5th Annual

GENERAL COUNSEL ROUNDTABLE BAY AREA

SEPTEMBER 18, 2014

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GENERAL COUNSEL ROUNDTABLE 2014

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5th Annual GENERAL COUNSEL ROUNDTABLE - Bay Area 2014

September 18, 2014

12:00 p.m. **Registration and Networking Lunch**

1:00 p.m. **Welcome Remarks**
Thomas DeFilipps, Sidley Austin LLP, Palo Alto

1:05 p.m. **Current Issues in Privacy**
The Honorable Maureen K. Ohlhausen, Commissioner, Federal Trade Commission
Bruce Sewell, Senior Vice President and General Counsel, Apple Inc.
Cameron Kerry, Sidley Austin LLP, Boston & Washington, D.C.
Alan Raul, Sidley Austin LLP, Washington, D.C. (moderator)

1:50 p.m. **Supreme Court Update: Review of Major Decisions and Upcoming Cases**
Joseph Guerra, Sidley Austin LLP, Washington, D.C.
Mark Haddad, Sidley Austin LLP, Los Angeles
Peter Keisler, Sidley Austin LLP, Washington, D.C.

2:50 p.m. **Networking Break**

3:10 p.m. **General Counsel Playbook: CEO Succession, Shareholder Activism & Cybersecurity**
Michael Jacobson, Senior Vice President, Legal Affairs, General Counsel and Secretary, eBay Inc.
Sarah O'Dowd, Senior Vice President and Chief Legal Officer, Lam Research Corp.
Erika Rottenberg, former Vice President, General Counsel and Secretary, LinkedIn Corp.
David Hoffman, Sidley Austin LLP, Chicago
Sharon Flanagan, Sidley Austin LLP, San Francisco (moderator)

4:10 p.m. **Networking Break**

4:30 p.m. **What CEOs and Directors Need from GCs**
Michael Brown, Interim President and Chief Executive Officer, Symantec Corp.
Laura Fennell, Senior Vice President, General Counsel and Secretary, Intuit Inc.
Cathy Lego, Board of Directors, Fairchild Semiconductor International, Inc., Lam Research Corp., SanDisk Corp.
Charles Robel, Board of Directors, Go Daddy, Jive Software, Informatica Corp., Palo Alto Networks Inc.
Thomas Cole, Sidley Austin LLP, Chicago (moderator)

5:30 p.m. **Introduction of Keynote Speaker**
Karen Cottle, Sidley Austin LLP, Palo Alto

Remarks by James Carville

Closing Remarks
Sharon Flanagan, Sidley Austin LLP, San Francisco

Cocktail Reception to Follow

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Current Issues in Privacy

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United States of America

Federal Trade Commission

The Power of Data

Remarks of Maureen K. Ohlhausen[1]
Commissioner, Federal Trade Commission

Georgetown University McCourt School of Public Policy and Georgetown Law Center
Privacy Principles in the Era of Massive Data
Washington, DC

April 22, 2014

I. Introduction

Thanks for inviting me to kick off what I am certain will be an insightful discussion of big data and its implications for privacy. As society has integrated and adopted increasingly powerful computers and pervasive communications networks, we have created massive amounts of data. This trend will continue as we move into the era of the Internet of Things, a universe of far-flung devices that will massively increase the amount of passive data collection. The tools that will enable us to collect and analyze this "big data" promise significant benefits for consumers, businesses, and government. I may be preaching to the choir a little here, as the mission of the McCourt School's Massive Data Institute is, and I quote, "to use 'big data' sets to increase understanding of society and human behavior and thus improve public policy decision-

[1] The views expressed in this speech are solely those of Commissioner Ohlhausen and are not intended to reflect the views of the Commission or any other Commissioner. I would like to thank Neil Chilson for his assistance in preparing this speech.

making."[2] Ultimately, I share the optimism of that mission statement. Although some potential uses of big data raise concerns about privacy and other values, we can address these concerns together, through a coalition of academics, regulators, businesses, and consumers. Big data is a tool; like all tools it has strengths and weaknesses. Keeping those strengths and weaknesses in perspective is important as we work together to adapt our laws, guidelines, best practices, customs, and society to integrate this new technology. As we adapt to big data, the FTC will serve an important role in protecting consumers and promoting innovation.

II. Keeping Big Data in Perspective

If everything you knew about big data came from news reports, you could be forgiven for thinking that big data is either a miracle cure for all of our most intractable social problems or a plague upon consumers. Some have called big data a "revolution in how we live, work, and think,"[3] or health care's big savior.[4] Others have labeled big data "the death of Internet privacy"[5] and many have compared it to the Tom Cruise movie "Minority Report."[6]

Of course, the reality is more complicated than the headlines. So what is big data? Some criticize the term as a meaningless buzzword, saying we should be specific: are we talking about "information transformation, storage, and retrieval? Machine learning and data mining? Pattern

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[2] Letter from Edward Montgomery, Dean, McCourt School of Public Policy, to Maureen K. Ohlhausen, Commissioner, FTC, April 7, 2014.

[3] *See generally* VIKTO MAYER-SCHÖNBERGER, BIG DATA: A REVOLUTION THAT WILL TRANSFORM HOW WE LIVE, WORK, AND THINK (Mar. 2013).

[4] *See* Ricky Ribeiro, *Will Big Data Become the Big Savior of Health?,* http://www.biztechmagazine.com/article/2013/06/will-big-data-become-big-savior-health (last visited Apr. 21, 2014).

[5] *See* Kate Knibbs, *Big Data and the Death of Internet Privacy*, http://www.mobiledia.com/news/154591.html (last visited Apr. 21, 2014).

[6] *See* Herb Weisman, *When Big Data Becomes Big Brother,* http://www.thefiscaltimes.com/Articles/2014/04/09/When-Big-Data-Becomes-Big-Brother (last visited Apr. 21, 2014).

recognition? Distributed computing? A specific technology that can be used to draw insights from data? Or just generally the impact mass information collection and storage is having on society?"[7] My answer is "Yes, to all of the above." But not pre-crime, I hope. For our purposes here, I'll rely on one common definition. Big data is data that has three characteristics:

- First, the data has large **volume** – there is a lot of it. And I mean a LOT. As of 2012, when Facebook had 15% fewer users than today, its largest Hadoop cluster had over 100 petabytes of data.[8] That's equivalent to 200,000 years of digital music, which I think is about six Pink Floyd songs.
- Second, the data has significant **variety**. That is, the data may be structured (like an Excel table with column headers), semi-structured (like an Excel table without column headers), or unstructured (like a folder full of electronic documents and images).
- Third, the data has high **velocity**. Meaning that data is being produced and analyzed at a rapid rate, often in real time.

Experts also use "big data" to refer to the set of software tools and techniques for collecting, storing, and analyzing data with these three characteristics.

Big data isn't completely new. Large companies like Wal-mart have been collecting and analyzing terabytes of consumer data since the early 1990s.[9] However, today the tools for big data analysis are cost-effective even for small companies. Additionally, there is a lot more data, of many different kinds, being produced today.[10] Back then, Wal-mart was collecting data on what consumers purchased from its stores and batch processing it each night. Today, a big data

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[7] Michael Sherman, *The Death of 'Big Data'*, http://www.texasenterprise.utexas.edu/2014/02/27/innovation/death-big-data (last visited Apr. 21, 2014).

[8] Andrew Ryan, *Under the Hood: Hadoop Distributed Filesystem reliability with Namenode and Avatarnode*, https://www.facebook.com/notes/facebook-engineering/under-the-hood-hadoop-distributed-filesystem-reliability-with-namenode-and-avata/10150888759153920 (last visited Apr. 21, 2014); Ben Foster, *How Many Users on Facebook,* http://www.benphoster.com/facebook-user-growth-chart-2004-2010/ (last visited Apr. 21, 2014).

[9] *See* Thomas Wailgum, *45 Years of Wal-Mart History: A Technology Time Line*, http://www.cio.com/article/147005/45_Years_of_Wal_Mart_History_A_Technology_Time_Line (last visited Apr. 21, 2014).

[10] According to Intel, in 2015 the world will produce 8.1 zettabytes of data – 1,500 times more than all the data produced from the beginning of time until 2003. *See* Intel, Big Data 101 Video, *available at* http://www.intel.com/content/www/us/en/big-data/big-data-analytics-turning-big-data-into-intelligence-cmpg.html.

project might combine such purchase data with shipping, inventory, and even traffic data to achieve just-in-time delivery of consumer products.

Benefits of Big Data. This change in tools and data sources has great potential to make our lives better. As Professor Sinan Aral of New York University has explained, "Revolutions in science have often been preceded by revolutions in measurement."[11] The promise is that big data techniques will extract from data knowledge that will help us better understand the world, similar to how the microscope's magnification of tiny things led to the germ theory of disease. Today we already benefit from Amazon, e-Bay, Netflix, and many other online merchants' use of big data to generate customized user recommendations. Big data is used today to aggregate millions of GPS signals to predict commute times, to identify potential causes of disease, and to detect and prevent credit card fraud. Kaiser Permanente used big data analysis to discover an increased chance of heart attack or cardiac death among users of Vioxx as compared to users of a competing medication.[12] Scientists are using massive data sets and powerful analytic tools to make progress on many of the most difficult problems in the health sciences and hard sciences. And many new uses are emerging, particularly because consumers are no longer simply data points to be researched. Today's consumers are themselves producers and consumers of big data, whether posting billions of cat photos on Facebook, using Bing's flight price predictors to make travel plans, or joining the self-quantification movement by wearing a FitBit Flex and using a Withings [Wye-theengs] bathroom scale. As more of our everyday existence becomes measurable and recordable, the more potential there is for big data to provide helpful insights.

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[11] *Data, Data Everywhere,* THE ECONOMIST (Feb. 25, 2014) *available at* http://www.economist.com/node/15557443.

[12] *See* Rachael King, *Data Helps Drive Lower Mortality Rate at Kaiser*, http://blogs.wsj.com/cio/2013/12/05/data-helps-drive-lower-mortality-rate-at-kaiser/ (last visited Apr. 21, 2014).

