DIRECTORS ROUNDTABLE

WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

Kate Schuelke

Senior Vice President, Chief Legal Officer &
Corporate Secretary, Seagate Technology

THE SPEAKERS

Kate Schuelke
Senior Vice President, Chief Legal Officer & Corporate Secretary, Seagate Technology

Christopher McLaughlin
Partner, Arthur Cox (Ireland)

Sally Yates
Partner, King & Spalding LLP, former U.S. Deputy Attorney General

Anna Erickson White
Partner, Morrison & Foerster LLP

Katharine Martin
Partner, Chair of the Board, Wilson Sonsini Goodrich & Rosati

(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, 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 the achievements of our distinguished Guest of Honor and her colleagues, we are presenting Kate Schuelke and the Legal Department of Seagate with the leading global honor for General Counsel and law departments. Seagate Technology is a global leader in data storage solutions.

Kate's address focuses on "The Role of the General Counsel in a Corporate Crisis." The panelists' additional topics include internal investigations, dealing with government entities during civil and criminal investigations, the board's role in a crisis such as a data breach, and contingency planning for a no-deal Brexit.

The Directors Roundtable is a civic group which organizes the preeminent worldwide programming for Directors and their advisors, including General Counsel. Join us on social media for the latest news for Directors on corporate governance and other important VIP issues.

Kate Schuelke

Senior Vice President, Chief Legal Officer & Corporate Secretary

Kate Schuelke joined Seagate in 2017 as Senior Vice President, Chief Legal Officer, and Corporate Secretary. She has more than 25 years of experience representing technology companies with particular expertise in intellectual property law, corporate governance, litigation, compliance, mergers and acquisitions, and commercial transactions. In addition to her role as Chief Legal Officer, Kate is responsible for Seagate's Global Security and Government Relations teams.

Prior to joining Seagate, Kate was Senior Vice President, General Counsel, and Secretary at Altera Corporation, during which time she helped negotiate that company's purchase by Intel. She also held a number of senior leadership roles at Altera before her appointment as General Counsel.

Earlier in her career, Kate held several positions of increasing responsibility at major law firms both domestically and internationally and was a Fulbright Scholar lecturer on U.S. intellectual property (IP) law while overseas.

Kate received a Bachelor of Arts Degree in Economics from the University of Buffalo and received her Juris Doctor from New York University School of Law.

SEAGATE

Seagate Technology

Seagate is the global leader in data storage solutions, developing amazing products that enable people and businesses around the world to create, share and preserve their most critical memories and business data.

Over the years, the amount of information stored has grown from megabytes all the way to geopbytes, confirming the need to successfully store and access huge amounts of data. As demand for storage technology grows, the need for greater efficiency and more advanced capabilities continues to evolve.

Today, data storage is more than just archiving; it's about providing ways to analyze information, understand patterns and behavior, to relive experiences and memories. It's about harnessing stored information for growth and innovation. Seagate is building on its heritage of storage leadership to solve the challenge of getting more out of the living information that's produced everyday. What began with one storage innovation has morphed into many systems and solutions becoming faster, more reliable and expansive. No longer is it just about storing information; it is about accessing and interpreting information quickly, accurately and securely.

KAREN TODD: Good morning! My name is Karen Todd, and I'm the Executive Director and Chief Operating Officer of Directors Roundtable. We're very pleased that you're here today. I want to especially thank the people of Seagate Technology, the outside law firms, the bar groups, the university law schools, and other organizations who came to the program today. We're also very appreciative that Morrison & Foerster is hosting this event, so I'd like to give them a hand for the great job they did this morning. Thank you. [APPLAUSE]

The Directors Roundtable is a civic group whose mission is to organize the finest programming on a national and global basis for boards of directors and their advisors, which include General Counsel and their legal departments. Over the last 27 years, this has resulted in more than 800 programs on six continents. Our chairman, Jack Friedman, started this series after speaking with corporate directors, who told him that it was rare for a large corporation to be validated for the good they do. He decided to provide a forum for executives and corporate counsel to talk about their companies, the accomplishments in which they take pride, and how they have overcome the obstacles of running a business in today's changing world.

We honor General Counsel and their law departments so they may share their successful actions and strategies with the Directors Roundtable community via today's program, as well as the full-color transcript that will be made available to more than 100,000 leaders worldwide.

Today, it is our pleasure to honor Kate Schuelke, Senior Vice President, Chief Legal Officer and Corporate Secretary, and the Law Department of Seagate Technology, many of whom are here today. I'd like to acknowledge them at this time. [APPLAUSE]

I'd also like to introduce our Distinguished Panelists: Christopher McLaughlin from Arthur Cox, Ireland's largest firm, who flew

in from the Emerald Isle to be in the program today; Sally Yates of King & Spalding, who's here from Atlanta and Washington, D.C., and whose name you may recognize as both a former U.S. Acting Attorney General and Deputy Attorney General; Anna Erickson White of Morrison & Foerster, who's based in San Francisco and has twice served as the firm-wide managing partner; and Katie Martin of Wilson Sonsini Goodrich & Rosati, where she chairs the firm from its Silicon Valley office.

I have a special surprise for Kate this morning. It's a letter from the Dean of her alma mater, the New York University School of Law, that I'd like to read to you:

> Dear Kate:
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> I wanted to send a quick note to congratulate you on being honored by the Directors Roundtable for your work as General Counsel at Seagate. What terrific and well-deserved news. Your career serves as an inspiring example for our students. Congratulations once again to you, your department, and the entire organization. I hope to see you back at the law school soon.
>
> Sincerely,
>
> Trevor Morrison

[APPLAUSE]

I'm going to turn it over to Kate now for her presentation.

KATE SCHUELKE: Thank you so much for the nice introduction, Karen. It was a nice surprise to hear the letter from Dean Morrison at NYU. As a matter of fact, I'm going to be going back to my 30th class reunion in a couple of weeks, so I will get a chance to meet him and connect with some of my classmates.

An interesting observation that I had as I was just listening to the letter is the year that I graduated, they told us that we were the first class at NYU that had 51% women in the graduating class. Someone earlier today commented on the fact that Chris is the lone male on our panel, which has not been my primary experience throughout my career! [LAUGHTER] Nonetheless, I'm very grateful for Chris coming all the way over from Ireland, and for Sally, Anna and Katie taking time out of their busy schedules to be here with me today.

Thank you also to all my colleagues from Seagate who are here today. They've given me such a great welcome when I joined the company in 2017, and they work with passion and hard work every single day to protect Seagate.

I'm also really glad to see some of my colleagues here from the Intel Legal Department and a former board member from Altera. As you know, I spent 20 years there, and I had a fantastic team there, as well.

I wanted to start by giving you a little background about what we're doing at Seagate, and some information about the company.

In addition to leading the Legal and Government Affairs functions, I also have oversight of the Global Trust & Security organization, which is responsible for protecting our employees, our property and our assets, as well as our global supply chain. Although I spent more than 20 years working in the technology sector, going to Seagate has presented me with many new challenges and great opportunities to learn new things, in part because of the complexities of working in a global manufacturing company.

Since its founding in 1978, Seagate has been a leader and an innovator in the data storage industry. In addition to designing and manufacturing hard drives, Seagate also sells storage systems and solid-state drives. We're incorporated in Ireland, and we have our corporate headquarters in Dublin. We have approximately 40,000 employees in 22 countries and 44 different sites, including major manufacturing facilities in six countries, including in the U.S.

Because our business operations are so complex and they span the globe, it's imperative to our success that we're constantly reevaluating emerging risks to our business, to our employees, and to our ability to produce and deliver products without disruption to our customers.

We're the global leader in data storage solutions, and we develop products that enable people and businesses to store their most cherished memories and most critical business information. We're working to expand the way that people interact with information—not just how they store it. From family members being able to store pictures on the fly that they take on their mobile devices, to teenagers who download and purchase games over the Internet that they want to store for later use, to helping businesses build out complex and massive cloud data storage centers, Seagate is changing the way that people interact with information. We're empowering the next generation of innovators, creators, gamers, and scientists by allowing them to securely store their important information and quickly access it when they need to.

Today, people are leveraging the power of big data analytics to find cures for diseases, to explore the outer reaches of our universe, and to make their work safer and more efficient. Secure and mobile data storage allows individuals to instantly become movie producers, news reporters and social influencers. The amount of data that we're producing in our society every single day is just mind-boggling, and that's one of the reasons I'm so enthusiastic about working at Seagate.

But that explosion of data is also one of the main things that keeps me up at night. I actually spend a lot of my time as the General Counsel thinking about how we can manage Seagate data, as well as the data that's entrusted to us by our employees, by our customers, our suppliers and third parties. How can we best protect that confidential and private information? How do we ensure that data is not corrupted or lost, and maintains its integrity when you need to be able to use it? How can employees safely collaborate with each other or with people outside of the company without putting that data at risk? How do we know we've actually deleted the data when we no longer need it, or when data privacy laws tell us that we have to get rid of it? How do we make sure we know how to find data when it's relevant in a litigation and we have a legal obligation to produce it? Those are just some of the questions that we're struggling with, and that we know all of our customers are struggling with.

These challenges are not just part of Seagate's Enterprise Risk Management programs; they're also at the heart of our ability to sell products to our customers, and understanding those risks is the key to our future opportunity.

When I joined Seagate in mid-2017, the company had recently kicked off a cross-functional team to prepare for GDPR [EU General Data Protection Regulation] and to strengthen our data privacy and cyber security programs. The effort was started in part because Seagate had been the victim of a phishing incident which had exposed the confidential personal data of our U.S. employees. Although I realize the importance of the effort from a risk management perspective, it was also apparent to me right away that creating a best-in-class data protection program and cyber security program was an opportunity for us to really learn the challenges that our customers have, so that we could better be able to create solutions to help them solve those problems, as well.

Today, we're looking at cyber security and data protection, as well as product security and physical security, as part of our larger crisis management and business continuity planning effort. We know that a cyber

security breach raises the same types of issues as any other type of corporate crisis. We also know, from looking at the headlines every day, that having a well-thought-out crisis management program can mean the difference between coming out of a crisis relatively unscathed versus having tremendous brand damage and a precipitous stock price drop.

With major manufacturing facilities in six countries, Seagate is no stranger to crisis and business continuity planning. We have employees across the globe who are familiar with well-defined processes and experienced personnel at our sites who are prepared to respond to various types of crises, such as a natural disaster or a major supply chain disruption. However, we're discovering in our efforts that there are some unique issues and challenges on planning for a suspected cyber security breach or a potential product security vulnerability. For example, as we saw in the case of Supermicro, even an unsubstantiated allegation of a product security flaw can have catastrophic consequences for a brand and a company's stock price.

Our crisis planning efforts need to account for the likelihood of numerous false positives in the area of security. Unlike a natural disaster that everyone knows has happened, the first step in dealing with a suspected cyber security breach is to actually determine that it really happened. This means that we're spending a lot of time internally aligning our views as to what actually constitutes a crisis; when do we initiate crisis management planning exercises; when do we escalate communications to the executive team or even to the board of directors.

My 21 years of experience as a mother of two boys has been great training for thinking of all the things that can cause someone to get hurt and then trying to find ways to avoid that from happening. [LAUGHTER]

That experience is similar to my training as a lawyer, where we're taught to think of every single contingency that can happen in any circumstance, and to plan ahead for a way to avoid that.

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In the case of crisis planning, it's actually really easy for me to come up with a long list of everything that can go wrong. From a cyber security breach to ethical or illegal conduct, or to financial improprieties, the list is long and so it's easy for us to develop a list of crisis scenarios. However, unlike a natural disaster, all of those things can be prevented. So part of the legal department's role in the crisis planning stage is really crisis prevention. It's to think about the things that we can do, in terms of compliance training or additional controls, that can help avoid a crisis such as a compliance failure or a legal failure. That's one of the areas that our team is focused on.

