? You can take some or all of your contract work, your day-to-day, your routine operations, the supply chain, commoditize that or have some outside vendors do their work so you have your team looking at one or more strategic issues, such as the transactional side or in the food space side. That's how I look at it. I consider the business changes over time and the skills that we need to have.

The relationship with outside counsel is really, really important, because we don't have the ability to know everything or to do everything, and that's fine. There are also messages or conversations you need to have with senior management, with the board. Sometimes, a voice the board hears outside of the law department or outside of my office can be heard a little stronger. I sometimes will partner with outside counsel and say, "I need you to be involved with me in a conversation with the board of directors," or I may bring outside counsel in for an educational moment, as well. There's real value in that collaboration with outside resources.

There are times with counsel here, I may not spend more than 20 hours with them a year, potentially. But if I call someone, and I need that moment of advice, it really is that

consultation, and the quality of that input that makes such a significant difference in counsel. Who do you, in the General Counsel's office, have to lean into on some issues that involve judgment or integrity? I like to nurture and maintain connectivity with counsel whose insight I value and can trust.

On the notion of who we hire, we've entered into this preferred counsel relationship with individuals. There are a number of factors that matter: subject matter expertise, winning doesn't hurt! I always tell folks, winning is really an important thing when it comes to selecting counsel!

More seriously, there is also the diversity and inclusion considerations that we require. We ask our counsel to include people who work on our cases who are diverse, including managing partners that are diverse, because if we don't lean into the diversity of our profession; it's not going to reflect the needs of our society going forward.

When you talk about globalization; you've got to have all kinds of people around the table. As I look at my leadership team, I am just so thrilled with the value they bring to the business every day. And I keep talking about that talent, because they reflect the world in which we live.

I was at a meeting the other day, and we were talking about a particular issue with both the business folks and my team. Someone from my team, he was born and educated outside the U.S., said, "You guys are looking at this from a western perspective. Here's how you might go at it differently, that would change the dynamics." It made such a difference in how we interacted. So just having that diversity of people — whether it's race, gender, culture, skill set, or way of thinking — empowers the organization to go fast-forward.

Let's talk a moment about diversity and inclusion in the legal profession. There's a new book by Debra Sanders that discusses "the trouble with lawyers." Again,

I encourage you to read her book. She observes that the legal profession is actually the least diverse. Eighty-eight percent of lawyers are Caucasian. When you talk about globalization, how do you balance that out? All of the lawyers back here at the table have made that commitment to diversity in their law firm. For people who work on our legal matters, it's very important to The Hershey Company. It's very important to our board. In fact, at every board meeting, we talk about talent and we talk about the diversity of our talent, and striving to have the best people available to support out growth plans. Thank you.

**JACK FRIEDMAN:** I wanted to ask the panel about the executive comp area. What is essential for a board, process-wise, in setting executive compensation?

**THOMAS P. DESMOND:** The advice that I give to our clients, whether it is a board decision or a compensation committee decision that affects pay; a merger and acquisition; or anything the board or committee is being called upon to do, is to go all the way back to basic organizational behavior. What is the business objective you're trying to reach? Then go about studying that, getting the data or other information, so that at the end of the day, you've made an informed decision.

In other words, what the law would require is an informed decision based upon the information reasonably available. That's really the key. You need to benchmark, whether by a compensation consultant or, if the people that you have on your staff internally are very, very good at executive compensation and compensation, by your internal folks. Either way those individuals know what they're talking about and they give the board or committee the materials that they need.

It is really all about the process. Lawyers always tell people it's the paperwork, it's the process, we've got to create a lot of pages, because we get paid by the page. But it really isn't. It really is what leads you to get to your best result.

Frankly, when we advise clients, we want to understand the business objective and give the advice. Sometimes the advice is "no," or sometimes the advice is "you shouldn't do it that way; this is a better way to do it; here's the way the other 10 companies in your field have tackled that problem." If the CEO wants to do something different; we have to talk him out of it or we have to talk her out of it, because it doesn't make sense. That's the process. The process is iterative; it's benchmarking; it's having a process where information can be gathered and provided to the decision makers. They feel like they've had the time to consider that information; and then they make their decisions.

**JACK FRIEDMAN:** If the Delaware Court in Wilmington feels that the process was fair, and done in an intelligent way, they won't question the exact outcome?

**THOMAS P. DESMOND:** That's right.

**JACK FRIEDMAN:** I'd like to ask Steve Patterson a quick question. Could you give us an idea of the enormity or the variety of the people that you work with in doing an M&A deal?