Technical Challenges. Some advocates of big data go even further, asserting that big data will change how we approach science. Specifically, some say that with big enough data sets, we can simply looks for correlations between variables or sets of variables without needing a theory for why the two variables might be related or how the causation might work.[13] If this were true, it would make many intractable problems seem more approachable.

These claims are challenged by some data scientists, however. David Spiegelhalter, Winton Professor of the Public Understanding of Risk at Cambridge University, is one of the skeptics. He has said, "There are a lot of small data problems that occur in big data… They don't disappear because you've got lots of the stuff. They get worse."[14] In particular, there are two technical concerns regarding big data that I'd like to discuss today. First, there are so-called "signal problems," where the data set, huge as it may be, is not representative of the real world. Kate Crawford describes the City of Boston's StreetBump mobile app as an example of this kind of problem.[15] The StreetBump app monitors GPS and accelerometer data on users' phones to passively detect potholes and report them to the city. However, the data is noticeably tilted toward finding potholes in areas where a higher percentage of the driving population owns a smartphone. Thus, because the underlying data did not accurately reflect the real world, neither did the result of the analysis.

Second, big data is susceptible to the "multiple comparisons problem." Big data tools are particularly good at discovering correlations in complex data sets. However, as a recent New

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[13] *See generally* PATRICK TUCKER, THE NAKED FUTURE: WHAT HAPPENS IN A WORLD THAT ANTICIPATES YOUR EVERY MOVE? (Mar. 2014).

[14] Tim Harford, *Big data: are we making a big mistake?,* http://www.ft.com/cms/s/2/21a6e7d8-b479-11e3-a09a-00144feabdc0.html#axzz2xGZdY1so (last visited Apr. 21, 2014).

[15] Kate Crawford, *The Hidden Biases in Big Data*, http://blogs.hbr.org/2013/04/the-hidden-biases-in-big-data/ (last visited Apr. 21, 2014).

York Times op-ed pointed out, big data can't tell us which correlations are important and which are spurious.[16] If a scientist examines a single data set for 100 different correlations, probability says he will find five patterns that appear statistically significant but which are a result of random chance. This problem actually gets worse in larger data sets because there are more possible correlations to test. This may be an even more significant problem when the investigator is simply exploring a big data set without a particular question in mind. In such cases, it is easy to find "statistically significant" correlations that are actually the result of pure chance.

Both of these problems are reminders that data, even big data, isn't knowledge or wisdom. It can be misleading. Even worse, data-driven decisions can *seem* right while being wrong. Political polling expert Nate Silver notes that "[o]ne of the pervasive risks that we face in the information age … is that even if the amount of knowledge in the world is increasing, the gap between *what we know* and what *we think* we know may be widening."[17]

The good news is that these problems are not new. Statisticians have been developing methods to deal with bias and sample errors for as long as there have been statisticians. Data scientists will need to update those long-standing techniques to correct these problems in the context of big data. These problems do not negate the significant potential benefits of big data techniques. But they do mean that big data analysis is not an all-powerful technique. It is a tool that has certain limitations, and like all tools, it can be used or misused. Both big data boosters and big data skeptics should pay attention to these limitations. By pulling some of the hype out of the debate, we can better ensure an appropriate and proportional response.

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[16] Gary Marcus and Ernest Davis, *Eight (No, Nine!) Problems with Big Data,* THE NEW YORK TIMES (Apr. 6, 2014) *available at* http://www.nytimes.com/2014/04/07/opinion/eight-no-nine-problems-with-big-data.html.

[17] NATE SILVER, THE SIGNAL AND THE NOISE: WHY SO MANY PREDICTIONS FAIL – BUT SOME DON'T (2012).

III. Privacy and Other Concerns

Like many new technologies, big data raises concerns about how current laws will protect consumers. Of course, many types of big data research have nothing to do with individuals and do not raise these concerns. However, some consumer and privacy advocates are concerned that consumers will suffer harm from other uses of big data. Such advocates are particularly uncomfortable about the implications of large, persistent data sets containing information on individual customers. These concerns generally fall into three categories. First, some of the concerns about big data apply to data more generally, and the FTC has been actively addressing these issues for years. Second, big data does raise some genuinely new challenges, particularly about how we can adapt the FIPPs framework to work with big data.[18] These issues need further research and careful consideration by stakeholders. Third, there are concerns over fairness and discrimination in big data. While these aren't really privacy issues as such, they are important and worth studying carefully. I would like to explore these three points more fully.

Many concerns over big data are not unique to big data. Many big data concerns are also concerns for traditional "small data" and are already familiar to the FTC. For example, without adequate security safeguards, any data, big or small, can fall into the wrong hands. Recent reports of data breaches at retailers and other businesses obviously raise serious concerns. Yet there are real market and reputational incentives for companies to get data security right in the big data context. Furthermore, the FTC has for years been actively enforcing basic data security requirements to address consumer harm and has brought more than fifty data security cases. Recently, in *FTC v. Wyndham*, a federal district court confirmed that the FTC has

[18] *See* DEPT. OF COMMERCE INTERNET POLICY TASK FORCE, COMMERCIAL DATA PRIVACY AND INNOVATION IN THE INTERNET ECONOMY: A DYNAMIC POLICY FRAMEWORK, at 11 (2010) (describing the 1973 origin of the Fair Information Privacy Practices framework at the Department of Health, Education, and Welfare), *available at* http://www.ntia.doc.gov/files/ntia/publications/iptf_privacy_greenpaper_12162010.pdf.

authority to protect consumers from unfair data security practices by bringing such cases.[19] And while some recent "big data" breaches are very large in scale, this is not a new development. For example, in 2009 the FTC investigated a data breach at Heartland Payment Systems, where hackers stole more than 130 million credit card numbers.[20] The FTC's data security enforcement framework is not perfect; I would like to develop more concrete guidance to industry, for example. But I haven't seen anything that suggests that big data technology raises fundamentally new data security issues.

Similarly, some groups also argue that certain types of particularly sensitive data, such as data about children, health, or finances, deserve heightened protection when stored in big data sets. Of course, the FTC already recognizes the need to more thoroughly protect such types of data, whether the data is in big data or small data environments.

Tension with Certain Fair Information Practice Principles. Other concerns about big data do appear to raise new issues, however. In particular, maximizing the benefits of big data may create tension with the notice and the purpose limitation principles in the FIPPs. These two related principles say that an information collector should inform consumers about the collection and its purpose and get the consumer's consent for the collection for that purpose. Yet much of the promise of big data is that it can find something new and useful in the data that could not have been anticipated at the time of collection. But companies cannot give notice at the time of collection for unanticipated uses. Furthermore, in many cases, data scientists create one big data set from many other smaller collections that initially served different purposes and may have

[19] *FTC v. Wyndham Worldwide Corp.*, No. 13-1887, 2014 U.S. Dist. LEXIS 47622 (D.N.J. Apr. 7, 2014).

[20] Robert McMillan, "SEC, FTC investigating Heartland after data theft," Feb. 25, 2009, COMPUTERWORLD, *available at* http://www.computerworld.com/s/article/9128658/SEC_FTC_investigating_Heartland_after_data_theft.

been collected at different times from a wide range of sources. As such, it is difficult or impossible to notify individuals of the new purpose for which the data is being used.

The FIPPs principle of data minimization is also in tension with the incentives of big data. Part of the promise of big data is to pull knowledge from data points whose value was previously unknown. Thus, retention of as much data as possible for lengthy amounts of time is a common practice. Strictly limiting the collection of data to the particular task currently at hand and disposing of it afterwards would handicap the data scientist's ability to find new information to address future tasks. Certain de-identification techniques such as anonymization, although not perfect, can help mitigate some of the risks of comprehensive data retention while permitting innovative big data analysis to proceed.

I believe FIPPs remains a solid framework and is flexible enough to accommodate a robust big data industry, but we have some work to do to resolve these tensions. I welcome your ideas on how we can do this.

Other, Non-Privacy Concerns. Finally, some advocates worry that companies will use big data techniques to prejudge or discriminate against individuals unfairly or erroneously without recourse. The concern is that a researcher could collect non-sensitive information about a consumer and then use big data analysis to infer certain sensitive characteristics about that consumer.

This is a complicated issue that we need to know more about. First, companies have long engaged in this type of consumer targeting with more traditional tools. It is not clear how much additional value big data analysis will bring, because, as noted earlier, big data analysis is not a foolproof tool for all questions. Second, it is not yet clear how likely companies are to use such

an approach. Third, if companies do engage in this sort of analysis, we need to determine how they might use such information.

This third point, the type of use, matters, as our legal framework restricts certain uses of data regardless of how it was collected. Specifically, the Fair Credit Reporting Act establishes constraints for companies that make certain uses of data: creditworthiness, insurance eligibility, evaluation for employment, and renter background checks. Passed in 1970 in response to the creation of credit reporting bureaus, the FCRA could be considered the first "big data" bill. In fact, the FTC has applied the FCRA in a "big data" context. In 2012, the FTC entered into an $800,000 settlement with Spokeo, a company that assembles personal profiles of individuals from information in public records, white pages, and social networking sites.[21] Spokeo was allegedly marketing personal information to potential employers in violation of the FCRA. I believe the FCRA may provide a useful model for the types of big data uses that raise significant consumer concern. Any new exploration of FCRA-like use restrictions, however, should not undermine the continued application of many of the FIPPs principles, which have worked well for decades. But I hope we can explore whether specifically prohibiting certain clearly impermissible uses could help protect consumers while enabling continued innovation in big data. Any exploration of this FCRA-like approach should involve a detailed cost-benefit analysis, of course.