Developing that list of potential crisis scenarios is probably the easiest part of crisis planning. The harder part is actually thinking about what people are going to do during a crisis – how they're going to respond logically, as opposed to panicking; how you can help them learn to communicate without creating additional problems.

It's especially difficult when you think about a crisis that can hit multiple functions in the company or might occur across multiple sites, such as a major cyber security breach. For example, in any large company – like Seagate – there is likely to be a local chain of command, as well as a chain of command within a functional unit, that sometimes takes over in a crisis. It's important to make sure that a centralized crisis management team understands that structure, and that it plans ahead to work with those individuals.

A key to responding effectively during a crisis is to develop the communication protocols that will go into effect automatically at the time you have the crisis. It's really important for the legal department to be part of that exercise in creating the templates and practicing, to ensure that any communications that are put out – either internally or externally – during the crisis don't create additional legal exposure for the company.

Right now we have several members of our Legal Department with experience in different areas—data privacy, data protection, SEC reporting and litigation—as well as a deep understanding of the business, who are involved in our crisis communication planning, so that if we have to get to that point of exercising the crisis management plans, they are well aware of all the protocols and who else in the company needs to be involved.

In the response phase, the most important aspect of responding well during a crisis, as a General Counsel, I've found, is to maintain your objectivity as long as humanly possible. Colleagues you may have known can be greatly affected by the crisis or even responsible for the events leading up to it. But as we know, the company is the client—not the individuals—and the board of directors, outside auditors, shareholders and other employees depend on the General Counsel to be a transparent and

unbiased sources of information. It's also really important for the General Counsel to be the calm within the storm.

It's a lot easier to do that if you've identified your team of experts—your subject matter experts—long before the crisis hits, including lawyers within your department who have litigation, SEC reporting, and employment law experience, who can handle all the numerous work streams that come out of any major crisis, including litigation management, document preservation, dealing with HR issues, and external reporting. This is especially true today in the GDPR era that we live in, because the reporting periods are so short.

In certain types of crises, such as where there's an allegation of unethical or illegal conduct, the work of the lawyers usually goes on far longer than the events of the crisis. That's because, as we know, lawsuits are inevitable and they may go on for many years after the events of the crisis. Also, there are often ongoing government investigations. But it's important for the legal team to take the time immediately after the crisis response is finished to understand exactly what went wrong and try to think about controls that can be put in place or additional training that might help prevent future crises.

Fortunately, my experience at Seagate has been focused only on crisis planning but I've learned some lessons earlier in my career that I thought might be helpful in thinking about how to plan for and respond to a crisis.

First of all, practice will not make you perfect. There are absolutely going to be things that you don't think about ahead of time. It's very important to create what we're calling at Seagate a "risk resilient culture," which is a place where people understand what the protocols are; they've practiced things enough so that they don't panic, and that they logically think through those new issues that are going to come up.

That's not to say that practice isn't important—it really is. But the most important thing is to be agile and flexible, and to work together as a team to respond to the crisis. This requires frequent repetitive tabletop exercises where you look at lots of different scenarios, so that people understand the types of issues that can come up.

Second, it's important to have your team of experts lined up before the crisis hits. There's nothing worse than scrambling at the beginning of a crisis to work through conflicts issues with your outside law firms or your outside communications experts. The other advantage to having those relationships established ahead of time with people like the illustrious lawyers who are on this panel is that they can give you great advice about things that they've seen before—when you're in your planning stage.

Third, I've unfortunately seen numerous examples of employees who tried to cover up the acts that led to a crisis—even negligent acts—and the employees have been terminated or received other consequences for the cover-up, as opposed to what actually happened to trigger the crisis. Even though we need to remind employees that we work for the company, and that they may need to get their own counsel, I think the most important role that the General Counsel plays in leading up to a crisis is to continuously remind people of the importance of speaking up and being transparent when things go wrong. A key to doing that is to create a culture where people feel confident that they can speak up and admit mistakes, and the only way to do that is for the senior leadership team to be the first one to admit when they've made a mistake.

Fourth, when you're overwhelmed by the events of a crisis and stressed to get everything done—which I can attest to is a horrible situation to be in—it's really easy to forget that the crisis has a human toll on the people who are involved. I remember one instance where we had a major issue that we had to deal with that ultimately led to a financial restatement and several people being terminated. Very early in discovering that, one of the first people that I had to get involved was a member of our IT Department, because we had to preserve documents. We immediately put her on the blackout list. She was prohibited from selling stock for six months. She was responsible for helping us preserve documents and so she knew the basic facts that we were investigating, as well as the employees who were being looked at. Being on the blackout meant that she couldn't exercise options that expired during that six-month period. I knew, the whole time, that that was a huge financial loss to her. It created a lot of consternation, in addition to the fact that she was working crazy hours and couldn't tell any of her colleagues what she was doing.

Although the company made her whole after the crisis, it was a really good lesson to me about the fact that these types of incidents can take a big toll on people who are on your team. It's important to take the time to understand how the crisis is affecting them outside of their day job.

Finally, once the crisis is over, think about how you can use the facts of the crisis to actually incorporate it into your employee compliance training. Sometimes I've seen a hesitancy after the crisis is over to actually talk about it. I think some of that comes from the fatigue of going through the crisis, but I think it also comes from the fact that people have been told they have to keep things confidential. But once it's all out there, what I've found is that employees will really listen to what you're telling them about compliance and controls if you can illustrate it with real-life examples of crimes and punishments.

Thank you very much for listening to me today, and I'm looking forward to hearing from the views and experiences of our panel members. [APPLAUSE]

KAREN TODD: Before we move on to Chris, I wanted to get a little more information from Kate. How do you organize your legal department to address operating in so many countries?

KATE SCHUELKE: As my team hears me say all the time, we have a very, very small department. First of all, we work really hard. We have employees in various countries; our largest team is in Cupertino; we also have people in Minnesota, and then we have a team in Singapore, in Longmont, Colorado, and I'd like to have them in several other places. We also have a few people in Dublin.

Part of the way we do that—and this is my philosophy throughout my career in-house—is that it's invaluable to cross-train people. I've always had a very actively managed rotation program, where I have employees work in different areas. I have people on my team now who are litigation experts who, for the past year, have been working on corporate governance matters. I've brought in people outside and they have experience in one area and then gotten them to be responsible, for example, for compliance and data privacy. I think the best way for us to be agile, to be able to respond to different things, is to have a broad range of knowledge.

What I tell people is, "My title is General Counsel because I'm a generalist; I can't be a specialist any more, like I was when I was in private practice." That allows us to spot issues and then go outside when we need more in-depth expertise.

The second piece of it is to be enmeshed in the business. As I talk about assignments or projects that we're working on, really spending time on the business reasons behind those things and then encouraging people to get involved in cross-functional projects or also going to staff meetings for other people in the business. Then they truly understand why things happen, both from an organizational perspective, but more importantly, from a business goals perspective. As we're developing our own goals in Legal each year, we try to align them very closely with the business objectives.

KAREN TODD: Thank you. When you operate in that many countries, I would assume it also spans a lot of different time zones. Do you find yourself being on call 24/7?

KATE SCHUELKE: That's a great question. My family is super-important to me, so I always tell my team that I'm available if I need to be reached, 24/7. Another philosophy that I have is that it's important to me to empower people on my team to be able to be there at different times of the day, too. For example, in the crisis management exercises that we've been going through, we've been talking about the fact that we're such a small team. It's really not possible for us to be 24/7 if we're only relying on people in

a certain geography. What we're doing right now is training people in other locations to help supplement what we're doing in our group in Cupertino. In addition to that, I have the same philosophy with our outside counsel—I let people know ahead of time if it's really a crisis or not or if it's just an issue that I need help with. I've always found that it's important for people to understand when things are a priority as opposed to a made-up crisis.

KAREN TODD: Thanks very much. We're now going to move on to Chris McLaughlin and his presentation.

CHRISTOPHER MCLAUGHLIN: Good morning, ladies and gentlemen. First of all, I'd like to congratulate Kate and the whole Seagate legal team on the great honor today, so congratulations, and very well-deserved. I'd also like to thank Karen and the Directors Roundtable for asking me to come and speak today with you, and to have the opportunity to speak with some great panelists. Thank you to you all.

Before I start, I'm here to talk about Brexit, or "the B word," as it's called over the water. These days, people generally like to avoid talking about it; that might explain why we are in the situation that we're in although there are many reasons for this, some of which I won't go into. The purpose of this discussion is not meant to be political, and so I'm going to try to give you a little bit of background about Brexit and the European Union, as well as what the effects of Brexit

will likely be. For legal departments and companies, what they might do to mitigate the effects of Brexit. That in itself is quite a difficult discussion, given the continued uncertainty on what Brexit actually means.

Before starting, as a California audience, I would like you to imagine a situation where California has voted to leave the United States; there is no coherent plan whatsoever in terms of how to address federal legal issues or relationships, and you are going to be leaving the United States in 30 days' time. I would hope that this sounds fairly shocking to you. That, however, is effectively the situation that the UK and the European Union are currently in.

As I mentioned, before discussing contingency planning, which hopefully will be of relevance to some of you, it's probably best to do a quick recap on what the European Union is, and what Brexit and its effects are. Also, I'd like to try to explain why I *think* we're in a situation where there's not yet any coherent plan. Be aware, however, that by the time this talk finishes, things could be quite different from how they are now. The Brexit situation changes daily, if not by the minute—going forward, sideways, and frequently backwards. Add to this, that there is growing concern, and anxiety, that because of the lack of progress, we may end up being in a situation where there's a no deal, otherwise known as a "hard Brexit."

Back to basics, what is the European Union? Well, having its foundation in 1957, it's essentially a political and economic union of 28 member states. Since its inception, it's developed into a single internal market, in a sense, a bit like the United States, through a standardized system of laws.

There are two main elements. First of all, you've got the single market. It's a single trading territory, which is based on four principles: the freedom of movement of goods, services, people, and capital. Many believe that it is this freedom of movement of people that has in some ways led to the

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Brexit crisis with increased immigration which is partly the result of expansion of the Union over the last 15 years or so.

The single market removes not just physical barriers to trade—for example, tariffs—but also physical and technical barriers. By way of example, hard borders have been removed within the European Union, and member states are not allowed to have divergent product standards. For this, laws need to be aligned.

In addition to the single market, there's also a customs union. What the customs union allows for is a common tariff on all goods entering into the Union, following which those goods can move between different member states free of any tariff. Once inside the Union, goods and services cannot be subject to any customs duties, discriminatory taxes or import quotas. This does not mean that there can't be any taxes; rather they just can't be discriminatory.

To add to the complexity of the arrangements, you have some countries which are members of the single market but not of the customs union. For example, in that group you have Iceland and Norway and, to a certain extent, Switzerland. Then you have other countries which are members of the customs union but not the single market. There, for example, you have Turkey in relation to its manufactured goods but not services or agriculture.

That's enough of an explanation about what the European Union is. What is Brexit? Well, perhaps the answer to that is, does anyone really know? Because it's quite clear that the politicians didn't when they put the vote to the British public at the time of the 2016 referendum. Nor do they seem to know what it is even now given that everyone appears to have a different view of what Brexit actually means.

By way of background, the UK joined the European Union in 1973 when it was the European Community and its relationship with the EU has always been volatile. It's been especially troublesome from a political perspective for the Conservative party, the ruling party in the UK at the moment. Issues arising with the European Union have effectively resulted in the removal of all Conservative prime ministers from office since Britain joined the European Union in 1973. With that in mind, you can understand why the Conservative party would like to try to put the European issue to bed.

To put this issue to bed once and for all, the previous Conservative Prime Minister, David Cameron, hoped to appease the problems within the Conservative party by committing to a national referendum. It was, I suppose, against all perceived expectations that the British public voted, by a fairly narrow majority of 51.9% to 48.1% to leave the European Union.