**J. STEVEN PATTERSON:** Well, as corporate lawyers, we often refer to ourselves

as quarterbacks of M&A deals, because there's so many specialized areas that are necessary for a good evaluation of a target and the due diligence in looking at a target will involve employment, real estate, IP, litigators, employee benefits, and other areas.

The list is very long, and sometimes it depends on the target. For certain companies, you may want more in the environmental area or the IT or IP area or food regulatory area. The breadth of the expertise needed is sometimes huge. In international transactions, the players are even more varied. You can't forget, in both situations, the bankers and accountants, in addition to the lawyers that you usually have involved in those deals. In the international deals, you bring in local counsel. You may have more than one type of local counsel, and you may have local government relations folks who've got relationships with the regulators, in addition to those who are just generally high-quality local counsel in that geographic area.

The important thing is ensuring at the outset that you understand what the business people are going after. I'm going to echo what Tom just said, because it's the same throughout the panel's discussion, is that the business objectives are always the most important thing. The preparation in an M&A deal means that you start first with the business objectives, and then you're going to work with the company, the General Counsel, the CFO or the lead business people. Often, in the larger companies, there is a lead in-house lawyer who is reporting to the General Counsel, who is interfacing with us and with the business people, and sometimes local counsel, as well.

**JACK FRIEDMAN:** Thank you. Bill, a quick question. You served in the DOJ in an important position, as well as in private practice. I assume that one of the big things you do in preparation for an M&A deal is to try to figure out and help the client understand the antitrust problems that they may have. Is that correct?

**WILLIAM F. CAVANAUGH, JR.:** You're basically looking at how concentrated is the market. We could take chocolate, for example. Chocolate is what you would consider a highly concentrated market. Hershey, Mars, and Nestlé, those three companies have substantial market share. Let's assume that they wanted to merge. That would raise, I suspect, a number of issues. So you work with your economist. Typically, if you're approaching a big deal, Steve or whoever's providing him with antitrust counsel would bring in an economist and look at the concentrations.

Many times, what you end up doing is if there is a strategic purpose to the deal, you immediately start structuring what the proposed remedy will be to the government. We are prepared to divest these factories, these product lines, whether it's future product lines, for example, in the pharmaceutical industry, you know the FTC is always very concerned about what you have in development. What do you have in phase 3 clinical trials right now? Because they're not only looking at what is the competition looking like today — because markets aren't static — but they're looking at what products do you plan on having to market in three years, and is that going to be competitive to the company you're proposing to acquire.

It's fairly complex. You *are* trying to predict what the government will do. The other thing you're trying to do, depending upon which side of the deal that you're on, is negotiating a breakup fee that, if the government, for some reason, challenges it and one or both parties decide to walk away, what's the breakup fee going to look like? If you look back over the past couple of years in one of the telecom deals that fell apart — I think Deutsche Telekom got $3 to $4 billion in a breakup fee — it was an enormously big breakup fee — because the deal had significant regulatory risks. It had to get both through the DOJ and FCC. So they negotiated a significant breakup fee if the deal didn't go forward.

**JACK FRIEDMAN:** Serving in the DOJ and government service is really valuable, because you happen to know exactly what they're thinking about, not just the general principles.

**WILLIAM F. CAVANAUGH, JR.:** That's true, but, administrations change; attitudes change on antitrust enforcement. If you look back over various administrations, I would say you'll see there are some differences in enforcement policies and practices.

**JACK FRIEDMAN:** Thank you. What is the difference between representing companies in the executive branch, where they may be implementing regulations, and the legislative branch?

**SEAN G. D'ARCY:** There are some differences. At the end of the day, whether it's lawmakers in the Congress, their key staff, or somebody at Treasury or the White House, they appreciate it when you deal in a world of facts and evidence as opposed to opinion. It's our job to present facts and evidence. You have to be straight with people. We talked a lot about corporate image today; all you have in Washington is your own integrity, and you're representing companies who value their corporate integrity. If you don't play it straight with people, you're not anybody's lawyer for long. It's really about judgment and telling people the truth.

That's not to say you're not an advocate. We are advocates, not judges.

**JACK FRIEDMAN:** You don't want to get a reputation that what you tell them is false.

**SEAN G. D'ARCY:** Right. You need to be honest with people. You also have to want to win. You want to advance the ball for your clients.

**JACK FRIEDMAN:** Leslie, let me wind up with two final questions. Could you describe examples of some of the charitable, philanthropic, corporate responsibility causes that Hershey has?