None of this is to denigrate the establishment of principles to guide the collection of data. Such principles can and do serve as important best practices or industry standards. That is why I have repeatedly supported as best practices many (although not all) of the recommendations of

[21] Press Release, Fed. Trade Comm'n, Spokeo to Pay $800,000 to Settle FTC Charges Company Allegedly Marketed Information to Employers and Recruiters in Violation of FCRA (June 12, 2012) *available at* http://www.ftc.gov/news-events/press-releases/2012/06/spokeo-pay-800000-settle-ftc-charges-company-allegedly-marketed.

the FTC's 2012 report on "Protecting Consumer Privacy in an Era of Rapid Change."[22] Some of the most relevant recommendations of that report for big data include:

- **Privacy by Design** – Companies should build in consumer privacy protections at every stage in developing their products. These protections include reasonable security for consumer data and reasonable procedures to promote data accuracy. In the big data context, built-in de-identification measures could play an important role in protecting consumer privacy.
- **Simplified Choice for Businesses and Consumers** – Recognizing that there is no single best way to offer notice and choice in all circumstances, companies should adopt notice and choice options that appropriately reflect the context of the transaction or the relationship the company has with the consumer. In the big data context, this may be challenging, but I believe it is a principle worth continuing to pursue.
- **Greater Transparency** – Companies should disclose details about their collection and use of consumers' information and provide consumers access to the data collected about them.

I believe these best practices are flexible enough to remain useful in many, if not all, situations. Companies that embrace these principles would benefit their customers. Of course, best practices necessarily change with the environment. We must work to determine what changes may be necessary to protect and advance consumer welfare.

IV. FTC's Role in Big Data

The FTC can help ensure that the promise of big data is realized by using our unique set of enforcement and policy tools. First, the FTC is an enforcement agency and it can and should use its traditional deception and unfairness authority to stop consumer harms that may arise from the misuse of big data. Strong enforcement will help not only consumers but also other companies using big data analysis by policing actors that may tarnish the technology itself. Second, we can use our convening power and our policy and R&D functions to better understand big data technology; the new business models it may enable; the applicability of existing

[22] FED. TRADE COMM'N, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: RECOMMENDATIONS FOR BUSINESSES AND POLICYMAKERS (Mar. 2012) *available at* http://www.ftc.gov/reports/protecting-consumer-privacy-era-rapid-change-recommendations-businesses-policymakers.

regulatory structures, including self-regulation; market dynamics; and the nature and extent of likely consumer and competitive benefits and risks.

I am happy to say that the FTC is working hard to understand the promise and risks of big data and related technologies. Last year the FTC held a workshop on the Internet of Things in which we explored both the potential benefits and risks to consumers of this new environment of constant data flow.[23] More recently, the FTC hosted a workshop on alternative scoring mechanisms to evaluate the potential implications of new types of scoring that rely on big data predictive analytics to provide identity verification, fraud prevention, and marketing and other services.[24] In May, the Commission will host an event on consumer generated and controlled health data – one of the newest and most interesting sources of big data.[25] The FTC also announced a September big data workshop that will explore some of the benefits and potential risks of various big data techniques.[26] I hope that many of you will attend and contribute to these upcoming events. Your insights will help educate the FTC on big data technology, the key issues it raises, and the FTC's proper course of action in this area.

As the FTC uses these various institutional tools to engage with big data issues, two principles should guide our work. First, as with all dynamic markets, we must approach big data technologies with what I call regulatory humility. Our most successful technological advances,

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[23] Press Release, Fed. Trade Comm'n, FTC Announces Agenda, Panelists for Upcoming Internet of Things Workshop (Nov. 8, 2013) *available at* http://www.ftc.gov/news-events/press-releases/2013/11/ftc-announces-agenda-panelists-upcoming-internet-things-workshop.

[24] Press Release, Fed. Trade Comm'n, FTC Announces Agenda, Panelists for Alternative Scoring Seminar (Mar. 14, 2014) *available at* http://www.ftc.gov/news-events/press-releases/2014/03/ftc-announces-agenda-panelists-alternative-scoring-seminar.

[25] Press Release, Fed. Trade Comm'n, FTC to Host Spring Seminars on Emerging Consumer Privacy Issues (Dec. 2, 2013) *available at* http://www.ftc.gov/news-events/press-releases/2013/12/ftc-host-spring-seminars-emerging-consumer-privacy-issues.

[26] Press Release, Fed. Trade Comm'n, FTC to Examine Effects of Big Data on Low Income and Underserved Consumers at September Workshop (Apr. 11, 2014) *available at* http://www.ftc.gov/news-events/press-releases/2014/04/ftc-examine-effects-big-data-low-income-underserved-consumers.

such as the Internet itself, have generated massive amounts of consumer welfare and have thrived largely because market participants have enjoyed wide latitude to experiment with new technology-driven business models, allowing the market to determine which of those models succeeds or fails. This is the right approach. Second, we must identify substantial consumer harm before taking action. Thus, the FTC should remain vigilant for deceptive and unfair uses of big data, but should avoid preemptive action that could preclude entire future industries. Ultimately, our work as an agency should help strengthen competition and the market to better provide beneficial outcomes in response to consumer demand, rather than to try to dictate desired outcomes to the market.

V. Conclusion

To conclude, big data is not just coming – it is here. It's neither a miracle cure nor a plague. It is a powerful tool with great promise and some risks. Many of the concerns raised by big data are suitably handled by current law and policy. But where there are new issues, regulators need to work with people like you to understand the issues deeply and focus our enforcement actions on situations where improper use of consumer information causes substantial harm. This approach will free entrepreneurs to innovate with big data tools while simultaneously helping to ensure that consumer privacy remains protected.

Thank you for having me today, and I look forward to your questions.

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Commissioner Maureen K. Ohlhausen
Office of the Commissioner

Aug. 5, 2014

Via Electronic Filing
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue N.W.
Washington, DC 20230

Re: Comments of Maureen K. Ohlhausen, Commissioner, Federal Trade Commission on Big Data, Consumer Privacy, and the Consumer Bill of Rights[1]

Dear National Telecommunications and Information Administration,

I write to provide my perspective on the policy issues for which you recently issued a request for comment.[2]

As society has integrated and adopted increasingly powerful computers and pervasive communications networks, we have created immense amounts of data. Data today has greater volume, variety, and velocity. Put more simply, there is a lot of data, it has many different forms, and it is created rapidly. This trend will continue as we move into the era of the Internet of Things, a universe of Internet-connected devices that will tremendously increase the amount of passive data collection. Tools that can pull useful insights from this flood of data have great potential to make our lives better and promise significant benefits for consumers, businesses, and

[1] The views expressed here are solely those of Commissioner Ohlhausen and are not intended to reflect the views of the Commission or any other Commissioner.

[2] National Telecommunications and Information Administration, Docket No. 140514424-4424-01, Big Data and Consumer Privacy in the Internet Economy, 79 Fed Reg. 32714 (June 6, 2014) (RFC).

government. Big data techniques will help us extract knowledge from data, and this knowledge will help us better understand ourselves and the world around us.

Although big data will offer many benefits, the potential uses of big data also raise concerns about consumer privacy. Big data is a tool; like all tools it has strengths and weaknesses. Keeping those strengths and weaknesses in perspective is important as government, industry, research institutions, and civil society work together to adapt our laws, guidelines, best practices, and customs to integrate this new technology. As we adapt to big data, I believe the FTC can serve an important role in protecting consumers while allowing innovation to thrive.

I. Keeping Big Data in Perspective

Forming an adequate, proportional policy response to big data technology requires a realistic and accurate view of that technology. Data is invaluable to help us understand and affect change to the world around us. However, data, even big data, isn't knowledge or wisdom. It can be misleading. Accurately understanding both the benefits of and shortcomings of big data technology is critically important to getting the most out of this technology.

Big data is not completely new. Large companies like Wal-Mart have been collecting and analyzing terabytes of consumer data since the early 1990s.[3] However, today the tools for big data analysis are cost-effective even for small companies. Additionally, there is a lot more data, of many different kinds, being produced today.[4] Back then, Wal-Mart was collecting data on what consumers purchased from its stores and batch processing it each night. Today, a big

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[3] *See* Thomas Wailgum, *45 Years of Wal-Mart History: A Technology Time Line*, Oct. 17, 2007, http://www.cio.com/article/147005/45_Years_of_Wal_Mart_History_A_Technology_Time_Line.

[4] According to Intel, in 2015 the world will produce 8.1 zettabytes of data – 1,500 times more than all the data produced from the beginning of time until 2003. *See* Intel, Big Data 101 Video, *available at* http://www.intel.com/content/www/us/en/big-data/big-data-analytics-turning-big-data-into-intelligence-cmpg.html (last visited Aug. 5, 2014).

data project might combine such purchase data with shipping, inventory, and even traffic data to achieve just-in-time delivery of consumer products.

Benefits of Big Data. This change in tools and data sources has great potential to make citizens' lives better. As Professor Sinan Aral of New York University has explained, "'Revolutions in science have often been preceded by revolutions in measurement.'"[5] The promise is that big data techniques will extract from data knowledge that will help us better understand the world, similar to how the microscope's magnification of tiny things led to the germ theory of disease.

Obviously, we are already seeing benefits from the use of big data techniques. Amazon, e-Bay, Netflix, and many other online merchants use big data to generate customized user recommendations. Other companies use big data to predict commute times by aggregating millions of GPS signals, to identify potential causes of disease, and to detect and prevent credit card fraud. Scientists are using massive data sets and powerful analytic tools to make progress on the most difficult problems in the health sciences and hard sciences. For example, Kaiser Permanente used big data analysis to discover an increased chance of heart attack or cardiac death among Vioxx users as compared to users of a competing medication. Congress is also considering a bill that would modify the national child death case reporting system to collect additional data that may allow big data techniques to help reveal the root causes, rates, and trend of sudden unexpected infant and child deaths.[6]

In addition, many new uses are emerging, particularly because consumers are no longer simply data points to be researched. Today's consumers are themselves producers and users of

[5] THE ECONOMIST, *Data, Data Everywhere*, Feb. 25, 2010, *available at* http://www.economist.com/node/15557443.

[6] Sudden Unexpected Death Data Enhancement and Awareness Act, H.R. 669, 113th Cong. (2013).

big data, whether posting billions of photos on Facebook, using Bing's flight price predictors to make travel plans, or joining the self-quantification movement by wearing a FitBit Flex. As more of our everyday existence becomes measurable and recordable, the greater potential there is for big data to provide helpful insights.