Following that vote in 2016, there is a formal mechanism within the Lisbon Treaty for countries to leave the European Union. Obviously, the UK is the first to test it and, with any luck, will be the last. That is by serving notice under Article 50, following which there is a two-year negotiation period. The UK government served that notice on March 29, 2017, and as a result, the UK is due to leave the European Union at 11:00 PM London time on March 29, 2019. That's not very long to go. There are current suggestions that the UK government

may need to seek a time extension, given the current inability of the UK parliament to agree on a withdrawal agreement.

And why is Brexit important? I suppose the principal reasons are that the European Union has led to increasing integration throughout Europe, as you would expect with a single market. It's very difficult to disentangle 46 years of integration. Also, on top of that, there's the whole economic aspect, that the EU is the UK's largest export market and its biggest source of foreign investment. Brexit is therefore a very big decision.

That brings us onto where are we now? Do we know?

In late 2018, after many months of negotiations, the EU and the UK eventually agreed to the terms of a Withdrawal Bill. But when I say the UK agreed, the UK *government* did. Principally, the Withdrawal Bill addresses the financial settlement or the "divorce bill," and also the rights of EU citizens in the UK and UK citizens in the EU. Those issues are relatively uncontentious. One major stumbling block has arisen through Northern Ireland, and the fact that the border between the north of Ireland and the Republic is the UK's only land border with the EU. Both sides, being the UK government and the EU, have made it very clear that they're committed to there being no reintroduction of a hard border. That all seems quite reasonable in terms of words, but the reality makes it quite difficult. This has become especially important, because of the Good Friday Agreement of 1998, which has led to peace on the island of Ireland as increased integration occurs between the north and the south. As a compromise position, the UK has agreed with the EU that the UK can remain in the customs union for the transition period, satisfying the UK demand that its territorial integrity over Northern Ireland will be preserved and not compromised.

But the quid pro quo for that is that the UK cannot exit what's known as the "backstop" until the EU agrees, and that will be whenever a new free trade deal between the EU and the UK is in place which keeps the border open.

In addition to that, there would be certain add-ons which would apply uniquely to Northern Ireland, in terms of both customs and regulations, bringing it closer to the European single market that the rest of the UK would be outside of.

Understandably, there's been a fear between a certain faction of the ruling Conservative party, which is a minority government, as well, that this deal and the backstop will keep the UK trapped in the customs union forever and forced to continue accepting EU regulations, to boot. Effectively being a "rule taker."

This has frustrated the UK government, and as a result, the Withdrawal Bill has not been passed, with the UK government suffering colossal parliamentary defeats as a result. Where we are at the moment is that the UK will crash out of the European Union at 11:00 PM on March 29th if the Withdrawal Bill or some other alternative bill is not passed by then. What that means is that the UK will go immediately onto WTO [World Trade Organization] terms, with automatic tariffs and a myriad of legal complications—obviously something that most people would like to avoid.

The latest position is that the British government announced on Monday that it will put the Withdrawal Agreement to the UK Parliament again on 12 March. If the bill is not passed on March 12th, then the government has agreed that the following day, there will be a vote put to MPs where they can say, do they approve leaving the European Union on a no-deal basis, i.e., with all these tariffs and no rules being in place. If the answer to that is "no," then the following day, there will be a further vote in which the MPs would be allowed to decide whether, in the end, to extend Article 50, which will delay Brexit.

I suppose the natural result of that is that the MPs could vote "no" to everything. If they do, then the UK will be in an impasse and even greater confusion, possibly leading to a second referendum on Brexit.

Amidst all this hype and noise and confusion, is there anything that companies can do to try to prepare for a post-Brexit future? Or, indeed, is there any point in trying to do it, given that no one really knows where we are?

My view is yes, that there are things that you can do and that it's certainly worthwhile in doing this. It is unlikely—although it may happen—that the status quo remains, and that the UK does not leave the European Union. But on the assumption that Brexit does proceed, it has been made clear by the UK government that the UK will be out of the single market and the customs union. It's possible to work on that basis to do some planning for the future.

Companies like Seagate which, as Kate mentioned, is Irish-incorporated and headquartered, but has a very large facility in the north of Ireland just beside the border, have carried out a no-deal Brexit contingency analysis, which I think is extremely

useful for them to have done. This has included looking at operations and financial Brexit risk assessments, and then also a legal risk analysis.

Against this background, from a legal perspective, it's worthwhile noting that the UK Parliament will be passing a bill called "the Great Reform Bill," and under that, all existing EU legislation and current EU legislation, will be automatically transposed into UK law. But what will happen is that over time, rules and regulations will undoubtedly diverge, so there will be more and more differences between the UK and the EU as time progresses. That UK bill provides some comfort to companies with operations in the UK.

The reality is that there is legal risk for all companies which trade between the UK and the EU, but not just that—also for companies which trade between the UK, and *any* countries with which the EU has a free trade agreement, because in the case of a hard Brexit, those free trade agreements will no longer be available to the UK. It's really quite a complex arrangement there.

To gauge the impact of Brexit, it's necessary to analyze how much of a company's operations rely on EU-derived rights and obligations. For certain highly regulated industries, such as financial services, those risks are clear and apparent, and companies in that sector have been doing a lot to try to address those. For example, the most obvious thing is that, in order to sell and provide financial services within the European Union, you need to be authorized. Now, the system in Europe is that you can be authorized in one member state, but then you're allowed to operate in all other member states through a passporting regime. But in the case of Brexit, the passporting regime will come to an end. As a result, many financial institutions have largely moved their European headquarters from London to a number of cities, the most popular being Dublin, Frankfurt, Paris or Amsterdam. Dublin, for example,

> "Our crisis planning efforts need to account for the likelihood of numerous false positives in the area of security. Unlike a natural disaster that everyone knows has happened, the first step in dealing with a suspected cyber security breach is to actually determine that it really happened." – *Kate Schuelke*

has been very attractive because post-Brexit, it will be the largest English-speaking city in the European Union, and it's assisted by having common law jurisdiction very similar to that in the UK.

From a regulatory perspective, EU and UK rules, regulations will inevitably diverge over time, and this is going to result in increased costs and burdens. Companies doing business in both the EU and the UK will need to comply with EU and UK regulations. This means increased cost and burden. But aside from the regulatory risk, the main legal risks that we see then are likely to be trade and supply chains, contracts, human resources, and then R&D and related funding.

From the trade and supply chain side, "no deal" means that you're going to be trading on WTO terms, with the introduction of tariffs and non-trade barriers. The non-trade barriers will result in increased cost and administrative burdens and delays at borders. Tariffs will result in increased cost. None of that sounds very good to businesses. In Europe, through the single market, the trade and supply chains have become highly integrated. It's a very complex issue. You need to look at your trade and supply chains. Also, health and safety standards will vary between each of the member states, so UK goods will no longer be certified for use in the EU and vice versa. From a trade and supply chain perspective, I think what companies need to do is consider who should bear the risk or whether to terminate the agreement. They may need to stockpile because of the likely delays, and potentially seek alternative suppliers. Then they need to assess the supply chain as a whole, because you may find key areas further up the chain, not with your direct counterpart, may be negatively affected.

Then the next thing, I suppose, is in terms of contracts. Brexit may affect those contracts that are in place, and also those that are currently being negotiated. Unforeseen costs may change the economic balance of the parties, in terms of tariffs and delays. Will parties try to change the contract or rely on some kind of force majeure event? What companies need to do there is carry out an audit of their agreements; they need to review the standard terms and conditions; and make changes where necessary. They may need to liaise with their suppliers and customers to deal with identified contractual issues.

You also need to consider your long-term contracts. For example, will these need to be renegotiated or amended, for example, to allow for corporate reorganization? As a firm, we find that a lot of companies, even in non-regulated spaces, are actually moving more of their operations to Ireland, for example. You need to make sure that you can do that with your contracts. Relevant jurisdiction clauses may also need to change with the UK no longer being in the EU. Likewise, with governing law.

From an HR perspective, you need to identify the staff who are affected, and then hopefully assist them with any kind of visa or obtaining settled status.

But the main thing to note is that it will be very difficult to hire unskilled workers into the UK, because they will no longer meet visa requirements. That could potentially lead to significant problems in terms of

hiring. It might also be, at the other end of the scale, difficult to attract high-skilled EU workers. If so, there will be issues for the talent pipeline.

If companies have key EU hires that they've identified, our advice would be to expedite the process as quickly as possible. One thing to consider is you need to make sure that the changed circumstances don't lead to discrimination from a labor law perspective. For example, if there's a redundancy program, don't simply pick on the EU workers in the UK. Likewise, if you have a transfer program to the European Union, make sure that's available to everyone and not just European citizens, as opposed to UK ones.

I suppose the last kind of major legal risk that we see is from an R&D and funding perspective. You may have heard of "Horizon 2020"—that's the EU's largest-ever research and innovation program. It is in the amount of €80 billion for the period 2014–2020 and, to date, UK companies have been able to qualify. For UK companies that have benefitted to date, the UK government has said that it will stand behind and guarantee projects that were approved prior to Brexit. But post-Brexit, there's some confusion, because it's not known whether UK companies will qualify or, indeed, whether the UK government will cover the costs of funding. Under that, as well, there may be difficulty in attracting EU talent, and it may lead to problems in terms of university collaborations.

So, as you can see, there's a lot to think about and prepare for. Hopefully, that gives you some idea as to what is going on and what is not going on in the European Union and the UK through this Brexit turmoil. Thank you. [APPLAUSE]

KAREN TODD: Chris, do you see any possibility of Ireland negotiating a particular relationship with the UK if there's a hard Brexit, or do they have to rely on Brussels to do that?

CHRISTOPHER MCLAUGHLIN: Ireland already has a special relationship with the UK which pre-dates the entry of both countries into the European Union in 1973. The UK and Ireland have a common travel area in Ireland which will survive, and the governments have confirmed that. But in the event of a hard Brexit, it would not be possible for Ireland to have a specific economic policy with the UK that does not pertain to the rest of the European Union, because of the policies of the single market. Ireland has given its commitment to remain in the European Union.

KAREN TODD: Okay. As a legal advisor to multinational corporations, what legal risks do you think board members should be most concerned about today?

CHRISTOPHER MCLAUGHLIN: The main thing is that the world has become more and more complex, and oddly enough, we've become more interdependent, but recent years show that we've become more separated from one another, as well. The main issues there, from a legal perspective for the board, are regulatory compliance, because it's a minefield out there. You've got different regulations in different countries. As the speech said, it's going to become more complex from a UK/EU perspective, bearing in mind GDPR, anti-money laundering, and anti-bribery, to name but a few. It's very easy to trip up on some of those. That's probably the main concern.

KAREN TODD: Thank you. We are now moving on to Sally Yates.

SALLY YATES: I, too, am delighted to be here today, to be able to recognize Kate and to have a conversation with the other panelists about the different challenges or crises that can face a company.

I was asked to talk this morning about interacting with the government during a criminal investigation. Certainly, a criminal investigation for a company can be a form of crisis, although I have to tell you,

Chris, after hearing about Brexit, I'm thinking a criminal investigation isn't so bad. [LAUGHTER]

I will also tell you, I am so glad that you laid that out. I've got a few other topics I never entirely understood that I'd like to ask you about, like Blockchain and other stuff you could also explain. [LAUGHTER]

Actually, a criminal investigation *can* be a defining event for a company. As Kate said a few minutes ago, much like other examples or other instances, oftentimes it's not so much the underlying conduct that becomes defining, but rather how the company responds to it.

A criminal investigation is something, hopefully, that most companies don't ever face. But when they do, they can be totally freaked out by the situation, and understandably so, because it's a really foreign environment for most regular people, and even most regular lawyers who don't normally practice in this area. I thought what I could do here, in just a few minutes, would be to try to pull back the curtain a little bit and at least give a few observations from my perspective, my time—almost 30 years at DOJ [U.S. Department of Justice], as well as time now in private practice—of

some things that I think can be effective or not so effective in dealing with the government if you find yourself in the throes of a criminal investigation.