**LESLIE M. TURNER:** Sure. We have a great program that focuses on education for children. Our primary supply chain, is in Ghana, West Africa. We have implemented a number of programs with third parties to support the education of children. We have a school feeding program that we've launched. We have a program called Nourishing Minds for kids. How is a child going to sit in a classroom and try to learn, if he doesn't have food for that day? We also have a relationship with an NGO in an initiative called "Project Peanut Butter," where a fortified food supplement is provided to children. We are working to source the peanuts for that project locally; mostly women in Ghana, West Africa actually do the farming of the peanuts. It's a whole entrepreneurial way of developing economic sustainability for women. Those are just a few of the things that we do.

**JACK FRIEDMAN:** The final question is in the five minutes a month that you have free for your personal time, what do you like to do?

**LESLIE M. TURNER:** I actually like to swim and dive.

**JACK FRIEDMAN:** Wow! That's why you're so fit! [LAUGHTER]

**LESLIE M. TURNER:** No one can reach me on my phone, on my Blackberry! [LAUGHTER]

**JACK FRIEDMAN:** I'd like to thank all the speakers, and the Guest of Honor. I'd like to thank the audience, because the Roundtable is about the audience. It's evident that there are many interesting people doing important things at Hershey, and they're taking their citizenship quite seriously.

## Sean G. D'Arcy

*Partner, Akin Gump Strauss Hauer & Feld LLP*

**Areas of Experience**

- Financial Services Policy
- International Trade Policy
- Policy and Regulation
- Public Law and Policy
- Health Care and Life Sciences
- Tax Policy
- Health Policy and Legislation
- Global Financial Services Regulation
- North America

Sean G. D'Arcy represents clients on a variety of legislative, regulatory and investigative matters, focusing on financial services, health care, trade, tax and procurement issues.

**Practice & Background**

Prior to joining Akin Gump in 1993, Mr. D'Arcy was counsel to Rep. Donald J. Pease (D-OH) who served on the Ways and Means and Budget committees. During law school, Mr. D'Arcy interned for Reps. Michael A. Andrews (D-TX) and Joseph D. Early (D-MA). He also served as a staff assistant in the Office of Chief Staff Counsel of the U.S. Court of Appeals for the District of Columbia Circuit.

Mr. D'Arcy remains active in national Democratic politics. Most recently, he ran get-out-the-vote operations in a number of northeast Ohio counties for President Obama's and Sen. Sherrod Brown's (D-OH) re-election campaigns. He performed similar duties for the Obama campaign in 2008 and participated in Sen. Brown's (D-OH) successful election campaign in 2006. In 2004, Mr. D'Arcy served as the senior advisor in Summit County, Ohio, for Sen. John Kerry's (D-MA) presidential campaign.

Mr. D'Arcy received his J.D. in 1991 from the Catholic University of America, where he was a senior staff member of the Journal of Contemporary Health Law and Policy and a member of the Thurgood Marshall American Inn of Court.

**Education**

J.D., The Catholic University of America Columbus School of Law, 1991
B.A., Fairfield University, 1984

**Bar Admissions**

District of Columbia
Massachusetts

**Articles**

January 9, 2012: "Regulatory Implications of Cordray Appointment to Head the Consumer Financial Protection Bureau"

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## Akin Gump Strauss Hauer & Feld LLP

Akin Gump Strauss Hauer & Feld LLP is a leading global law firm providing innovative legal services and business solutions to individuals and institutions. We are one of the world's largest law firms, with more than 900 lawyers and professionals in 21 offices. Our firm's clients range from individuals to corporations and foreign governments.

We were founded in Texas in 1945 by Robert Strauss and Richard Gump, with the guiding vision that commitment, excellence and integrity would drive the success of the firm. We incorporated those qualities into the firm's core values as we grew into an international full-service firm positioned at the intersection of commerce, policy and the law. Our goal in every engagement is to offer a level of client service that not only meets but anticipates our clients' needs and exceeds their expectations. From reputational defense of headline-makers to down- and midstream energy investments, from precedential class action dismissals to protection of terrorism's victims, we serve clients in over 85 practices that range from the traditional, such as litigation and corporate, to the contemporary, such as climate change and national security. Our lawyers, many of them with years of experience in the boardroom, on the bench, and in the halls of government, collaborate across borders and practice areas to provide comprehensive counsel.