Challenges in Applying Big Data. Big data can be misleading, however. There can be "signal problems," where the data set, huge as it may be, does not represent the real world. The oft-cited City of Boston's StreetBump mobile app is an example of both how such bias can exist in the data *and* the appropriate response to such problems. The city recognized that the crowd-sourced pothole-finding mobile phone app would identify more potholes in wealthy areas of the city simply because more residents in those neighborhoods used smartphones. But the city didn't throw out the project because of this potential bias in the data. Instead, they started with a pilot program used by city workers, allowing the city to identify and adjust for the skewed data.

Big data sets can also let us mislead ourselves. As Nate Silver explains in his book "The Signal and the Noise," our instinctual shortcut when we have too much data is to pick out the parts we like and ignore the remainder.[7] Big data is particularly vulnerable to the "multiple comparisons problem," in part because big data tools are very good at discovering statistical correlations between variables in complex data sets. Because there are many variables in the typical big data set, there are many potential relationships for a researcher to test. If a researcher explores a big data set without a particular question or theory in mind but instead simply tries enough comparisons between variables, they will often be able to find "statistically significant" correlations that do not reveal anything useful about *causation* in the real world.

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[7] Nate Silver, *The Signal and the Noise: Why So Many Predictions Fail - But Some Don't* at 3 (2012).

By better understanding the limits of big data and emphasizing the need for human judgment in the use of such tools, policy makers can help tamp down the hype – both for and against – over big data. Policy makers can help create a healthier regulatory atmosphere by critically evaluating the claims of both the pop-science promoters of big data as a "magic bullet" solution and the naysayers who fear enormous consumer harm from all-knowing algorithms. A realistic understanding of big data's potential will help policy makers to identify and focus on actual harms to consumers, if they occur.

II. Privacy and Other Concerns

As recognized in the White House's Big Data Report, big data raises concerns about how current laws will protect consumers.[8] Of course, many types of big data research have nothing to do with individuals and do not raise these concerns.[9] However, some consumer and privacy advocates are concerned that consumers will suffer harm from other uses of big data. Such advocates are particularly uncomfortable about the implications of large, persistent data sets containing information on individual customers. These concerns generally fall into three categories. First, some of the concerns about big data apply to data more generally, and the FTC has been actively addressing these issues for years. Second, as both the Big Data Report and the RFC indicate,[10] big data does raise some genuinely new challenges, particularly about how we

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[8] Executive Office of the President, *Big Data: Seizing Opportunities, Preserving Values* at 48 (May 2014) (Big Data Report), *available at* http://www.whitehouse.gov/sites/default/files/docs/big_data_privacy_report_5.1.14_final_print.pdf.

[9] For example, particle physics and astrophysics research produces enormous amounts of complex data. *See* Leah Hesla, "Particle Physics Tames Big Data," SYMMETRY, Aug. 1, 2012, *available at* http://www.symmetrymagazine.org/article/august-2012/particle-physics-tames-big-data. Long-term weather forecasters also use big data sets that pose no threats to privacy. Todd Woody, "Meet the Scientists Mining Big Data to Predict the Weather," FORBES, APR. 9, 2012, *available at* http://www forbes.com/sites/toddwoody/2012/03/21/meet-the-scientists-mining-big-data-to-predict-the-weather/.

[10] *See* Big Data Report at 54; RFC, 79 Fed Reg. at 32715.

can adapt the Fair Information Practice Principles (FIPPs) framework to work with big data.[11] These issues need further research and careful consideration by stakeholders. Third, there are concerns over fairness and discrimination in big data. While these are not privacy issues as such, they are important and worth studying carefully. I would like to explore these three points more fully.

Many concerns over big data are not unique to big data. Many big data concerns are also concerns for traditional "small data" and are already familiar to the FTC. For example, without adequate security safeguards, any data, big or small, can fall into the wrong hands. Recent reports of data breaches at retailers and other businesses obviously raise serious concerns. Yet there are real market and reputational incentives for companies to get data security right in the big data context. Furthermore, the FTC has for years been actively enforcing basic data security requirements to address consumer harm and has brought more than fifty-seven data security cases. Recently, in *FTC v. Wyndham*, a federal district court confirmed that the FTC has authority to protect consumers from unfair data security practices by bringing such cases.[12] And while some recent "big data" breaches are very large in scale, this is not a new development. For example, in 2009 the FTC investigated a data breach at Heartland Payment Systems, where

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[11] *See* DEPT. OF COMMERCE INTERNET POLICY TASK FORCE, *Commercial Data Privacy and Innovation in the Internet Economy: a Dynamic Policy Framework*, at 11 (2010) (describing the 1973 origin of the Fair Information Practice Principles framework at the Department of Health, Education, and Welfare), *available at* http://www ntia.doc.gov/files/ntia/publications/iptf_privacy_greenpaper_12162010.pdf.

[12] *FTC v. Wyndham Worldwide Corp., et al.*, No. 13-1887, 2014 U.S. Dist. LEXIS 47622 (D.N.J. Apr. 7, 2014), *appeal pending*, No. 14-8091 (3d Cir. July 29, 2014).

hackers stole more than 130 million credit card numbers.[13] Big data technology does not raise fundamentally new data security issues.

Similarly, some groups also argue that certain types of particularly sensitive data, such as data about children, health, or finances, deserve heightened protection when stored in big data sets. Of course, the FTC already recognizes the need to more thoroughly protect such types of data, whether the data is in big data or small data environments,[14] and current laws and FTC enforcement reflect that policy.[15]

Tension with Certain Fair Information Practice Principles. Other concerns about big data do appear to raise new issues, however. In particular, maximizing the benefits of big data may create tension with the notice and the purpose limitation principles in the FIPPs. These two related principles say that an information collector should inform consumers about the collection and its purpose and get the consumer's consent for the collection for that purpose. Yet much of the promise of big data is that it can find something new and useful in the data that could not have been anticipated at the time of collection. But companies cannot give notice at the time of collection for unanticipated uses. Furthermore, in many cases, data scientists create one big data set from many other smaller collections that initially served different purposes and may have been collected at different times from a wide range of sources. As such, it is difficult or impossible to notify individuals of the new purpose for which the data is being used.

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[13] Robert McMillan, "SEC, FTC investigating Heartland after data theft," Feb. 25, 2009, COMPUTERWORLD, *available at* http://www.computerworld.com/s/article/9128658/SEC_FTC_investigating_Heartland_after_data_theft.

[14] FTC REPORT, Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers, FTC Mar. 2012 at 15-16.

[15] *See* Children's Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501-6506 (COPPA).

The FIPPs principle of data minimization is also in tension with the incentives of big data. Part of the promise of big data is to pull knowledge from data points whose value was previously unknown. Thus, retention of as much data as possible for lengthy amounts of time is a common practice. Strictly limiting the collection of data to the particular task currently at hand and disposing of it afterwards would handicap the data scientist's ability to find new information to address future tasks. Certain de-identification techniques such as anonymization, although not perfect, can help mitigate some of the risks of comprehensive data retention while permitting innovative big data analysis to proceed. I believe FIPPs remains a solid framework and is flexible enough to accommodate a robust big data industry, but we have some work to do to resolve these tensions.

Other, Non-Privacy Concerns. Finally, some advocates worry that companies will use big data techniques to prejudge or discriminate against individuals unfairly or erroneously without recourse. One concern is that a researcher could collect non-sensitive information about a consumer and then use big data analysis to infer certain sensitive characteristics about that consumer.

This is a complicated issue that we need to know more about. Companies have long engaged in this type of consumer targeting with more traditional data tools. It is not clear how to weigh the additional value or risk big data analysis will bring to the long-established practice of targeted advertising.

Second, if companies do engage in this sort of analysis, we need to determine how they might use such information. How data is used matters, as our existing legal framework restricts certain uses of data regardless of how it was collected. Specifically, the Fair Credit Reporting

Act[16] establishes constraints for companies that make certain uses of data provided by "credit reporting agencies": creditworthiness, insurance eligibility, evaluation for employment, and renter background checks. Passed in 1970 in response to the creation of credit reporting bureaus, the FCRA could be considered the first "big data" bill. In fact, the FTC has applied the FCRA in a "big data" context. In 2012, the FTC entered into an $800,000 settlement with Spokeo, a company that assembles personal profiles of individuals from information in public records, white pages, and social networking sites.[17] Spokeo was allegedly marketing personal information to potential employers in violation of the FCRA.

The RFC asks, "Should a responsible use framework, as articulated in Chapter 5 of the Big Data report, be used to address some of the challenges posed by big data?"[18] I believe that it is important to seek an approach that protects consumers from substantial privacy harms while not hampering the economic and societal benefits that data-driven technology may offer. In pursuit of this goal, some have suggested focusing on the use of personal information and the impact on the individual, rather than attempting to safeguard privacy primarily by controlling information collection. Such use-focused approaches emphasize the difficulty of specifying unforeseen but valuable subsequent uses of data. To address these challenges, such approaches offer (in various formulations) a framework that emphasizes preventing harmful uses of personal

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[16] The Fair Credit Reporting Act, 15 U.S.C. § 1681 et. seq., was enacted in 1970 and significantly amended in 1996, 2003, and 2010. The FCRA does not limit what information may be collected by credit reporting agencies but rather focuses on limiting third party access to credit data for permissible purposes (which do not include marketing), ensuring accuracy of such data, providing consumers notice of adverse actions taken against them based on such data, and ensuring consumer access to and ability to correct data about themselves.

[17] Press Release, FED. TRADE COMM'N, *Spokeo to Pay $800,000 to Settle FTC Charges Company Allegedly Marketed Information to Employers and Recruiters in Violation of FCRA* (June 12, 2012) http://www ftc.gov/news-events/press-releases/2012/06/spokeo-pay-800000-settle-ftc-charges-company-allegedly-marketed.