One thing would be as Kate mentioned, the importance of having a plan. You can find out about a criminal investigation in a variety of ways. From one end of the spectrum, where you get a letter or a phone call from an agent who just wants to ask a few questions; it seems relatively non-threatening. At the other end, agents come in and it's a full-out search warrant that's being executed at your corporate headquarters.

Regardless of how you have that first interaction, it's really important that you've thought about this in advance, and that you have somebody who's designated to be the person who will interact with a government representative, whether it's somebody coming in to serve a subpoena, or an agent that's there for a search warrant.

After you've got someone who's initially designated to interact—and it may or not be the GC at the first point—it's also absolutely critical from the beginning, that you open up a line of communication with the government. Oftentimes that will start first with the agent who may have contacted you. That's a really good thing for the company, because you can oftentimes get a lot of information from the agent about what it is they're looking at, what they're concerned about. Then, obviously, reaching out to the prosecutor in a federal investigation, the AUSA [Assistant U.S. Attorney] who would be overseeing it.

Don't think that you shouldn't be reaching out to that AUSA until you have all of the answers. They're not going to expect you to have all of the answers. What's really important is that you set up the line of communication, and you make it clear that you *want* to have interaction with them.

> "Part of the legal department's role in the crisis planning stage is really crisis prevention. It's to think about the things that we can do, in terms of compliance training or additional controls, that can help avoid a crisis such as a compliance failure or a legal failure." – *Kate Schuelke*

This should not be the one-time call. You need to stay in regular communication with the government while this investigation is going on. I know there's some folks who think, "If you haven't heard from DOJ or you haven't heard from the agency, why wouldn't you just let that sleeping dog lie?" You'll probably be hearing about other activity going on, but let me tell you, you are not going to awaken the giant by making the phone call to them to check in. It's not like they are going to have forgotten about that investigation and then, all of a sudden, you remind them of it, so they get back on it. But demonstrating that you want to be in communication, you want to try to answer questions, and likewise you are trying to find out more from them during that process, is really important.

Chances are the first thing that you're going to get is some kind of document request, whether it's a civil investigative demand or a grand jury subpoena or an agency request for documents—it's going to be some sort of document request. If you want to set the right tone with the government, you really want to try to be as responsive as possible to that document request.

But sometimes the government has given you an unreasonable document request that they may not even know is unreasonable. For example, they may have put search terms in this request, that they have no idea will actually generate millions of documents. The government really doesn't want millions of documents right out of the gate. Being able to have a dialogue with the government, where you explain it to them and say, "We ran this particular search term, and here's the number of documents that came up, and here's some ways we might be able to narrow that request," that is going to buy you a lot of goodwill.

Likewise, don't also think that dragging your feet is going to be an effective strategy, either. Again, the government's not going to go away just because it's taking a long time to get the documents. In fact, they're probably going to get pretty darned annoyed about that unless there's a good reason why it's taking you a long time to gather those documents.

The first inclination a lot of times from a company, where there's an investigation, particularly if somehow that investigation is public, is to go out and make a lot of statements denying it and saying what happened. "Danger, Will Robinson," as they used to say—everybody here is too young to even know what that's from [LAUGHTER]—*Lost in Space*. That is a really risky thing to do, for a couple of reasons. First of all, you probably actually don't know what the facts are until you've done your own internal investigation. When you go out, as a company, and you say "this is what happened," you are going to live with that forever.

There is also an inclination sometimes for folks to talk about how wrong-headed this investigation is. Some folks actually use the term "witch hunt" in referring to an investigation. I get that you may feel like it's really unfair that your company is under the microscope for this conduct, and there are times and ways to be able to communicate that to the government—and maybe even later, in a public way. But right out of the gate, going on the attack, that this is really unfair and wrong-headed and it's a witch

hunt, it's not going to be a particularly effective way to be able to work collaboratively with the government after that.

Now, this one is sort of basic, but it's actually worth saying out loud, and that is: the most important thing that you have in the course of an investigation is your—the company's and your lawyer's credibility. Above all else, do not make a misrepresentation to the government. Even an unintentional one can be really hard to unwind, because when you're in the course of these investigations, you decide pretty quickly whether you can trust the lawyers on the other side. You know they are advocates for their clients—they're *supposed* to be advocates for their clients—but you develop a sense as to whether or not you can trust their representations, about whether certain documents exist or don't, or whether certain conduct occurred or didn't. Once those lawyers have made the very first representation, they develop a reputation, frankly, that follows them long after just that particular case and that investigation. You have to be really careful that you don't do anything that will impact that credibility. If you did unintentionally make a misrepresentation, you want to clarify it as quickly as you can.

Whether it's fair or not, a lot of times the conduct of the lawyers representing a company gets ascribed to the company. Sometimes that can be for the better. I remember when I was DAG—deputy attorney general—and there was a U.S. attorney's office that was advocating to decline prosecution of a particular company after some pretty egregious conduct. They're sitting in my conference room and they're going on and on and on about how cooperative the lawyers were, and they were contrasting it with another company and another group of lawyers and what they had done. In the end, I said, "Okay, I get why we don't want to indict the law firm. But tell me again why it is we don't want to indict the company?" [LAUGHTER]

It's just an example of how you can't help but intertwine the conduct of the lawyers with the client, and particularly whether you trust them in that regard.

You really want to consider—and this is obviously a strategic decision that's going to vary based on the facts of every investigation—as early on as you can do it from a position of knowledge, laying out your case for the government. If you really think that they are off-base in an investigation, particularly a criminal investigation, if you come in and sit down and lay out why you think they're wrong—and sometimes it can be wrong in that the conduct didn't occur; sometimes it can be wrong that in the big scheme of things, maybe the conduct occurred but here's why it's not as egregious as you think; and even sometimes, it can be, "We just don't think you're going to be able to prove it for X, Y or Z reasons." From having been on the other side, you don't want to spend time on an investigation that is not ultimately going to go somewhere. If you can be convinced early on that this is not a place you want to be sinking resources, for whatever reasons—fairness, not going to be able to prove it, there are other alternatives here—that this is not a place that you want to be using the very limited resources that you have at DOJ or many of the other regulators, you can reach an early resolution.

Now, you need to have a good story to tell when you come in. If, in fact, your facts are really bad and you don't have reasons why the government shouldn't be pursuing it, then the early discussion may not be strategically the best thing to do. But if you do have a good story to tell, you ought to at least consider telling it early.

If the company decided to cooperate, then fully embrace cooperation. Responding to a grand jury subpoena for documents and producing documents is not cooperation. That's called "complying with the law." [LAUGHTER]

Now, a company has no obligation to cooperate, and there may be times where that is not going to be in the company's best interests. And when I say "cooperation," I'm talking about doing more than just responding to lawful service of process here. I guess I probably couldn't sit at this table and talk about investigations without at least saying that also includes being willing to lay out who did what, to identify the individuals who are involved in the wrongdoing within the company.

If you decide to cooperate, if you decide that the company wants what can oftentimes be really substantial benefits—and that's, again, a strategic decision to make—but if you make that decision to cooperate, don't do it halfway. That "one foot in and one foot out" doesn't really buy you the advantages of cooperation, and, again, it makes the government mistrustful as to whether you're truly interested in cooperation or not.

In making decisions about whether to pursue an investigation, whether to indict a company, how to resolve a matter if you have decided to go forward—whether it would be through a plea or a deferred prosecution agreement or a non-prosecution agreement or just a declamation—at the risk of oversimplifying, the way I always looked at it was, is the bad stuff that happened here, is this how this company does business, or is it aberrational? Bad things can happen within

big organizations. Somebody is going to do something wrong at some point. The limited resources of the government should only really be used, particularly for a criminal prosecution, when that *is* how that company does business. If you can demonstrate to the government that when you found out about this misconduct, you remediated it or did something about it, that you got rid of the bad apples or put processes in place to make sure it never happened again, that can be incredibly persuasive. It could be a really effective compliance program that's not just this pretty paper that you have on a shelf that you pull out if the government comes knocking, but actually something that you have integrated into the practice of your company. This information will help when the government is trying to decide what's the appropriate response to this conduct that they found out about.

The final thing I would say is while you don't want to go around screaming "witch hunt!", at the same time there can be examples of overreaching. There can be abuse that happens. While I don't think that it's a particularly effective strategy in every letter and every motion to be alleging prosecutorial or agent misconduct, when it does happen, you need to bring that to the attention of people who have the authority to do something about it.

I remember early on when I was DAG, I got a letter from defense attorneys in a matter, and they were alleging all sorts of things that had been done by the Assistant United States attorney and the U.S. Attorney in an investigation. I was kind of new to it, and I had read the letter and thought, "There's no way in the world any of that is true," because that's not the way we did things back in Atlanta. I'd been U.S. attorney in Atlanta and AUSA for there, for many, many years prior to that. I got somebody on my staff to check into it, and I'll be darned if it wasn't true—that *is* what was happening in that matter. If folks had not brought that to my attention, I would not have been able to do anything about it. While, certainly,

> "Even though we need to remind employees that we work for the company, and that they may need to get their own counsel, I think the most important role that the General Counsel plays in leading up to a crisis is to continuously remind people of the importance of speaking up and being transparent when things go wrong." – *Kate Schuelke*

people in the supervisory chain at DOJ and other agencies give a lot of leeway to their folks in making judgment calls, what you don't give leeway to is unethical conduct. If it's bad—if you think this is the kind of thing that should not have happened—you can't really be worried about alienating the line people who are handling the case, and you need to bring it to the attention of somebody who can do something about it.

Overall, in a nutshell, I'd say it's the open line of communication; it's maintaining your credibility as you are interacting with the government. Then demonstrating that even though you will be advocating to the government that they shouldn't indict your client or take other enforcement steps, demonstrating that the company gets it. If, in fact, there was some bad stuff that happened, the company gets it and is doing something about it, and further government enforcement action is unnecessary. From my perspective, that's probably the best path to be able to stave off criminal enforcement.

KAREN TODD: Thank you. If a company finds out from the government that something occurred, and they don't have all the data, what would you recommend as the best way to liaise with the government when you're conducting your own internal investigation?

SALLY YATES: This is going to be one of those "it depends" answers, because it does depend. Sometimes it's a situation where you really don't want to be making representations to the government until you've done the full internal investigation and you actually know what happened. I've also been in other situations when I was on the DOJ side, when a company had discovered something bad; they hadn't yet been able to do the full investigation but, candidly, they were worried about the whistleblower getting to the DOJ first. It's not a bad strategy in those situations to go in and put a marker down and say, "Look, we have discovered 'X'; we don't know all the facts about 'X' yet"—and, look, every case is going to be fact-specific, so you don't always do this—"we're going to do an investigation; we'll come back to you when we've completed that investigation, but we wanted to let you know now." The main reason to do that is if you think that you are at risk of having someone else get to the government first and you've made a decision about voluntary disclosure, which is a very complicated decision that we probably don't have time for here today. Ideally, you've got all the facts buttoned down; you're not always going to have that luxury when you have to make a decision about whether to make an outreach to the government.

KAREN TODD: Thank you. What are some common mistakes that boards of directors make during a government investigation into wrongdoing?

SALLY YATES: I would say it's not being sufficiently involved early enough. And, again, that can vary, depending on the particular situation. Most internal investigations are not run by the board; they're run by the GC and the company; and even in those situations—particularly where it's something that can have a significant impact, and most criminal investigations could, on a company—the board really

needs to be in the loop and know about it early on. I've seen some situations where the investigation metastasizes a bit, before the board is really brought into it, or where it's a situation where the allegations involve wrongdoing by people high enough in the company, or the misconduct is pervasive enough to where it really should be a board-led investigation rather than a company-led investigation. Either the company starts, and then they're trying to do a hand-off to the board, which can be an awkward thing there, or it just sits while everybody tries to figure out whether it's going to be a board- or a company-led investigation. Certainly, the board shouldn't be in there running the day-to-day aspects of it. If you've got a criminal investigation of your company, that's something the board needs to know about and needs to be in the loop on.