## J. Steven Patterson

*Partner, Hunton & Williams LLP*

HUNTON& WILLIAMS

Steve is co-head of the firm's corporate finance and mergers & acquisitions group. His practice focuses on public and private securities offerings, securities compliance, mergers and acquisitions, and corporate governance matters, for domestic and international clients.

Steve is admitted to practice before the U.S. Court of Appeals for the 4th Circuit, the U.S. District Court for the Eastern District of Virginia, and the U.S. Bankruptcy Court for the Eastern District of Virginia. After earning his law degree, Steve served as a law clerk for the Hon. Ellsworth A. Van Graafeiland of the U.S. Court of Appeals for the 2nd Circuit. Currently, Steve is a member of the American Bar Association, Business Section, and a member of the Advisory Board for the Georgetown Corporate Counsel Institute.

**Relevant Experience**

Represented an international supermarket retailer in its $275 million sale of three banners and related assets.

Represented a Fortune 100, NYSE-listed retail company in response to share accumulations and public statements by Pershing Square Management.

Led $2 billion share exchange and simultaneous public offering in which an international supermarket company acquired U.S. public company and listed American Depositary Receipts on the New York Stock Exchange.

Led partial initial public offering of the largest Canadian quick-service restaurant company, valued at over $600 million; and its subsequent spin-off of remaining shares of company, valued at over $3.5 billion.

Represented domestic and international supermarket companies in securities compliance, strategic acquisitions, dispositions, shelf registrations, debt financings, Eurobond offerings and internal corporate restructurings.

Represented international consumer products company in $200 million Rule 144A/Regulation S senior notes offering and registered exchange offer.

Represented numerous public companies and their Boards of Directors on all aspects of corporate governance, including with respect to major corporate transactions, fiduciary duties, shareholder activism, strategic defenses and executive matters.

## Hunton & Williams LLP

With more than 800 lawyers practicing from 19 offices across the United States, Europe and Asia, we help clients realize new opportunities and solve complex problems with confidence.

At Hunton & Williams LLP, we take a contextual approach to our clients' business needs and legal issues. We understand that each case or client matter, no matter how unique or unprecedented, exists within a larger set of organizational objectives, diverse cultural forces, and market and regulatory pressures. To meet these challenges, we engage cross-disciplinary, client-focused teams with extensive industry, legal and strategic-planning experience. As a firm and as experienced individual practitioners, we emphasize creativity, communication, efficiency, integrity, and high-quality service in everything we do.

Hunton & Williams represents clients across the full spectrum of industries that make up today's global economy, from manufacturers, financial institutions, retailers, health care companies and professional services providers; to businesses and academic institutions developing renewable energy resources and new technology solutions. We represent businesses and individuals worldwide, and include half of the *Fortune* 10 and more than one-third of the current *Fortune* 100 among our clients. All of our lawyers participate in pro bono service; as a firm, we contribute more than 42,000 hours annually to community-service and charitable projects.

Founded in 1901, we blend more than a century of experience in virtually every key legal discipline with a broad view of current business realities and a forward-looking perspective on emerging issues, to provide legal and regulatory advice that serves our clients well. We are regularly named by legal and business publications as among the top law firms for client service and as a best place to work.

## Michael S. Burkhardt

*Partner, Morgan Lewis & Bockius LLP*

Michael is the co-leader of the firm's systemic employment litigation practice, and represents employers across the U.S. in systemic discrimination investigations and litigation. He represents employers in state and federal court through trial and at the appellate level in litigation matters, including noncompete injunction matters, whistleblower litigation, wellness program EEOC ADA litigation; age, EPA, and FLSA collective actions; and single-plaintiff discrimination claims.

Michael also counsels clients performing pay equity analyses; hiring, termination, and promotion analyses; testing and disparate impact analyses; policy audits; and diversity analyses.

Michael speaks and publishes on a range of employment topics, such as the use of statistical evidence in employment discrimination cases, affirmative action, and electronic interaction in the workplace. He was a contributing author and editor of "The Duty to Bargain," Chapter 13 in Hardin, *The Developing Labor Law* (Chicago, Il.: BNA Books, 1995, 1996 Supp.), and is a contributing editor to the *Pennsylvania Chamber of Business and Industry Labor Report*.

Morgan Lewis

## Morgan Lewis & Bockius LLP

At Morgan Lewis, we partner with clients to understand their needs and craft powerful solutions for them. Our team encompasses more than 2,000 legal professionals, including lawyers, patent agents, employee benefits advisers, regulatory scientists, and other specialists, working together across 28 offices in North America, Europe, Asia, and the Middle East.