[18] RFC, 79 Fed Reg. at 32715.

information, accountability for use of personal data however collected, a respect for context, and transparency about the use of such data with a concomitant ability of consumers to know if data has been used to disadvantage them.

I believe it would be useful to explore whether such frameworks, by specifically prohibiting certain clearly impermissible uses of data, could help protect consumers while enabling continued innovation in big data.

None of this is to denigrate the establishment of principles to guide the collection of data. Such principles can and do serve as important best practices or industry standards. Thus, I have supported as best practices many (although not all) of the recommendations of the FTC's 2012 report on "Protecting Consumer Privacy in an Era of Rapid Change."[19] Some of the most relevant recommendations of that report for big data include:

- **Privacy by Design** – Companies should build in consumer privacy protections at every stage in developing their products. These protections include reasonable security for consumer data and reasonable procedures to promote data accuracy. In the big data context, built-in de-identification measures could play an important role in protecting consumer privacy.
- **Simplified Choice for Businesses and Consumers** – Recognizing that there is no single best way to offer notice and choice in all circumstances, companies should adopt notice and choice options that appropriately reflect the context of the transaction or the relationship the company has with the consumer. In the big data context, this may be challenging, but I believe it is a principle worth continuing to pursue.
- **Greater Transparency** – Companies should disclose details about their collection and use of consumers' information and provide consumers access to the data collected about them.

I believe these best practices are flexible enough to remain useful in many, if not all, situations. Companies that embrace these principles would benefit their customers. Of course,

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[19] FED. TRADE COMM'N, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations For Businesses and Policymakers* (Mar. 2012) http://www ftc.gov/reports/protecting-consumer-privacy-era-rapid-change-recommendations-businesses-policymakers.

best practices necessarily change with the environment. Policy makers and stakeholders must work together to determine what changes in best practices may be necessary to protect and advance consumer welfare.

III. FTC's Role in Big Data

The FTC is working to ensure that the promise of big data is realized by using our unique set of enforcement and policy tools. First, the FTC is an enforcement agency and it can and should use its traditional deception and unfairness authority to stop consumer harms that may arise from the misuse of big data. The FTC has a strong track record of protecting consumers from harms, whether those harms are inflicted by bad actors using traditional or cutting-edge technological tools. The FTC's action in *Spokeo*, mentioned above, is an example of the agency's policing of harmful big data uses. Strong enforcement in the big data area will help not only consumers but also other companies using big data analysis by policing actors that may tarnish the technology itself.

Second, we are using our convening power and our policy and R&D functions to better understand big data technology; the new business models it may enable; the applicability of existing regulatory structures, including self-regulation; market dynamics; and the nature and extent of likely consumer and competitive benefits and risks. The FTC is currently working to understand the promise and risks of big data and related technologies. Last year the FTC held a workshop on the Internet of Things in which we explored both the potential benefits and risks to consumers of this new environment of constant data flow.[20] More recently, the FTC hosted a

[20] Press Release, FED. TRADE COMM'N, *FTC Announces Agenda, Panelists for Upcoming Internet of Things Workshop* (Nov. 8, 2013) http://www.ftc.gov/news-events/press-releases/2013/11/ftc-announces-agenda-panelists-upcoming-internet-things-workshop.

workshop on alternative scoring mechanisms to evaluate the potential implications of new types of scoring that rely on big data predictive analytics to provide identity verification, fraud prevention, and marketing and other services.[21] In May, the Commission hosted an event on consumer generated and controlled health data – one of the newest and most interesting sources of big data.[22] And this September the FTC will host a big data workshop to explore some of the benefits and potential risks of various big data techniques.[23]

As the FTC and other policy makers engage with big data issues, I believe two principles should guide our work. First, as with all dynamic markets, policy makers must approach big data technologies with what I call regulatory humility. Our most successful technological advances, such as the Internet itself, have generated massive amounts of consumer welfare and have thrived largely because market participants have enjoyed wide latitude to experiment with new technology-driven business models, allowing the market to determine which of those models succeeds or fails. Particularly as we consider whether big data could be used for discrimination, we should look at the lessons of recent technological history: in many ways, information technology has been a great equalizing force, giving voice and the power of information to the individual.

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[21] Press Release, FED. TRADE COMM'N, *FTC Announces Agenda, Panelists for Alternative Scoring Seminar* (Mar. 14, 2014) http://www ftc.gov/news-events/press-releases/2014/03/ftc-announces-agenda-panelists-alternative-scoring-seminar.

[22] Press Release, FED. TRADE COMM'N, F*TC to Host Spring Seminars on Emerging Consumer Privacy Issues* (Dec. 2, 2013) http://www ftc.gov/news-events/press-releases/2013/12/ftc-host-spring-seminars-emerging-consumer-privacy-issues.

[23] Press Release, FED. TRADE COMM'N, *FTC to Examine Effects of Big Data on Low Income and Underserved Consumers at September Workshop* (Apr. 11, 2014) http://www.ftc.gov/news-events/press-releases/2014/04/ftc-examine-effects-big-data-low-income-underserved-consumers.

Second, policy makers must identify substantial consumer harm before taking action. The FTC in particular should remain vigilant for deceptive and unfair uses of big data, but should avoid preemptive action that could preclude entire future industries. Ultimately, our work as an agency should help strengthen competition and the market to better provide beneficial outcomes in response to consumer demand, rather than to try to dictate desired outcomes to the market.

I do believe some specific changes are needed to better inform consumers about big data. The FTC recently recommended in our Data Broker Report that Congress consider requiring data brokers to give consumers more transparency and control over the information such brokers have about individual consumers.[24] I believe a proper implementation of this recommendation could help consumers embrace the big data movement by revealing the value of such information and reducing the fear of the unknown.

IV. Conclusion

To conclude, big data is a powerful tool with great promise and some risks. Many of the concerns raised by big data are suitably handled by current law and policy. But where there are new issues, regulators need to work with innovators to understand the issues deeply and focus our enforcement actions on situations where improper use of consumer information causes substantial harm. This approach will free entrepreneurs to innovate with big data tools while simultaneously helping to ensure that consumer privacy remains protected. I applaud NTIA's

[24] FED. TRADE COMM'N, *Data Brokers: A Call for Transparency and Accountability*, 49 (May 2014), http://www ftc.gov/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014.

efforts to explore these issues and look forward to future opportunities to work together to ensure consumers benefit from big data technology while mitigating any risks.

Sincerely,

/s/
Commissioner Maureen K. Ohlhausen
Federal Trade Commission

Notes

GENERAL COUNSEL ROUNDTABLE 2014

Supreme Court Update

Bay Area General Counsel Roundtable

Joseph R. Guerra
Mark E. Haddad
Peter D. Keisler

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Overview

- The Current Court
  - Brief overview of October Term 2013
  - Liberal? Conservative?
  - In Transition?
- October Term 2013 – Leading Cases
- October Term 2014 – Marriage Equality on the Docket?

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OT 2013 – Term Overview

- 73 Cases Decided, 67 Merits Opinions, 6 Summary Reversals
  - Docket continues to dwindle
- 41 cases of interest to business
  - High percentage of business-related cases
  - 19 *amicus* briefs from the U.S. Chamber of Commerce
- In 14 cases in which both the Chamber and the SG's Office participated, they were on the same side 5 times, and on opposite sides 9 times.

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OT 2013 – Justice Profiles

- Most likely swing vote in 5-4 cases:
  - Justice Kennedy: Only Justice in majority in all 5-4 cases
- Most / least active at oral argument:
  - Justice Scalia (nearly 20 questions per case)
  - Justice Thomas (no questions last Term)
- Most entertaining:
  - Justice Scalia (57 laugh lines, 19 more than next)
  - Compare: Justice Ginsburg - 0

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The Roberts Court – Fundamentally a Conservative Court?

- *Burwell* v. *Hobby Lobby Stores* – Allows closely held corporations to deny contraceptive coverage to their employees where such coverage violates the owner's religious belief.
- *Shelby County* v. *Holder* – Strikes down preclearance requirement of Section 4 of the Voting Rights Act.
- *Schuette* v. *Coalition to Defend Affirmative Action* – upholds Michigan constitutional amendment banning the use of affirmative action by public universities.
- *Citizens United* v. *Federal Election Commission* – Strikes down ban on independent political expenditures and electioneering communications by corporations.

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The Roberts Court – Fundamentally a Liberal Court?

- *National Federation of Independent Business* v. *Sebelius* --Upholds individual mandate of the Affordable Care Act.
- *United States* v. *Windsor* – Strikes down federal Defense of Marriage Act.
- *Brown* v. *Entertainment Merchants Association* – Strikes down California's ban on the sale or rental of violent video games to minors.
- *United States* v. *Jones* – Holds that attaching and using GPS device to monitor a vehicle's movements is a search for purposes of the Fourth Amendment.

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The Roberts Court – Fundamentally in the Middle of the Road?

- Unanimity:
  - 66% of decisions were 9-0; Only 14% were 5-4.
- Yet even some unanimous opinions were divisive:
  - 7 drew concurrences only in the judgment
  - Justices Scalia, Thomas, and Alito collectively wrote 216 pages to explain why they agreed only with the judgment

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The Roberts Court – Liberal or Conservative?

Pew Survey Results	April 23-27, 2014	July 8-14, 2014
Conservative:	25%	27%
Middle of the Road:	35%	38%
Liberal:	31%	26%

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The Roberts Court – Liberal or Conservative?

-- Impact of *Hobby Lobby* on ideological observers:

Pew Survey Results – Liberal Democrat	April 2014	July 2014	Pew Survey Results – Conserv. Republican	April 2014	July 2014
Conserv.:	47%	60%		9%	8%
Middle of the Road:	33%	26%		33%	44%
Liberal:	19%	11%		53%	42%

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Demographics and the Court

- Will there be any change in the composition of the Court?
- Worried liberals say there should be.
- The Justices say "no."
  - "As long as I can do the job full-steam, I would like to stay here. Last term was a good example. I didn't write any slower. I didn't think any slower. I have to take it year by year at my age, and who knows what could happen next year? Right now, I know I'm OK. Whether that will be true at the end of next term, I can't say."
    Ruth Bader Ginsburg May 2013
  - "I wonder if Sandra regrets stepping down when she did?" RBG July 2013.
- Do statistics suggest otherwise?