KAREN TODD: Thanks very much. Our next speaker is Anna Erickson White.

ANNA ERICKSON WHITE: Thank you. I knew that Sally would be a hard act to follow. [LAUGHTER]

I decided I had to be prepared, and I went out to a number of my colleagues who I think have a good sense of humor and asked them to give me ideas of things that I should say when this transition happens. [LAUGHTER]

Unfortunately, most of them were star-struck, because I only got one response and it was that I should say that I told Kate that I would only do the panel if Sally would be my warmup. Sally, thank you—you did a really good warmup job! [LAUGHTER]

SALLY YATES: Next week, we're in Vegas! [LAUGHTER]

ANNA ERICKSON WHITE: But actually, the first response I got was unintentional; it was from a friend of mine who also is a big fan of Sally's, and I told her

that I was going to be speaking following Sally, and she just said, "Well, that's unfortunate." [LAUGHTER]

I feel very fortunate to be here today, to be honoring Kate. I've known Kate for a long time, and she is a really good friend of mine. She is the GC that you want if you are in the middle of an investigation—there's no doubt about it. I've dealt with her in that situation, and I can attest to that. She has, and I'll use some of the words that she used when she was describing the characteristics of a GC that you need. She is objective; she always has the client's, the company's interests at heart, not looking at the individuals. She is transparent. She is unbiased, and she is the calm within the storm. She is also strategic—she sees both the business and the legal issues that are involved, and she keeps the big picture in mind.

I know Seagate does not have any crises that are coming up; if it does, Kate will be the person that will lead them through the storm really well.

What Kate asked me to talk about is dealing with a crisis from an outside counsel perspective. That sometimes can be a difficult position to be in, because everybody's moving really quickly and wants to address the situation and often what are unfair media reports about what has happened. You have to be there, telling people to stop and pause and take a deep breath before some important decisions are made. That's often not what people want to hear, but it's really important for them to hear that. That's because, as Kate said, it's not just an immediate crisis; it's not just going to be something that plays out in the next week or two weeks or a month. There's going to be litigation and regulatory actions that last for *years*, and what you do *now* is going to become part of the record for how the litigation and the administrative actions play out.

There are three important considerations or decisions that may be made early on that it's important to get outside counsel perspective on. That is first, what is said publicly; the second one is who conducts the investigation; and the third one is how it's going to be paid for.

Some of this has already been touched on, and I won't go into a lot of detail, but what is said publicly after a crisis happens, after it's made public, is very important. There has got to be a lot of pressure from the company, from maybe your PR consultants, from IR [investor relations], to get out there and say something. There also may be, because what's said is unfair and there's been some report by a newspaper reporter that's sensationalized. You want to be able to get out and say your side of the story. The problem is that, as Sally says, you just don't know what the scope of the problem is. You may know who has made the allegation, and it may be a whistleblower; it may be a former employee; and it may be just a newspaper reporter; but you really don't know. You don't know who's involved; you don't know the scope of things. You don't know if it's material; you don't know if your debtors are involved, or if customers are involved, you just don't know. You have to be very careful about what you say at that point. If you get out too fast, it's going to be something that could be used as an admission against you—and I'm talking

about it from a civil litigation perspective—or it can be used as something that's a new, misleading statement.

I want to give you an example of something that happened fairly recently for a client of ours. There was a newspaper reporter that was out there looking at an issue that a former employee had raised, and for the question about whether the company had engaged in some unethical sales practices. The company got wind of this, and they knew who the former employee was. They knew it was a disgruntled former employee; they knew this person was a troublemaker. They felt that the issue had been raised before, and they had looked into it. They didn't think there was any merit to it, and they wanted to say, "We've looked at this; there's absolutely no merit to these allegations, and this is just unfair, and you should stop reporting on this issue." But then it turns out that once that issue gets out, then more information starts coming out from other people. Even though you may not believe the person, or you have some questions about the disgruntled employee, there are other people that you do have some confidence in, who start giving you corroborating information. Now the company has gone out and made that statement which would have become a misleading statement and could have been part of a civil litigation.

The other part that outside counsel can be important for, in terms of disclosure, is what your disclosure obligations are. Do you need to say something now, or can you wait before you say something? It's actually built into the law that the company has opportunities to investigate something before it has to speak. Because the courts understand that you don't know, as soon as something happens, and that it takes a while for the facts and the story to be developed.

The second thing where outside counsel can be really helpful at the beginning of a crisis, is determining who's going to run the investigation. Often, the impulse is to have the in-house legal department run it, and for good reason, because the in-house legal department knows the people, knows the company, has the confidence of leadership at that point. The problem is that, often during a crisis, there is a combination of business and legal people that are involved and trying to handle this crisis. That can create some real privilege issues in terms of waiving the privilege. If you have in-house counsel deal with it, it exacerbates that problem, because they wear a dual hat often. It's not clear if they're acting in a legal capacity or in their business capacity, and it becomes a harder question in terms of whether there is a privilege to protect at that point. Outside counsel is in a much better position, because they have a pure legal role.

> "One more thing that in-house counsel should always remember is that they're going to be around after the crisis, and the outside lawyers aren't. Part of the role of the General Counsel and the in-house legal team is to balance those issues about business, customers, suppliers, as well as the legal issues." – *Kate Schuelke*

The other issue is that you may need the investigation to be independent, and this can come up particularly if you have executives that may be implicated, or even the legal department that may be implicated in the crisis. Or if it looks like there's going to be regulatory or governmental involvement in investigating the issues, obviously, outside counsel will be in a better position in terms of independence, because they're not as tied to the individuals in the organization. If independence becomes a really big issue where you can't only go to your regular outside counsel, but you need to get outside counsel that's completely independent of the company to look at it.

The third reason why it can be really useful to have outside counsel do it is just that often investigating a crisis is a really hard thing to do. You're asking difficult questions of the people within the organization, and it's hard to put the in-house counsel in that role. It's much easier if you have outside counsel—who don't have these personal relationships—doing these interviews and also making the really difficult decisions about what's going to happen to employees or what issues to raise to the board.

The last issue that it's important to get outside counsel perspective on is at the beginning of an investigation of a crisis, how it's going to be paid for. Again, you have to remember, this is going to last for years. Normally, the financial protection is going to be three-fold: one, the company's balance sheet; the second is do you have insurance, and the third is indemnification. The crises and the legal fees in particular that are going to be spent in defending against the investigation and the litigation that arises is going to put stress on all three of those. You can't go out at that point and buy more insurance; all you can do, really, is manage the litigation and the investigation as it happens. One of the things that it's important to do in a crisis is that often you will have multiple individuals who are going to need representation separate from the company. But it's making decisions early on in terms of having joint representations, so you don't have each individual getting their own counsel and depleting the insurance policy more quickly than it should. The other thing a company can do is work with the counsel early on, in terms of complying with the company's billing guidelines. Just because they're out getting independent counsel, it's not correct that we have no say in terms of what the legal fees are going to be, but

there are discussions along those lines that should happen early on towards preserving that insurance as long as possible.

The last issue that you can become vulnerable in a crisis situation is indemnification, which is really important for the individuals in particular. If the individuals have insurance and indemnification and the means for paying for their legal fees and any settlement or judgment that they may have against them, if a company's insurance is depleted—because you have all these people that are using the same insurance policy—then all that's left is the company and indemnification from the company. In the crisis, though, there's also increased likelihood that the company could become insolvent or may be acquired. In either of those situations, the chance that you have indemnification becomes much less. There are things that you can do at that point if you think that either of those situations are going to occur, to protect yourself or give you more financial resources. Talking to a bankruptcy expert about possibly putting money aside in a trust, or prepaying legal fees. Or if there's an acquisition, making sure that the terms of the acquisition make clear that the acquiror still holds the indemnification obligations, and is going to honor their indemnification obligations to the individuals of the acquired company.

There are many other ways that outside counsel can give you sound advice in the event of crises, having gone through it many times, but those are just three issues where it's important to get outside counsel's perspective early on during your crisis.

KAREN TODD: Thank you. With respect to the insurance aspect, are there any new areas that an outside counsel could recommend for boards and companies to consider now for possible crises?

ANNA ERICKSON WHITE: Absolutely. I can think of several. One is you should know about the company's insurance program and have confidence that there's enough insurance in the event that there's

a catastrophic event, and that the insurance policy has terms that will allow you to draw on that insurance if there's a catastrophic event. There are a number of different policy terms that any lawyer that handles this regularly, or broker, should be able to tell you should be in that policy.

The other thing to consider, in particular where you have outside directors who are independent, is having a separate policy that just covers those outside directors. If there is some kind of crisis, a number of individuals, including executives, are drawing from that policy. There should be a separate policy that is just for the independent directors and that cannot be used for the defense or for any settlement for the executives.

KAREN TODD: Thanks very much. During an internal investigation of wrongdoing, what advice do you give board members when there's a credible allegation of wrongdoing by an executive who's important to the company's success?

ANNA ERICKSON WHITE: That they still have their fiduciary obligation to investigate the allegations. Obviously, it's a hard decision, but you have to do it. Often, in that situation, the independence of who is investigating the executive becomes more important, and you have to think harder about who's doing it. Do you have a committee of the board? Are the members of that committee independent of the high-level executive that's being investigated? Do you have counsel that's clearly independent of the executive that's being investigated?

There was a cautionary tale in the news yesterday about Wynn Resorts, where they were just hit with a $20 million fine from the Nevada gaming regulators. It was unprecedented, because the board failed to investigate serious allegations going years back about sexual harassment by Steve Wynn. They had been given notice that there were issues, but they failed to actually do an investigation. As a result, the company, and possibly the individual board members, were fined a significant amount by the Nevada regulatory agency.

KAREN TODD: Thanks for sharing that. Our final speaker is Katie Martin.

KATHARINE MARTIN: Thank you very much. It's really a pleasure to be here today, and I also want to acknowledge Kate. She's a tremendous General Counsel—I couldn't agree with that comment more. I've had the pleasure of working with Kate both when she was at Altera and at Seagate, and she really is the General Counsel you want when there's a crisis.

I'm a practitioner and I've been practicing law for about 31 years here in the San Francisco Bay Area. I've represented lots of companies that have had a lot of crises, but the particular perspective that Kate was hoping I would share today is from my service on a public company board. I've had the experience both as a director but also, over the years, advised many companies, so I understand the type of advice you would give and the type of process and protocol a company would want to go through in the context of a crisis. I've also been in the hot seat as a board member in that context. I thought I would spend a few minutes talking about that. I'm going to be touching

a bit on what everybody said, because as a board member, you come at things from a slightly different perspective.

First of all, especially from a U.S./Delaware law standpoint, the buck stops with the board. When there's a crisis, you're relying very heavily on management and the General Counsel in particular. If somebody's going to get sued, it's often the board that gets sued. It puts you in an unusual situation, because the board has a lot less information all the time than the management team does. The management team has a lot of information. You heard earlier, when Kate was talking about preparations that Seagate goes through to plan for and mitigate risks associated with potential crises that could happen. Often, when this is happening—and you all know this—boards get very busy. They're focused on business, and a lot of pressure on financial results. There are a lot of things that you need to talk about from a business perspective. The amount of time the board has to hear a full presentation from someone like Kate, who can say, "Here's what we're doing; here's how we're thinking about things; is there anything else you think we should do?" That's not always the case.

The other thing is that boards divide and conquer. It's always been the case that boards have leveraged committees, but even more so that's the case since Sarbanes-Oxley, given that we now have a specific mandate for committees.

For example, the audit committee will take the heavy lifting role and responsibility with respect to things like looking at and analyzing risk and putting in place a whistleblower program. The question is, how much does the rest of the board have visibility into this. I would say boards vary tremendously in terms of the ones that are really good about making sure all the directors are on the same page and have a sense of things versus the ones where it's a little bit more siloed relative to the work that the committees are doing.