We offer truly comprehensive services for clients as they work across the globe. If a client has a question, we'll find the person in our network with the answer. If there's a shift in the legal landscape, we're on top of it, and our clients will be too.

Whether a client has been with us for days or decades, whether it's today's industry leader or tomorrow's game-changer, we're always responsive and always on.

**Corporate, Finance & Investment Management**

We counsel a diverse clientele of Fortune 500 companies and public and privately held businesses of all sizes. We know and understand our clients' industries and business enterprise structures. Handling complex transactions well requires a multidisciplinary approach, and our corporate, finance, and investment clients are well served by the firm's breadth and depth across a wide variety of practice areas.

**Intellectual Property**

We draw on the diverse strengths of patent, trademark, and copyright litigators; transactional lawyers; and other professionals.

Our full range of services include litigation, patent preparation and prosecution, trademark and copyright registration, counseling and opinions, transactions, and due diligence. Clients range from Fortune Global 500 companies to start-ups.

**Labor, Employment & Benefits**

We help employers around the world navigate the constantly changing landscape of global, U.S., state, and local laws and regulations governing the workplace. We apply a solutions-oriented approach to give clients a competitive edge as we work with them to address the full range of workforce matters that affect their bottom line.

**Litigation, Regulation & Investigations**

In today's global economy, multidimensional corporate challenges often play out on the world stage. Clients turn to us when vital interests are at stake, looking to our trial capabilities, legal and business sophistication, broad scope of services, and ability to find solutions.With experience in most jurisdictions worldwide and a rare combination of trial capacity and practical insight, we frequently serve as trial, strategic, permitting, and coordinating counsel in large, complex matters.

## William F. Cavanaugh, Jr.

*Co-Chair, Patterson Belknap Webb & Tyler LLP*

Patterson Belknap Webb & Tyler LLP

William Cavanaugh is Co-Chair of the firm. His areas of concentration include antitrust, intellectual property and commercial litigation.

A skilled trial attorney with extensive experience in both state and federal courts as well as in arbitration, Mr. Cavanaugh has served as national and trial counsel in several large multiparty antitrust, fraud, and consumer protection litigations in federal and state courts across the United States brought by private plaintiffs and State Attorneys General. His clients include major pharmaceutical, medical device and financial services companies. Mr. Cavanaugh also recently served as Deputy Assistant Attorney General of the United States for Civil Enforcement in the Antitrust Division of the Department of Justice.

Mr. Cavanaugh's trial experience includes securing defense verdicts in a multi-billion dollar antitrust class action, civil fraud class actions and representing a plaintiff medical device manufacturer in back-to-back jury verdicts of $325 million and $271 million in patent infringement cases against two competitors. He has also successfully tried a number of Hatch-Waxman patent cases and represented a number of major health care companies in arbitrated contract disputes.

Mr. Cavanaugh has been named the Best Lawyers® 2015 Litigation – Antitrust "Lawyer of the Year" in New York City. He is a Fellow of the American College of Trial Lawyers. *Chambers USA* has recognized him in the area of Intellectual Property: Patent, where sources "describe him as 'very accomplished' and 'a strong first chair'" in his representation of "marquee clients in business-critical patent cases." Euromoney Institutional Investor PLC's *Benchmark: America's Leading Litigation Firms and Attorneys* has listed Mr. Cavanaugh as a "Litigation Star" for New York. Mr. Cavanaugh has also been selected as a Life Science Star in the inaugural edition of *LMG Life Sciences 2012*, which identifies leading lawyers in the areas of intellectual property, regulatory, transactional and non-IP litigation.

## Patterson Belknap Webb & Tyler LLP

Founded in 1919, Patterson Belknap is a law firm of over 200 lawyers committed to providing high quality legal advice and service to clients and to maintaining a congenial and diverse workplace. We make our clients' business issues our own. At the same time, we care about our attorneys, our staff and the community we are privileged to serve. As a result of our performance and our values, the firm was included on *The American Lawyer*'s 2015 "A-List" of 20 leading law firms in the United States.

Patterson Belknap delivers a full range of services across more than 20 practice groups in both litigation and commercial law. Our practice groups and attorneys are regularly ranked among the leaders in New York and nationally by the most respected industry guides, based on client and peer reviews. Clients include a diverse group of institutions and individuals: from pharmaceutical and medical device companies to major media and publishing empires; from consumer products companies to financial institutions; from fine art museums to famous entertainers; from foreign companies seeking to transact business on U.S. stock exchanges to U.S. companies doing business abroad.