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Demographics and the Court

- Statistics suggest this Court will stay together at least until next Presidential term
  - Average tenure throughout history of the Court: 16 years
  - Since 1970, average tenure: 26 years
  - Since 1970, average retirement age: 79 years
  - John Paul Stevens age at retirement: 90 years
- Longest serving current members:
  - Antonin Scalia: 28 years tenure – 78 years old
  - Anthony Kennedy: 26 years tenure – 78 years old
  - Clarence Thomas: 22 years tenure – 66 years old
  - Ruth Bader Ginsburg: 21 years tenure – 81 years old
  - Stephen Breyer: 20 years tenure – 76 years old

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New Voices

Schuette v. *Coalition to Defend Affirmative Action*

MR. BURSCH: . . . I want to focus on the University of Michigan because there's two things that they could be doing right now that would get them closer to the race-neutral goal. The first thing is that they could eliminate alumnae preferences. Other schools have done that. They have not. That's certainly one way that tilts the playing field away from underrepresented minorities. The other one, and this is really important, is the focus on socioeconomic –

JUSTICE SOTOMAYOR: It's always wonderful for minorities that they finally get in, they finally have children and now you're going to do away for that preference for them. It seems that the game posts keeps changing every few years for minorities.

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Schuette v. *Coalition to Defend Affirmative Action*

"Race matters to a young man's view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman's sense of self when she states her hometown, and then is pressed, 'No, where are you *really* from?', regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: 'I do not belong here.'"

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The Way to Stop Discrimination. . .

- "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." (*Parents Involved in Community Schools* v. *Seattle School District No. 1*) (Roberts, C.J.)

- "It is a sentiment out of touch with reality . . . The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race…." (*Schuette* v. *Coalition to Defend Affirmative Action*) (Sotomayor, J., dissenting)

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Schuette v. *Coalition to Defend Affirmative Action*

"[I]t is not 'out of touch with reality' to conclude that racial preferences may themselves have the debilitating effect of reinforcing precisely that doubt, and – if so – that the preferences do more harm than good . . . People can disagree in good faith on this issue, but it similarly does more harm than good to question the openness and candor of those on either side of the debate." (Roberts, C.J., concurring)

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Town of Greece v. *Galloway*

JUSTICE KAGAN: Mr. Gershengorn, could you respond to this? Here's what our country promises, our Constitution promises, It's that, however we worship, we're all equal and full citizens. And I think we can all agree on that. And that means that, when we approach the government, when we petition the government, we do so not as a Christian, not as a Jew, not as a Muslim, not as a nonbeliever, only as an American.

And what troubles me about this case is that, here, a citizen is going to a local community board, supposed to be the closest, the most responsive institution of government that exists, and is immediately being asked being forced to identify whether she believes in the things that most of the people in the room believe in, whether she belongs to the same religious team as most of the people in the room do.

And it strikes me that that might be inconsistent with this understanding that, when we relate to our government, we all do so as Americans and not as Jews and not as Christians and not as nonbelievers.

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Town of Greece v. *Galloway*

"[T]he principal dissent's objection, in the end, is really quite niggling….[If] a rotating system would obviate any constitutional problem, then despite all the high rhetoric, the principal dissent's quarrel with the town of Greece really boils down to this: The town's clerical employees did a bad job in compiling the list of potential guest chaplains." (Alito, J., concurring)

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Town of Greece v. *Galloway*

"Honest oversight or not, the problem remains: Every month for more than a decade, the Board aligned itself, through its prayer practices, with a single religion. That the concurring opinion thinks my objection to that is 'really quite niggling' says all there is to say about the difference between our respective views." (Kagan, J., dissenting)

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2013 Term – Key Cases

Class Actions

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Halliburton v. *Erica P. John Fund*

- **Issue:** Should the Court overrule any use of the fraud-on-the-market presumption?
- Without "*Basic*" presumption, no securities action could proceed as a class action.
- *Basic* Presumption: public, material information about a publicly traded company affects the price of the company's stock.
- Fifth Circuit ruled that Halliburton could not challenge the presumption at class cert.
- **Held (9-0):** Vacate and Remand. Upheld the fraud-on-the-market presumption, but ruled that securities class action defendants may rebut the presumption of reliance at the class cert stage, by showing a lack of price impact (e.g., through an event study).

Halliburton v. *Erica P. John Fund*

- **Win or a Loss for Business?**
- Plaintiffs: Relieved that the *Basic* presumption survived.
- Defendants: Now able to weed out some frivolous claims at class certification by shifting the focus away from "market efficiency" to "impact on stock price."
- Overall: a practical interim solution, but with details still to be resolved.

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Halliburton in Context:

- **Recent important class action decisions:**

- *Wal-Mart* v. *Dukes:* overturning certification of large employee class for lack of commonality
- *Comcast* v. *Behrend*: overturning certification where individual damages issues predominate
- *Concepcion*; *American Express*: enforcing arbitration agreements that bar class actions.
- Takeaway: Five Justices receptive to cabining "that adventuresome innovation…"

On the (Deepwater) Horizon?....

- *BP Exploration & Prod.* v. *Lake Eugenie Land & Dev. Inc. et al., pet. for cert. docketed* Aug. 5, 2014 (No. 14-123):
  - May certified or settlement classes include members whom defendant did not injure?
  - Claims Administrator: paid claims "for losses that a reasonable observer might conclude were not in any way related to the Oil Spill."

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Intellectual Property: Patent

The Demise of the Patent Trolls?

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The Demise of the Patent Trolls?

- *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*
  - Easing the standards for awarding fees against losing party.
- *Limelight Networks, Inv.* v. *Akamai Technologies, Inc.*
  - Refusing to relax the standards for induced infringement.

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Alice Corp. v. *CLS Bank*

- When are computer-implemented inventions patentable?

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Alice Corp. v. *CLS Bank*

- **Held (9-0):** Basic business methods may not be patented, even if computers are used to apply them. Merely requiring generic computer implementation fails to transform an abstract idea into a patent-eligible invention.

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Intellectual Property: Copyright

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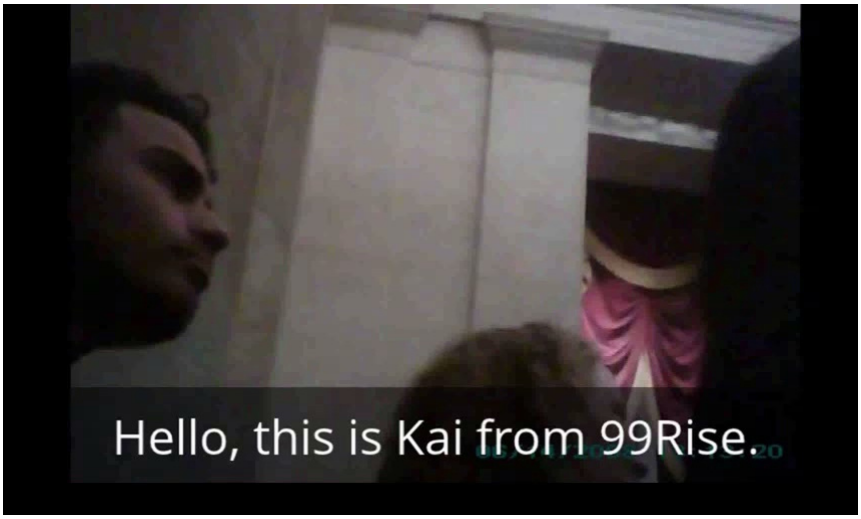
ABC v. Aereo

- **Issue:** Whether a company may retransmit a copyrighted television program to paid subscribers over the Internet.
- Aereo is an online service that charges its subscribers a monthly fee — currently $8 — to access and record broadcast television on their computers and other devices. Aereo does not pay networks for any of the content it captures through the airwaves and rebroadcasts.
- **Held (6-3):** Aereo's streaming service violates copyright law because it is a "public performance" of the major television networks' copyrighted works. Narrow holding — Court stressed that its decision has nothing to do with downloading a TV program in order to view it later.

  — Justice Scalia, Justice Thomas and Justice Alito dissented.

First Amendment



McCutcheon v. *Federal Election Commission*

- **Issue:** Can Congress limit the total amount of money an individual may contribute to federal candidates for office?
- **Held (5-4):** The aggregate contribution limits imposed by the Federal Election Campaign Act violate the First Amendment.

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McCutcheon v. *Federal Election Commission*

"The government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may endorse."

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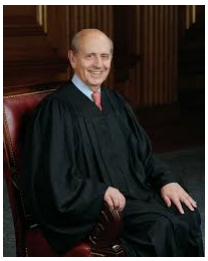
McCutcheon v. *Federal Election Commission*

"[T]he First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech matters."



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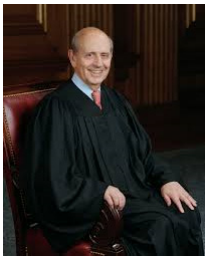
McCutcheon v. *Federal Election Commission*

"We have said that government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford. . . . Any regulation must instead target what we have called *quid pro quo* corruption or its appearance."

McCutcheon v. *Federal Election Commission*

"[T]he plurality relies heavily upon a narrow definition of 'corruption' that excludes efforts to obtain influence over or access to elected officials or political parties . . . .[T]he plurality defines 'corruption' too narrowly."



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Other First Amendment Cases

- *Harris* v. *Quinn* – Requiring home healthcare workers to pay fees to a public employee union violates the First Amendment.
- *McCullen* v. *Coakley* – Thirty-five foot "buffer zone" around abortion clinics violates the First Amendment.
- *Burwell* v. *Hobby Lobby Stores* (not actually a First Amendment case, but a close cousin) – Closely held corporations may not be required to provide contraceptive coverage to their employees where such coverage violates the employer's religious beliefs.