Plus, given how busy everybody is, the cadence of the board is such that you don't always get to a point where, after the fact of the crisis, you think to yourself, "Wow! Wouldn't it have been great if we'd had a full presentation on what to do in a crisis!" You're not necessarily thinking about that until it's happened the first time. The one thing that I've noticed is that companies are definitely different after they've had their first big crisis. Of course, those of us here in Silicon Valley have had the pleasure of working with companies that are very young. Seagate's a mature company with a lot of experience under its belt. It's been around for a while and it's built up processes and controls; they hire experienced executives. Also, one of the wonderful things about Silicon Valley is we see a lot of companies that are young, nascent and growing 100% year over year. They have changes at the helm, but they don't necessarily have all the experience. How do you manage risk in that context, especially when what they're doing is disruptive to an industry and their technology disrupts industry? That can create risks that obviously make it a little bit more challenging.

As a board member, when you're sitting there and realizing that the buck stops with you, the question is, "What is your role in all of this?" I thought I would spend a few minutes just talking about it from that perspective in terms of fiduciary responsibility on the board, and then also touching on some of the advice that the legal advisors gave, including me.

First, the duty of care. It really is the responsibility of the board. Chris can weigh in from an Irish perspective, but I suspect it's not too dissimilar. They really are responsible to make sure they understand the company's risks, assess them and understand what the company is doing, how you're planning, and what things you put in place in order to mitigate risk.

The board is particularly helpful in this context, too. While they have a small level of information, they can't necessarily look out or guard against *all* the risks. The one benefit they have that the management team doesn't have is that they sit at 100,000 feet or 50,000 feet. They're able to look out ahead, and they're also able to bring perspective. They're not necessarily just heads down, one company, one industry, focused on one thing. They're saying, "Wait a minute—I'm seeing these things happen in other industries and other areas, other geographies, that perhaps bring into the boardroom a perspective that has been missed." It actually is a really good idea to make sure that part of the board planning process ensures that on an ongoing basis, your board is supported in terms of the level of information it needs, the presentations it needs, and then also is given the time to request certain presentations from the management team so that they can be sure that Ts are crossed and the Is are dotted with respect to the preparations.

Kate mentioned enterprise risk management. That's a really important thing for boards to focus on, which is the company's overall enterprise risks, and then who's in charge of them and, who do they map

relative to the board and its committees, and how do we check this? I would say that is a concept you find more fully fleshed out with respect to mature companies, and less so in younger companies. Boards can push to get Fortune 500 level processes and systems in place for younger companies, but what you find is there just isn't enough time or people, you're moving too quickly. It creates an environment for the board where there's a little bit more risk.

Having said that, this is where the job of a director *is* hard. It's hard to know when to push versus upset the management team because you're making more and more requests that they think are wasting their time, or they don't have time to focus on it. The good directors will push appropriately. They'll also be patient; they won't necessarily insist on something instantly; but it is really important that you understand this. I was on the board of a company that actually did have a cyber-attack. When that happened, in the first instance, to Kate's point and Sally and Anna made the same point, too—you don't know what you don't know. One of the other critical things that a board can do in conjunction, especially if you have a great management team, great General Counsel, is to set the right leadership tone right at the getgo. The discipline that we heard, almost everybody has comments about this—companies have to exercise extreme discipline in a situation when you're in a crisis. Like in a situation with the cyber-attack that I was talking about, we had customers who couldn't get their hosted services, they're upset. They're demanding things, and they're asking for commitments. But this company showed extraordinary discipline, and it was from the leadership at the top down. I would give the CEO a lot of credit for this, but basically, "We're not going to over-commit; we're not going to say things that we can't commit to, that we don't know. We're going to say what we're going to deliver and tell them exactly what we're going to do." Exercising that kind of discipline is extremely important in that moment in time.

It's also really important—and Kate mentioned this, as well—that you don't panic. One area where I've seen this happen for boards is shareholder activism, which has been going on for a while. Usually it's a fundamental issue with respect to the business that drives shareholder activism, so sometimes those are the harder issues. You don't necessarily have a compliance issue or some other specific problem. You actually have something that's really hard, which is, "Our business isn't doing very well," and your stock drops precipitously and everybody's under a lot of pressure. In those contexts, you need a board and a management team; you need people to recognize that you've got some time; don't panic and get the advice you need.

That's where the preparations and the preplanning that goes into building trust and relationships with advisors—like in a SWAT team—if you have a shareholder activist-type situation, there's a playbook for the types of advisors you need. You really shouldn't be, in that context, a company picking up the phone and calling an advisor for the first time, after something happens. Especially if you recognize something could happen, and something's coming down that puts you at risk. Certainly, with respect to a shareholder activist, you can do the analysis. If your share price is down, you're vulnerable, underperforming businesses, all the telltale signs are there. It's not really something that you couldn't have anticipated; it's something you should anticipate, and you should plan for it.

Brexit is another example of that. There are certain types of risks that you can plan for. You don't necessarily know how it's going to play out. Of course, they're the ones that just happen instantly, and those are the ones where you hope your scenario is played out appropriately, but you don't necessarily know that it will.

The one thing I've seen recently is in the context of some of these #MeToo-type claims, or the claims where you have issues

with respect to execs in particular that relate to personal issues. It's not necessarily how great they are in terms of the job that they're doing; it relates to something else that's affecting their work. Maybe they didn't comply with the code of conduct; maybe there's an employee issue, a policy issue, etc. It may not be a criminal issue per se, but it could be something that is inconsistent with strong leadership and a strong culture. I get it, and these are really tough calls for boards to make. I've seen, over the years, boards and individual directors with wide-ranging responses to things. I've seen directors say, "Let's not do a witch hunt." I'm sure you have too, Anna, even with respect to internal investigations. From my perspective as an outside advisor, there's a standard protocol that we think is appropriate in any particular situation. What I've found in boardrooms, and then particularly with respect to individual directors, is that they may not understand all of that. They may not have the experience; they may not have been through it. They're going to bring their own judgments to bear, and some of those judgments are spot-on. They have incredibly good common sense; some of them have the right leadership instincts, but some of them push the envelope. They're a little bit more aggressive in terms of, "Do we have to investigate? Why do we have to investigate? How come we have to get an outside law firm involved?" They'll push back hard on the advisors. That's good—that's part of the board's responsibility—but

I think it's also important that the advisors continue to push. As a director, I appreciate it when the advisors didn't just give up the first second that somebody said, "Yes, that's a terrible idea!" They pushed, they tried to explain like fast-forward, let's look at how this is going to play out; look at what this could mean for you.

One board that I represented, they were in a negotiation with the FTC. They had a consent agreement that potentially had been violated, that was what was alleged, and they were trying to reach a settlement. The terms just weren't coming together, so it ended up that the settlement discussions broke down and they ended up getting sued. The announcement of that caused a huge impact on their stock price. Again, this was a situation where the board probably didn't have full appreciation of what the bigger picture was in that context, and what that meant and how that was going to play out for the company.

It's important, as a board member, that you build the relationships with the management team so that they understand the kind of information that you need. The bar that you're setting, essentially, for the company, so that they can help you achieve that. As a director, you really are handicapped in not having all the information, and you're relying tremendously on the management team to do the right thing.

The only other thing that I wanted to say has to do with independence. It gets very tricky when you're dealing with an executive or there's an issue internally. This is where boards need to reflect on who's the right person—even at the board level—to be dealing with the issue. If you've got people—certainly in the U.S. and particularly in Delaware—the bulk of these conflicts are avoidable. If two of the board members and the CEO went out and played golf every weekend for years and years, perhaps they're not the right ones to be overseeing an investigation with respect to that particular CEO. It's important for boards to constantly create an environment where the decisions they're making are objective. I know that was commented on earlier, and what that means is that the directors don't have interests. The fiduciary standard of review that they'll be held to will defer to the directors' decision, as opposed to escalate, which happens when there are conflicts of interest.

We have seen, recently, a significant increase in dual stock structures, controlling shareholders, and often that's around the visionary founder and CEO. All that has to be taken into account in the context of things like this, because board members are a little more beholden to circumstances of that construct. They have to think a little differently in terms of how they're going to manage in that context. Having a lot of trust, mutual respect between the board members and the controlling shareholders in that case is very important.

Lastly, I would say communication is important. This has been mentioned already, but both internal and external. I'll bet you Kate would tell you that, in a crisis, her single biggest job is being the traffic cop. Picking up the phone and making sure people know what they need to know, when they need to know it. That's managing up to the board; that's managing the management team that's down below, especially witnesses and executives who might be implicated in the investigation, if there is one. Twenty years ago, Silicon Valley had a lot of investigations around stock options being backdated, and a lot of people understood what these investigations entailed, and the protocols associated with them. Also, what that meant if you were a witness and how you couldn't be involved, and you had to step out. Fast forward to today, I would say that not as many executives are as familiar with that, or not as many boards are as familiar with that type of process. When you're confronted for the first time, as a board or an executive with that situation, it can be a very shocking moment when you're realizing, "Wow! I'm not going to be involved; I have to step out; you're going to make decisions without me."

As part of crisis planning, as Kate mentioned, it's just as important to educate all the constituents on this. Not only that we're doing what we can to try and mitigate the crisis, but if there is a crisis and an investigation, this is how they have to have it, and this is the right tone that we need to set, and this is the right way to go about doing it.

KAREN TODD: Thank you very much. What advice would you give to new companies with respect to choosing board members for their boards so that they can handle a crisis if it occurs?

KATHARINE MARTIN: That's a great question. One of the things that I have seen, is some CEOs leverage board members tremendously well. Especially if you're a younger, newer CEO, where you haven't been through the experience before, getting experienced public directors can be very helpful. They're the ones that can really light up the runway for you. There are some great directors out there that are very matter-of-fact. They don't waste people's time, but they say, "No, you've got to be doing this." They recognize the speed with which the company's growing, and they really help those executives understand things they wouldn't necessarily see. Experienced board members are really key.

KAREN TODD: Thanks. As both a lawyer and a public company director, what is your advice for lawyers in working with board members?

KATHARINE MARTIN: It's transparency and just being honest with your advice when you go in. Recognize that you want to give good advice, but you also have to recognize that board members are going to do what they want to do. The lawyers go into a boardroom and they think they know how it's going to play out, and then they

come out with a different result. People's responses can be somewhat varied within that context, as well.

To me, the thing that's always mattered when advisors were communicating with us is that you could tell they were being sincere, that it was their honest opinion. Again, that they pushed a little bit—they didn't necessarily just buckle—if six directors said, "Yes, well, I've never seen that, I don't agree," that they're willing to push a little bit and challenge that and have the confidence to do that.

KAREN TODD: Thank you. We're now going to go through a few questions for the entire panel. I'm going to start with Chris.

What advice do you have for board members who are overseeing their companies' crisis planning efforts?

CHRISTOPHER MCLAUGHLIN: The principle thing for them is to make sure that there is a plan in place, and that some consideration has been given to items like preparation and personnel. That is essentially what is needed from a board perspective. The board needs to be stress-testing and probing management as to what's going on with the company. The boards' perspective should go into critical issues.

KAREN TODD: Thank you. Sally?

SALLY YATES: Sometimes you actually need to practice a little bit, and, for example, in a data breach context, it is valuable to not only have a protocol in place, but actually do some type of tabletop. Having it written down on paper and then trying to execute on that, and particularly, in that example of a data breach, can be two different things. That can not only identify execution issues for that particular scenario, but execution issues for other things, as well.

KAREN TODD: Good. Kate?

KATE SCHUEKLE: This is a piece of advice not just for directors, but for in-house attorneys, which is to spend time externally, not working, going to conferences and really understanding what emerging risks are. What you see often is directors have been out of the business environment sometimes for several years or even decades. We know the pace of change is very dramatic and being able to challenge the management team requires that directors understand how things are changing right now in the environment.