Commitment to public service is, and always has been, a key value of the firm. We are consistently ranked near the top of *The American Lawyer*'s annual *pro bono* survey. Every year since 2004, 100% of our attorneys participated in *pro bono* projects, perhaps a first for a law firm of our size.

Patterson Belknap is dedicated to being the best professional home in New York City, maintaining an atmosphere and culture of civility, dignity, inclusion, and respect in which all firm personnel can engage and flourish. Diversity among our lawyers and staff is critical to that culture. Among our several diversity initiatives, we have three affinity groups (Patterson Attorneys of Color, Out at Patterson, Women Lawyers at Patterson), which meet regularly to discuss issues and concerns and to foster mentoring. The affinity groups also assist in efforts to recruit women and diverse students, clerks, and lateral attorneys.

**Thomas P. Desmond**
*Chair, Corporate Practice,*
*Vedder Price PC*

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Thomas P. Desmond is Chair of the Corporate practice area, Co-Chair of the Executive Compensation & Employee Benefits practice group and a member of the firm's Board of Directors. Mr. Desmond served on the firm's Executive Committee from 1994 to 2003 and was Chair of the firm's Corporate practice area from 1991 to 1994.

Mr. Desmond's practice includes advising corporations and financial institutions with respect to executive compensation, mergers and acquisitions, corporate finance and governance matters. His corporate engagements have included acting as advisor to boards of directors and to compensation, audit, governance, and other special committees of boards of directors of public and privately held corporations.

Mr. Desmond is known nationally for his representation of corporations, compensation committees and executives with respect to employment, retirement and separation arrangements affecting senior executives, incentive compensation programs, and related regulatory and disclosure requirements. His assignments in this area have included employment arrangements, compensation plans, and regulatory and disclosure matters relating to numerous organizations, including Ace Hardware, Calamos Investments, ConAgra, Delphi, Dimensional Fund Advisors, DIRECTV, Fifth Third, First Midwest, Fiserv, Harris Associates, Hershey, Hyatt, ING, LPGA, MB Financial, Morningstar, NYSE/Arca, PepsiCo, PGA Tour, PrivateBancorp, Solera Holdings, Sony Music, Swiss Re, Tellabs, Treehouse Foods, United Way, and a number of private equity-sponsored entities.

Mr. Desmond has also spoken and written on executive compensation and governance issues and has been quoted on these matters in the *Wall Street Journal*, the *New York Times* and the *Chicago Tribune*.

From 2011 to 2015, Mr. Desmond has been ranked in *Chambers USA* in the Illinois Labor and Employment: Employee Benefits and Compensation category. He was selected by his peers for inclusion in *The Best Lawyers in America* in the category of Employee Benefits (ERISA) Law from 2015 to 2016. The *Legal 500* United States recognized Mr. Desmond in the Labor and Employment — Employee Benefits and Executive Compensation category.

## Vedder Price PC

Vedder Price is a thriving general-practice law firm with a proud tradition of maintaining long-term relationships with our clients, many of whom have been with us since our founding in 1952. With approximately 300 attorneys and growing, we serve clients of all sizes and in virtually all industries from our offices in Chicago, New York, Washington, D.C., London, San Francisco, and Los Angeles.

The corporate practice is Vedder Price's largest practice area and provides legal services to clients around the world, ranging from large, publicly held corporations to small, emerging companies, as well as numerous partnerships and individuals. This highly regarded practice efficiently handles all types of business and financial matters for clients.

Vedder Price is acknowledged as a premier labor and employment law firm. Clients of this practice include large corporations, smaller professional and business corporations, multi-employer trust funds, investment managers, and other plan fiduciaries in a variety of matters.

Attorneys in our litigation practice handle client matters in trial and appellate courts, before administrative agencies and in arbitration and other alternative dispute resolution contexts. Our litigation attorneys have extensive experience in representing all types of matters for clients.

Vedder Price is committed to enhancing the diversity of our workforce and promoting the likelihood of success for all people. We maintain and enhance an inclusive culture at Vedder Price in which individual differences are respected and appreciated, recognized as a source of strength for the firm and valued as qualities that enrich our working environment and our ability to serve our clients.

In addition to serving our clients, many of our attorneys participate in or otherwise support legal assistance for the indigent and other forms of community service. Vedder Price has a long history of support for *pro bono* services. The firm encourages and supports the public service activities of its attorneys.