October Term 2014 – Marriage Equality on the Docket?

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Questions?

Notes

General Counsel Playbook: CEO Succession, Shareholder Activism & Cybersecurity

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CEO Succession Checklist

September 2014

1. The Board has a fiduciary duty to engage in succession planning; should be an agenda item on a periodic basis; may be delegated to a Board Committee but should be reviewed with full Board

2. Ongoing Succession Planning
    a. The Board should formally do a CEO evaluation annually and should periodically discuss with the CEO the potential timing of a natural course CEO transition
    b. The Board should engage in an ongoing management development review that includes C-level and next level executives to understand strengths and capabilities
        - Should be on the agenda at least annually
        - Could engage third party consultants to assist
        - Discuss potential internal candidates with CEO and identify areas of further development for those candidates; hold CEO accountable for development plan implementation
        - Expose senior management such as C-level and next level management to the Board
        - Benchmark internal talent pool candidates relative to external marketplace talent
    c. Consider any potential impact on Board composition and leadership from CEO transition
    d. Understand charter and bylaw requirements regarding CEO transition and Board membership changes; understand Board and Committee responsibilities with respect to CEO transition
    e. Analyze relevant contracts relating to the existing CEO as well as such issues as loan covenants that may be affected by CEO transition
    f. If existing CEO termination is not consensual, determine whether it is a "for cause" termination or a mutual agreement for the CEO to resign

3. Implementing Planned Succession
    a. Delineate attributes of ideal candidate and selection criteria
    b. Determine whether using a search firm is appropriate; to assist in decision, diligence internal candidates to assess against attributes and criteria. Consider:

- prior performance and experience
- views of current CEO and Directors
- views of Senior Management
- anticipated reaction of regulators, shareholders and customers
- comparison to theoretical list of external candidates (search firm assistance?)
- interviews; background checks
- consider pros-and-cons of search or not (*e.g.*, disclosure, risk of loss of internal candidate)
- benchmarking

c. If external search required, engage search firm with clear selection criteria;

d. Determine which Board member or members will lead the search and negotiate with the candidate and the incumbent CEO, if required.

e. Determine successor from internal and external search; conduct background check and negotiate terms (assistance from counsel and executive compensation consultant)

f. Determine whether successor will also be Chairman of Board; this may be an opportune time to effect structural Board change

g. Be prepared for press inquiries and stories

h. Understand and negotiate any transition or termination agreement for incumbent CEO:

- On-going role or not?
    - to assist in decision, consider benefits/need for transitional period to new CEO
    - benchmarking
    - would announcement of an on-going role negate an inference of a "problem"?
- If on-going role, what is it?
    - Chairman of the Board (if so, Executive or Non-Executive)
    - Director
    - Consultant
- If on-going role, negotiate terms
    - duration of role, change of control (yes or no; if yes, duration), non-compete (depending on jurisdiction) and compensation
    - termination of existing agreements

4. Unexpected/Emergency CEO Vacancy
    a. The Board should have an emergency succession plan in the event the CEO or another key executive is unable or unwilling to perform his/her duties. The plan should describe how a determination is made that the emergency has occurred and when it concludes and who should assume CEO responsibilities during the interim period.
    b. File 8-K as required.
    c. Follow planned succession checklist above.

Required Securities Filings
8-K Regarding the Departing CEO
• Upon the CEOs retirement, resignation or termination, an 8-K must be filed. Note that the reporting obligation is triggered by a notice of a decision to resign, retire or refusal to stand for re-election (in the case of director CEO), whether or not notice is written, and regardless of whether conditional or subject to acceptance. No disclosure is required solely by reason of discussions or consideration of event. Whether communications represent discussion or consideration, on the one hand, or notice of a decision, on the other hand, is a facts-and-circumstances determination. (See Item 5.02(a) or (b), as the case may be.)
• If the departing CEO also resigns as a director, the 8-K should include the date of the resignation. (See Item 5.02(b))
• If the departing CEO is also a director and resigns due to a disagreement with the company's operations, policies or practices, or if he/she was removed for cause, the 8-K requires certain additional information. In these cases, the departing CEO director must be given an opportunity to respond to the 8-K disclosure, and any written response would be filed as an amendment to the 8-K. (See Item 5.02(a))
8-K Regarding the New CEO
• Upon hiring a new CEO, an 8-K must disclose the appointment and its effective date, certain biographical information about the new CEO, a brief description of any material agreements or compensatory arrangements with the new CEO and any related party transactions (including any such matters with respect to a new CEO's service as a director — see below). (See Item 5.02(c) & (e))
• If the new CEO is appointed to the Board, the 8-K must also disclose that fact and the date of appointment, the committees of the board on which he or she will (or is expected to) serve, and, in addition to the matters described above, a description of any arrangement between the new CEO director and any other person pursuant to

which he or she was selected. (See Item 5.02(d))
• The filing of an 8-K to disclose the new CEO may be delayed beyond the typical four-day deadline if the Company plans to make a public announcement other than by means of an 8-K. In such case, the 8-K must be filed on the date the Company makes a public announcement of the event. (See Instruction to Item 5.02(c))
Other Filings
• The new CEO should file a Form 3 (if not already an executive officer of the company), and a Form 4 should be filed as applicable for any new equity grant to the new CEO.
• A Form 4 may be required for the departing CEO (upon vesting of performance shares in connection with the termination).
• Any agreements with the departing or new CEO should be filed as an exhibit to the company's next 10-Q (or 10-K, as the case may be), unless such agreements are filed as exhibits to the relevant 8-K.
• If there is an inducement equity grant (one not made under an existing plan), the company should determine whether there are any securities registration requirements.
Stock Exchange Considerations
• Issue a press release on the day of the event, and, if released during trading hours, comply with any prenotification procedures.
• Consider whether a stock exchange notice or listing application is required in connection with any inducement equity grant.
• Comply with all notice requirements regarding changes in executive officers and Board members.

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Shareholder Activism Preparation and Response Checklist

September 2014

1. Activists look for underformance or a perception of underperformance:
    - A declining stock price
    - Reduced earnings, lowered forecasts and other weaknesses in the Company's income statement
    - Underperformance versus peers
    - Multi-segment businesses, where one segment could be sold or spun-off
    - Scandal or management missteps
    - Operational or disclosure issues
    - Corporate governance vulnerabilities
    - Litigation or other issues not fundamental to the Company's core business
    - Leverage potential, for example, a strong balance sheet or excess cash reserves
    - Perceived unlocked value
    - A lack of takeover defenses
    - An unfavorable deal price and terms
    - Insufficient canvass of the market for buyers
2. Activists may focus on:
    - Share buybacks
    - Other increased leverage options
    - Strategic changes including Company sale, break up, spin-off or divestiture, leadership changes and/or governance changes
3. Activist tools include:
    - Pressure on Boards
    - Shareholder proposals
    - Bylaw amendments
    - Withhold vote campaigns
    - Proxy contests
    - Litigation
    - Unsolicited takeover attempts
    - Aligning with other shareholders
4. Management and the Board must understand the Company's vulnerabilities. Strategic planning should include an analysis, either done internally or by external consultants, of an activist's view of the Company based on an external evaluation of the Company. The Board also should be educated regarding activists' playbooks.

5. Understand corporate governance vulnerabilities; review corporate governance and structure:
    a. If before IPO, evaluate possibility of a dual class stock structure.
    b. Since a poison pill will trigger scrutiny from ISS and certain institutional shareholders, conduct a process with the Board to create an appropriate "shelf" poison pill that can be quickly approved by the Board.
    c. Understand corporate governance trends and their impact on the Company's Board; for example, activists often attack directors older than 75 or who have served for more than 10 years.
    d. Review the Company's advance notice provisions; adopt one if the company does not have one.
    e. Consider adoption of a provision that Board members must agree in writing to abide by all policies applicable to directors, including policies defining and specifying the treatment of Company confidential information. In particular, the Board's confidentiality policy should expressly provide that directors should not disclose outside of the boardroom any confidential information unless specifically authorized to do so, including disclosure of information to a shareholder that designated, appointed or nominated the director, as well as disclosure to investors, the media or anyone else; directors should periodically be reminded of their strict confidentiality obligations.

6. Engage a stock watch service to monitor who is acquiring a large position. Monitor Schedule 13D/Gs, Form 13Fs and HSR filings to determine if an activist is taking a position. Activists may discreetly acquire stock below the disclosure threshold so it is important to monitor. Do not discount rumors of activists amassing a position.

7. Create a response team, assign responsibilities in the event an activist becomes engaged and hold periodic meetings to maintain readiness and keep all on the team aware of corporate strategy and developments.

    Internal team: CEO, CFO, GC and PR/IR.

    External advisers: Legal counsel, including DE counsel, investment bankers, proxy solicitation firm (e.g., D.F. King, Innisfree, Mackenzie Partners), and special situation PR firm (e.g., Sard Verbinnen, Joele Frank).

8. Maintain contact and good relations with institutional investors (including both investor relations and governance contacts) before an activist surfaces.
    a. Proactively communicate the Company's strategy and accomplishments pursuant to the strategy to investors and analysts.
    b. The Investor Relations Officer, together with the CEO and CFO, is key to maintaining ongoing relationship with investors and understanding their issues.
    c. Keep management and the Board aware of shareholder sentiment.

d. Consider whether periodic director contact with institutional investors is appropriate for the Company.

e. Monitor business peer groups, financial and industry analysts, proxy advisers (e.g., ISS; Glass Lewis), activist institutions (e.g., CalPERS), social media and the media for reports that will attract activists.

9. Responding to an activist that does not go public with its intentions:

   a. Research the activist to understand the playbook; engage internal team and external advisers.

   b. No duty to discuss or negotiate but engagement is appropriate and necessary

      - Try to learn as much as possible by listening
      - Set the tone of engagement; failure to respond may have negative consequences
      - Company messaging should be consistent
      - Determine if and when it is appropriate to let the activist talk to the Board and management

   c. No duty to disclose unless there is an internal leak.

   d. Make sure the Board is fully informed and clearly agree on Board and individual Board member roles.

   e. Be prepared for public disclosure.