KAREN TODD: Thank you. Anna?

ANNA ERICKSON WHITE: I would just echo what everybody else has said. It's important to understand what the planning is; it's important to be part of the stress testing; it's important to understand what your role is, and what management's role is, and to make sure that you're getting the communications plan clear, and that you know what you're going to be communicating about, and when.

KAREN TODD: Very good. Katie?

KATHERINE MARTIN: The only other thing I would add there is just the notion that you could get a presentation, for example, on cyber security preparedness at the board, and then you have a cyber breach. Ask the questions, rather than just get informed, because you will be informed, but then you have to sit back and say, "Okay, what *aren't* we thinking about? Where *are* we vulnerable? Do we have old servers that are vulnerable?" Directors need to ask the questions on the theory that yes, you're getting a presentation, and yes, you're being reassured of all the reasons why the company should be prepared, but you have to be a cynic in the room, saying, "Yes, *but* everybody's vulnerable somewhere. Where and how are we vulnerable?" Poke at it to try and open up the line of discussion that brings in what Kate's talking about, which is something that goes outside of the company and has your fingers on the pulse of what other people are doing in terms of preparedness. You have to get educated in order to do that.

KAREN TODD: Great. Anna, what advice do you give board members with whom you're consulting during a corporate crisis?

ANNA ERICKSON WHITE: That it's really important, first, to understand what their role is versus the role of management. They have an oversight responsibility. They're not there most of the time, leading the crisis efforts. That the management is developing and implementing the crisis plan, but they really are, again, in the situation of being oversight, which means asking probing questions. Trying to understand what's happening, getting information from management about how the crisis management is going, making sure that you're monitoring what sort of external information is happening, what's being said in the press about the company, and that you can ask questions about that. For example, does management have it under control? Do you need to have a separate committee that's set up to be responsible for the board in terms of helping oversee management in terms of the crisis? Then just being a good sounding board to management and the CEO, particularly if you have, as Katie was saying, a young CEO who's never been through it before. We have many companies like that in Silicon Valley.

KAREN TODD: Thank you. Do any of the other panelists have things they want to add to that?

KATE SCHUELKE: I have one thing. One of the issues that happens in investigations where the board needs to retain outside counsel is that the General Counsel isn't necessarily as involved in things like billing, setting rates, and setting budgets. Anna touched a little bit on the insurance, but there's another piece to this, which is having that business view of the investigation for the directors on an internal committee is really important. These things can get astronomically expensive. When the General Counsel isn't the one overseeing what the outside counsel to the independent committee is doing, it can be really frustrating for the in-house person later to look at the bills and say, "This wasn't done very efficiently." There's a way to manage the investigation effectively without actually bankrupting the company. Having that balance of business people as well as directors would be a really good mindset.

KAREN TODD: Great. Anyone else? Okay. Katie, what is the role of the board versus the role of management in dealing with or planning for a crisis?

KATHERINE MARTIN: We've covered a lot of this. It really is different, and Anna was just saying that the board has oversight responsibilities, so they're not going to be in the trenches. They might weigh in on advisors, and I usually think it's a good idea, depending on how serious the situation is, that you get their input on advisors, because they're going to have to rely on those advisors.

For the most part, the work for a board in terms of a crisis should happen before the crisis happens. It should be in pushing the management team to put in place the processes, the controls, the environment; creating the culture that's going to minimize the risk. When there's an actual crisis, you as a board are best taking a lead from the advisors and from the management team and understanding your role. Recognizing, too, you have some risk in it, so it can be a little unnerving, but it really is, in that moment, all you can be doing.

KAREN TODD: Thank you. At this point, we're going to take questions from the audience. Does anyone in the audience have a question for our panelists?

[AUDIENCE MEMBER]: How do you feel about Jeremy Corbyn, who's leader of the opposition Labor party in the UK, of his reversal in the second referendum.

CHRISTOPHER MCLAUGHLIN: In fact, it's not a total reversal, because the way that they are presenting it is effectively that they have maintained the same policy since the party conference last year. What they have been pushing for is a customs union; failing that, a general election; failing that, a second referendum. He has come out more clearly on this. I wonder if it is desperation and a bit too late. The fact is, politically, a lot of those who are "remainers" found some solace in the Labor party at the last general election in 2017. However, the Labor party has not fully stood for that and, by way of background, in the UK, amongst all the chaos that I mentioned earlier, there was further chaos, because the Labor party—eight or nine MPs – in the last couple of weeks, have resigned from the party and formed an independent group. Three Conservatives have done the same. Another Labor MP has resigned and is leaving politics. This is a reaction to the fact that the party has very poor crisis management. [LAUGHTER]

The background to this, as well, is facing a crisis of anti-Semitism within the party which there were ruptures in last year. I'm personally not surprised that this has come back to bite them, but it's an interesting question. Thank you.

KAREN TODD: We have another question in the back. I'm going to take that, and then I'll come back to the one in the front.

[AUDIENCE MEMBER]: If you're in-house counsel for startups, putting good processes in place for the board and management is important. But I'm hearing that you also want to be thinking about the first crisis that can happen, and the people are just trying to get a product out. How and when do you broach that with management and the board so that there is a little bit of thought given to this issue. Hopefully, it never happens, but how do you do that?

KATHARINE MARTIN: I can start with this one. Yes, it's a really excellent question, and it's actually not necessarily easily answered. What I mean by that is, clearly, the priority of the company is to get the product out, and everybody is focused on that. Also, depending on the phase of the company, you don't necessarily have even independent directors on the board yet. When companies are first formed, usually they are populated by insiders. Then over time, some investors, but it usually isn't the independent directors that are brought on. That happens until the time of an IPO or until the company has matured to a level where it's important. Those board processes tend to be a lot less. They're a lot more focused on budgets; they're a lot more focused on timelines, product development and issues like that, and they are a lot less focused on crisis management.

Probably the best way to manage in that environment is to just raise the issues with your managers. Hopefully, it gets on the radar of the CEO or the CFO and the management team is the kind of a management team that wants to incorporate that into the culture of the company. Certainly, you don't need to go for the A+ level crisis preparation at that stage, but even a little preparation is better than nothing. Of course, the stakes are potentially different, too, for private companies, but we've seen some enormous private companies, so the stakes can be pretty high across the board.

Part of this is a cultural thing. Trying to get your management team bought into the benefits of it, that it's not just a waste of time, but it's really important for the long-term success of the enterprise.

KAREN TODD: Anyone else on the panel want to respond? Okay, we'll take the next question.

[AUDIENCE MEMBER]: Regarding voluntary disclosure, is there a de minimis? I'm thinking in particular about FCPA [Foreign Corrupt Practices Act] breaches. Say you have a very low-level employee, who gives €100 to some European employment regulator to cover up something that she did wrong. Internal investigation may show that this is not something that is common; this is just a one-off. Is there a de minimis?

SALLY YATES: That is a really hard situation, because on the one hand, if it's the isolated incident that happens halfway across the world, you don't think you have a whistleblower situation where the government is going to find out about it anyway. You've taken care of it, so it's not going to happen again. I totally get the feeling of "Why in the world would we raise our hands and say, 'Oh, government, over here! Come look at what we did!'" That's actually a reasonable response to that scenario, just to make sure that you have remediated in that instance, so that you have a good story to tell if the government does come knocking.

The only thing that you may want to think about is that if, in fact, you've got that really strong track record, where you're not a recidivist, where you don't have high-level executives involved, and it was the isolated incident, under the DOJ policy that's now not just a pilot program but that's actually been instituted as actual policy there, you're pretty much going to get a declamation in that instance. It's a question of whether you want to play the odds as to whether you've got somebody out there who may then bring back the attention of the government.

Now, if that happens, that doesn't necessarily mean that something bad is going to happen to you in that situation, but you're always in a better standing, if you're the one who's brought it to the government's attention, as opposed to a whistleblower or disgruntled employee or somebody else.

There are more factors to consider, necessarily and this is not a definitive answer. I guess you figured that out! [LAUGHTER]

KAREN TODD: Alright. Do we have any other questions?

[AUDIENCE MEMBER]: What is the difference between a pure legal and a pure PR crisis? What advice do you give the board on that?

KATE SCHUELKE: I don't think there is such a thing as a pure legal crisis or a pure PR crisis, particularly today. Any crisis is going to be in social media instantly, and that's one of the issues that companies and outside advisors have to deal with. Any crisis can become a PR crisis, and any PR crisis can result in a lawsuit. From the perspective of the lawyers inside, each crisis has to be looked at the same way. Regardless of what the facts are, how it arises, whether you think, as Sally talked about, it's completely unfounded but somebody's making an allegation against you. As soon as it gets to that level where you think it's a crisis, and that could include 24-hour news coverage or a lawsuit or a DOJ subpoena. A lot of things will get to your desk as a GC that will make you obviously realize you're in crisis mode, but there isn't really a separation there. That's my view.

KAREN TODD: Thank you.

[AUDIENCE MEMBER]: How do you balance the statement of response to a crisis with understanding and acknowledging employees that may be involved?

KATE SCHUELKE: That's the hardest question that we've gotten.

KATHARINE MARTIN: Yes, you're testing the advice, because this is where it gets really hard, in my view. This is where the discipline that we talked about earlier is really important. Even when you have overwhelming reasons to want to speak, you're generally better off not to, or being very careful about what you do say, because it always can, and always will, unfortunately, come back and get you.

The internal communications are really hard in that regard, and that's one of the reasons why having a communications firm is probably one of the most important things. They have a good way of being reassuring, but without committing to anything. For example, "We're going to stay focused on what we're doing." Perhaps if it's employees, you can say in terms of resources that you're going to make available, but you don't necessarily have to go so far as to say, "We feel really bad; we're really sorry." That's where Anna would come in and start marking up the communications and say, "Let's not go quite that far." [LAUGHTER]

It's discipline and it's really hard, especially in that first moment, when you have an instinct to try to reassure everybody it's going to be fine. That's the most important moment when you just resist. Instead, you don't create pandemonium; you don't create fear; but, on the other hand, you have to resist trying to be overly reassuring with things that you really don't know whether that's the case.

ANNA WHITE ERICKSON: There's a difference between saying what happened, as opposed to talking about what you're going to do at this point. Instead of trying to show that you're taking control of the situation and you're looking into it, making admissions can come back and hurt you.

There are some examples where, by making an admission early on, even though the company had a lawsuit which is going to happen, that actually helped minimize what the lawsuit was, because the company took responsibility early on. It's just a lot of different factors you have to take into account.

CHRISTOPHER MCLAUGHLIN: There's also the importance of discipline within the company, as well. For example, when a decision is made, you should all act with one voice. People should not be having side discussions and saying, "Yes, it was dreadful what's happened," which, of course, is human nature and those things happen. It is discipline, as well, to prevent the kind of action that you mentioned.

KATE SCHUELKE: One more thing that in-house counsel should always remember is that they're going to be around after the crisis, and the outside lawyers aren't. Part of the role of the General Counsel and the in-house legal team is to balance those issues about business, customers, suppliers, as well as the legal issues. Sometimes there are going to be issues where you're going

to have to make a call that says, "We have to do this because we're losing employees" or "we're losing customers," and you have to be thinking about the business after the crisis, too.

KAREN TODD: Thank you, everyone. We have one more question.

[AUDIENCE MEMBER]: What advice would you give to General Counsel who may run into ambivalence or resistance from management or even the board, in terms of operating with a sense of urgency and taking seriously the investigation and not colluding with each other to minimize the seriousness of what has transpired?

SALLY YATES: Do they read the paper? [LAUGHTER]

I know that sounds sarcastic, but seriously, if you can point out to them how bad cases became exponentially worse because they weren't tended to, and it's in all sorts of things, whether it's a #MeToo issue or a financial statement issue or otherwise. You should pull up some of those examples for them.

KATE SCHUELKE: The other thing is that we know, as attorneys, that we have different obligations than other executives do. It's important to explain that to the management team, that you have ethical obligations that arise out of your status as an attorney. You may even have reporting up obligations. Try to find somebody on the board who understands that and hopefully before the crisis. Having established a relationship with that director, where they trust you and they know that you're going to say what you think, you can do that. Over time, you gain a credibility with people, both in the management team and directors. They realize the value of the General Counsel and other in-house attorneys, that they do have that obligation and role to always say what they think is the right thing.

ANNA WHITE ERICKSON: I would just add that sometimes making a real fine point of it and explaining what the personal liability might be if they don't do something is what gets people to act! [LAUGHTER]

You can use a good in-house attorney to do that, but sometimes that's a really good use of your outside counsel.

KAREN TODD: Alright. With that, I'd like to thank Kate for accepting our invitation to be honored, as well as the Seagate Technology Legal Department, and I'd like to thank all of our panelists for sharing their expertise with us today. Let's give them all a round of applause. [APPLAUSE]

KATE SCHUELKE: Thank you, Karen, you ran a great panel.

Christopher McLaughlin

Partner

ARTHUR COX

Expertise

Chris is a partner in the Corporate Department. He specializes in corporate finance, advising international and domestic listed, public and private companies on all aspects of company law, including on compliance and governance issues. He has extensive experience of advising on corporate migrations to Ireland, public takeovers and schemes of arrangement, ECM transactions and private equity. Prior to joining the firm, Chris trained and worked in London, most recently in the London office of a leading U.S. law firm.

Experience

In recent years, Chris has advised:

- Pentair plc on its demerger of nVent Electric plc
- OrbiMed and Longitude Capital on their majority investment in Sublimity Therapeutics (formerly Sigmoid Pharma)
- Ascential plc on its acquisition of Clavis Insight
- Summit Partners on its equity investment in Trintech
- Montagu on its acquisition of Oasis Group
- Cooper Industries plc on its takeover by Eaton Corporation under a new NYSE listed Irish holding company
- Warner Chilcott plc on its takeover by Actavis, Inc. under a new NYSE listed Irish holding company
- Actavis plc on its acquisition of Forest Laboratories, Inc.
- Alkermes, Inc. on its merger with the drug delivery business of Elan Corporation, plc, resulting in a new NASDAQ listed Irish group holding company
- Seagate on the acquisition of Samsung's hard drive business
- Alkermes plc on an underwritten offering of its shares
- Carlyle on its investment in ION Investment Group

Education

- BA (Hons), 1990, Balliol College, Oxford University
- CPE/LSF, 1993, College of Law, London

Professional

- Admitted as a solicitor in Ireland, 2005
- Admitted as a solicitor in England and Wales (non-practising) 1995

Arthur Cox (Ireland)

Arthur Cox is one of Ireland's leading law firms. For almost 100 years, we have been at the forefront of developments in the legal profession in Ireland. Our reputation is founded on proven professional skills, a thorough understanding of our clients' requirements with an emphasis on sound judgment and a practical approach to solving complex legal and commercial issues. Our commitment goes further than simply responding to today's issues. We partner with our clients in preparing to meet what lies ahead – both the challenges and the opportunities.

A dynamic player in Irish business and corporate law, Arthur Cox has participated in the most important business and financial transactions involving Ireland. We provide a comprehensive service to an international client base ranging from multinational organisations, banks and financial institutions and established global leaders to government agencies and new players in emerging industry sectors.

Sally Yates

Partner

KING & SPALDING

Former Deputy Attorney General Sally Yates is a partner in King & Spalding's Special Matters & Government Investigations practice. Sally's deep experience, leadership and wide-ranging background provide clients with seasoned judgment in difficult times. Her practice focuses on counseling clients in complex and sensitive matters, including government enforcement and regulatory matters, compliance, corporate governance and crisis management. Drawing upon her nearly three decades at the Department of Justice, she specializes in internal and independent investigations for public and private organizations and boards.

As the second-highest ranking official at the U.S. Department of Justice (DOJ) and as Acting Attorney General, Sally was responsible for all of DOJ's 113,000 employees including all prosecutorial, litigating, and national security components. She also was responsible for all U.S. Attorney's offices and law enforcement agencies and the Bureau of Prisons. Sally oversaw DOJ's most significant matters and was instrumental in setting DOJ's enforcement priorities and initiatives.

Known for her lifelong, nonpartisan focus on public corruption, Sally is recognized worldwide for her integrity and credibility.

An accomplished trial lawyer and Fellow in the American College of Trial Lawyers, Sally has tried numerous high-profile cases.

A 27-year veteran of DOJ, Sally rose through the ranks of Assistant United States Attorneys to become U.S. Attorney in Atlanta, Deputy Attorney General and Acting Attorney General. As Deputy Attorney General from 2015 through 2017, Sally was responsible for crafting and implementing initiatives focused on many of DOJ's priorities, including corporate fraud, cybercrime, gang violence, civil rights, and financial crime. She led DOJ's criminal justice reform efforts and implemented substantial prison reform measures.

Prior to becoming Deputy Attorney General, Sally was the first woman to serve as U.S. Attorney for the Northern District of Georgia. During her five years as the chief federal law enforcement official for the district, she oversaw the prosecution of all federal crimes and the litigation of civil matters and immediately became a leader in the Department as Vice Chair of the Attorney General's Advisory Committee (AGAC), which guides DOJ's strategies and policy decisions.

King & Spalding LLP

King & Spalding helps leading companies advance complex business interests in more than 160 countries. Working across a highly integrated platform of more than 1,000 lawyers in 20 offices globally, we deliver tailored commercial solutions through world-class offerings and an uncompromising approach to quality and service.

King & Spalding was born of a combination of legal brilliance and empathic counsel, in the business eye of 1890s Atlanta. In each decade since, we have grown by understanding industry and advancing its interests – and by upholding a culture of personal service.

Our high-performing culture is founded on a drive for uncompromising quality, a dedication to service and genuine respect for others. Clients tell us that our culture sets us apart, leads to beneficial outcomes and is a consistent experience across our offices in the U.S., Europe, the Middle East and Asia.

We are guided on a daily basis by a set of client service principles that express our straightforward, outward-oriented and personal approach to delivering solutions.

Our goal is to deliver a world-class work product to solve complicated business issues. We take pride in our uncompromising approach to quality, recognize that everything we do or produce is a measure of our commitment to quality, and give 100% the first time and every time. No exceptions.

We listen carefully to understand each client's business and culture. The insight we gain allows us to anticipate our clients' needs and give proactive advice. We treat our clients' challenges as our own. We think and say "we," not "you."

Anna Erickson White

Partner

MORRISON FOERSTER

Anna has more than 25 years of experience in securities and other complex, high- stakes civil litigation. She has represented companies, as well as their officers and directors, in securities class actions, derivative suits, merger and acquisition litigation, and general commercial disputes. She also regularly advises boards and management on disclosure and high-profile governance issues. Her clients span a range of industries including technology, life sciences, renewable energy, gaming, and financial services.

Anna is a frequent speaker on securities litigation and corporate governance topics and is regularly quoted in publications such as the *Daily Journal*, *The Recorder*, and *Law360*. Some recent engagements include:

- Directors Roundtable
- Stanford Directors' College
- Practising Law Institute
- Benchmark Women in Litigation
- Women in Securities (WISe)

In recognition of her ability to add real value to clients' businesses above and beyond other players in the market, Anna was named a Client Choice Award winner. She is also recommended by *Legal500 US* for shareholder litigation and was named a Woman Worth Watching by *Profiles in Diversity Journal* in 2014.

In addition to her practice, Anna currently serves on the firm's executive committee, compensation committee, and board of directors. She has also twice served as a firmwide managing partner, from 2006 to 2009 and 2012 to 2015.

Anna received her J.D. from Stanford Law School in 1992. She received her B.A. from University of California, Berkeley, in 1985.

Before attending law school, Anna was a Peace Corps volunteer in Cameroon, Central Africa, where she helped start and advise cooperative credit unions.

Morrison & Foerster LLP

Morrison & Foerster is a firm of exceptional credentials. Our name is synonymous with a commitment to client service that informs everything that we do. We are recognized throughout the world as a leader in providing cutting-edge legal advice on matters that are redefining practices and industries.

But the Morrison & Foerster name tells only part of our story. In the 1970s, when teletype was used to send overseas cables, the firm purposely chose "mofo" as our teletype address. The nickname stuck, and we later decided to use it as our domain name.

In many ways, the MoFo nickname is an affectionate reminder that while we are very serious about our clients' work, we don't take ourselves too seriously.

We collaborate across a global network of 17 offices located in key technology and financial centers in the United States, Asia, and Europe. Our clients include some of the largest financial institutions, Fortune 100 companies, and leading technology and life sciences companies. We also represent investment funds and startup companies, and over the years have supported many in their growth and development as leading industry players and household brands.

Morrison & Foerster stands out for its commitment to client service. The BTI Consulting Group's Client Relationship Scorecard regularly includes us on its prestigious list of "Power Elite" law firms, based on the results of interviews with general counsel and other decision-makers at more than 500 leading companies.

Katharine Martin

Partner, Chair of the Board

Katharine (Katie) Martin is chair of Wilson Sonsini Goodrich & Rosati's board of directors and a partner in the firm's Palo Alto office, where she practices corporate and securities law. Katie previously served as a member of the Policy Committee and as the leader of its business law department.

Katie has extensive experience in representing public companies. Her practice includes all aspects of company representation, including corporate governance, SEC compliance, 1934 Act issues, public offerings, private placements, and mergers and acquisitions. She also has represented underwriters in public offerings and issuers and investors in private equity financings.

Katie joined Wilson Sonsini Goodrich & Rosati in 1999, after 12 years at Pillsbury Madison & Sutro LLP, where she was a partner. She is a frequent speaker on corporate and securities law, corporate governance, and mergers and acquisition topics, presenting at such venues as PLI, Corporate Board Member, and the SEC Institute.

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Wilson Sonsini Goodrich & Rosati is the premier legal advisor to technology, life sciences, and growth enterprises worldwide, as well as the venture firms, private equity firms, and investment banks that finance them. We represent companies from entrepreneurial start-ups to multibillion-dollar global corporations at every stage of development. The firm's attorneys collaborate across a comprehensive range of practice areas and industry groups to help the management, boards of directors, shareholders, and in-house counsel of our clients address their most pressing challenges and pursue their most promising opportunities.

The firm is nationally recognized for providing high-quality services to address the legal solutions required by its enterprise and financial institution clients. Our services include corporate law and governance, public and private offerings of equity and debt securities, mergers and acquisitions, securities class action litigation, intellectual property litigation, antitrust counseling and litigation, joint ventures and strategic alliances, technology licensing and other intellectual property transactions, tax, and employee benefits and employment law, among other areas.

Our clients are companies and other entities that compete in rapidly developing and innovative industries, including the biotech, communications, digital media, energy, financial services, medical devices, software and other sectors.

Wilson Sonsini Goodrich & Rosati has offices in Austin; Beijing; Boston; Brussels; Hong Kong; London; Los Angeles; New York; Palo Alto; San Diego; San Francisco; Seattle; Shanghai; Washington, D.C.; and Wilmington, DE.

Our global experience includes the representation of both U.S. and international clients in such matters as litigation, cross-border mergers and acquisitions, joint ventures, competition law, intellectual property counseling, and branch operations. Our clients span a broad array of industries, from energy to media and Internet, medical devices to food services, pharmaceuticals to many technology sectors.

Our roster of attorneys includes many multilingual speakers who have worked at law firms throughout the world, giving them experience and familiarity with international laws and regulations, courts, trade commissions, and other government agencies. In addition, our extensive network of alliances with leading law firms in major global markets enables us to provide our clients with the highest quality and consistency of legal representation and service.