      - Have a business strategy document ready to respond to criticism.

10. Responding to an activist that goes public:

   a. Public tactics may include public letters, media campaigns, SEC or HSR filings, shareholder proposals, proxy contests, public offers to generate interest in sale, litigation.

   b. Engage internal team and external advisers.

   c. Response to the activist: "The Board will consider your proposal."

   d. Call special Board meeting to discuss.

11. Settlement agreement with activists:

   a. Be prepared to negotiate.

   b. Understand key terms, such as Board composition and size, corporate governance, term, standstill, covenants binding on Company and covenants binding on activist.

   c. Be prepared for a proxy fight and have key advisers ready in case negotiations do not result in a settlement.

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Cyber Legal Preparedness

1. Develop information governance controls
    a. Establish procedures to work with the Board and executive management regarding cybersecurity issues, disclosure, and regulatory compliance
    b. Determine how the Management/Board has assigned responsibility and established expectations for cyber-related internal controls, risk management, and reporting
    c. Ensure clear designations and resources have been provided
    d. Understand process for Board oversight of cybersecurity

2. Identify, map and assess compliance with legal and regulatory obligations at federal, state and international levels and determine cyber vulnerabilities and risks
    a. Identify applicable cyber regulatory and *de facto* legal obligations, including but not limited to: SEC disclosure, FTC information security standards, Massachusetts and other state security (personal data); Gramm-Leach Bliley safeguards rules and SEC Regulation S-P (financial); HIPAA (healthcare); FISMA and DOD regulations (government and defense contractors); applicable non-US standards such as UK CyberEssentials and EU data protection standards
    b. Assess compliance with industry standards, including but not limited to: NIST Cybersecurity Framework, PCI, ISO, COBIT, and Sans Institute controls, etc.
    c. Identify potentially material vulnerabilities and cyber-risk factors
    d. Consider exposure to and mitigation of "insider threats"
    e. Identify and prioritize systems and databases that contain personal information, trade secrets, confidential data, and other sensitive information to determine where valuable information is stored and assess whether such information is adequately protected
    f. Determine obligations to third parties regarding cybersecurity protections
    g. Utilize legal counsel to conduct and direct review and retain experts
    h. Coordinate review with auditing and compliance, IT, and other relevant departments
    i. Review the company's own past experience (and its industry's) with data breaches and cybersecurity incidents
    j. Keep Board informed regarding risks/remedial steps

3. Establish a legal work plan for cybersecurity crisis prevention and crisis management
    a. Consider developing and implementing comprehensive written information security policy
    b. Develop and implement incident response plan that covers: containment, government and other required reporting, forensic consultants, PR communications, regulatory and litigation counsel, as applicable
    c. Focus on remedying vulnerabilities and risks identified by the assessment of compliance review
    d. Review the incident response and written information security plans with relevant departments and with the Board
    e. Define cybersecurity responsibilities for users, administrators, and managers
    f. Maintain accountability standards for violations of policies
    g. Memorialize the Board review and approval of the plans
    h. Preserve privilege by maintaining control over the plans
    i. Comply with SEC and public filing disclosures regarding cyber risks and security breaches
    j. Implement strategies for industry information sharing and government and law enforcement coordination
    k. Consider whether you should adopt cybersecurity insurance
    l. Consider whether any of SAFETY Act liability protections are available

4. Develop and maintain internal and external privacy policies
    a. Develop polices to cover the company's personal information collection and sharing practices.
    b. Ensure that policy is posted on company's website and provided in employee handbook
    c. Update policies to make sure the company's current practices are reflected

5. Establish written policies and procedures and training programs
    a. Define cybersecurity responsibilities for users, administrators, and managers
    b. Maintain accountability standards for violations of policies
    c. Ensure that employees and contractors are trained on legal obligations

6. Deploy appropriate information security safeguards for vendors/service providers, including reporting and due diligence
    a. Ensure the agreements adequately protect the company's cybersecurity interests
    b. Safeguard data that may exist with "cloud" providers

c. Identify data security and reporting requirements imposed upon the company by contract

d. Ensure that contracts with third parties provide appropriate indemnification

e. Consider whether auditing is appropriate and/or review vendors for compliance with relevant security standards

7. Implement secure technology design

   a. Ensure system is capable of effective network-level monitoring

   b. Select and implement appropriate encryption standard

   c. Conduct regular testing and system updates

   d. Create authentication process to enroll and verify authorized users and to delete users that are terminated

   e. Employ physical and technical authentication mechanisms

   f. Continuously monitor network intrusion detection systems

8. Identify consulting resources

   a. Consider use of computer forensic resources for prevention, detection, and remediation of cyber threats

   b. Develop protocol and budget for use of legal services and public relations services

   c. Identify suitable PR resources

   d. Pre-position credit monitoring, mailing, and call center services

9. Regularly test and update all assessments, safeguards, and protocols

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Cyber Incident Response

1. Collect applicable privacy, information security, incident response, communications and other relevant policies and procedures. (*see* Cyber Legal Preparedness) Review any applicable incident response plans and determine their requirements and applicability in the specific circumstances (consider need for any necessary or appropriate departures from standard protocols)

2. Designate coordinator and team for incident response:
    a. For example: GC, Privacy Officer, CIO/IT, HR, CFO/finance, legal, security, communications, internal audit/investigation, compliance, customer relations, senior management representative, etc. As needed, involve forensic consultants, outside counsel, public relations advisors, credit monitoring services, etc.
    b. Provide for leadership and direction by counsel to preserve privilege and work product protection in anticipation of potential litigation and investigations
    c. Cyber incident response plan should assign responsibilities for each member of the incident response team. (*see* Cyber Legal Preparedness 3(b))

3. Determine the scope of the incident or compromise.
    a. Develop understanding of known extent of loss; confidence levels for existing knowledge; degree of further work necessary to develop inventory of affected data and individuals
    b. Determine what information relevant to the incident may be available from security system data, logs or audit trails; access records; security footage; entry records; telephone records; etc.
    c. Assess whether and extent to which the compromised data were encrypted or otherwise protected by passwords or other administrative, technical or physical safeguards
    d. Determine facts regarding involvement of any insiders, third-party providers, agents, vendors, or consultants; gather implicated contracts; and interview relevant individuals
    e. Interview relevant employees or other personnel involved in or knowledgeable about the incident

4. Check physical security measures and their logs, including:
    a. Reception or entry checkpoints
    b. ID scanner or other access records
    c. Video or still footage

d. Physical logs

e. Elevator and garage records

5. Take immediate measures to prevent further compromise and unauthorized access, such as:
    a. Check network security measures and close off future network intrusion
    b. Activate enhanced system logging and monitoring
    c. Consider whether any global or local password changes, or modified access privileges, or other enhanced security measures are immediately necessary, and effectuate corresponding changes immediately
    d. Ensure that any implicated current or former employees no longer have access privileges
    e. Review access privileges for contractors, vendors, and other third parties

6. Determine obligations:
    a. Conduct initial risk assessment to assess whether:
        i. Misuse of data has occurred or is reasonably likely or unlikely
        ii. What risks and harms could occur if data were misused
        iii. Recreation of the affected data is possible
        iv. Any current or former employees or vendors could be involved
    b. Assess whether any federal, state, or international laws or regulations apply, including data breach notification requirements
    c. Review customer, business partner, and collective-bargaining agreements to determine any contractual obligations with regard to data in question
    d. Determine whether any third party is the proper notifying party
    e. Consider whether a document hold may be necessary or appropriate

7. Determine whether and what notifications, reporting or consultation is necessary or appropriate:
    a. Consult and report to appropriate company leadership and management
    b. Consider report to law enforcement if appropriate, and they are not already aware
        i. if contacted by law enforcement, work with them to determine the scope and purpose of the attack, potentially impacted information assets, whether the attack is ongoing, whether the incident is similar to others, and other pertinent information
        ii. Ascertain whether law enforcement requests delayed notification to public, affected individuals, government agencies, etc.

iii. Take care not to waive privilege with law enforcement

c. Determine whether consultation with relevant customers, business partners or vendors is necessary or appropriate, pursuant to contract or otherwise

d. Assess need to make or update SEC public filing disclosures

e. Assess need to notify consumers, customers, employees, third parties, federal or state regulators, foreign authorities, or national credit reporting agencies

i. Depending upon the type of information involved, notification to federal and state regulators may include: State Attorneys General and state agencies, Federal Trade Commission, Department of Health and Human Services, Securities and Exchange Commission, U.S. Secret Service, and Federal Bureau of Investigation

ii. Consider need or advisability of providing credit monitoring and ID theft insurance to affected individuals

f. Assess notification to insurance carriers

g. Consider internal communications to affected employees

h. Consider external and internal communications measures, including whether to establish calls centers, web page and/or toll-free telephone number, employee notices, etc.

8. Prepare for possible plaintiff's litigation from impacted consumers and potential investigations from state and federal agencies:

a. Consider issuing a litigation hold notice to all relevant employees and IT departments

b. Preserve all documents regarding prior efforts to increase security, the impacted systems, the response to the breach, and all other potentially relevant documents

c. Consult with outside counsel regarding next steps to avoid and/or prepare for litigation and investigations, or legislative inquiries

9. If information involves foreign data subjects, consult legal counsel from the impacted jurisdictions and assess foreign legal obligations

10. Document all actions taken (including all notifications)

11. Keep senior management apprised; report on privacy and information security compliance to appropriate executives

12. Review or update determinations, after appropriate investigation, as to whether misuse of stolen data has occurred or is reasonably likely or unlikely, with the assistance of forensic and legal experts; reassess whether any former employees, current employees or competitors could be involved

13. Determine whether any company or business partner trade secrets, IP, corporate records or negotiating documents are affected

14. Consider possibility of pursuing legal action against relevant cyber criminals
15. Monitor possible ongoing misuse of data in question
16. Finalize assessments: a. Internal investigation of incident b. Elimination of any residual or persistent threats or malware c. Assessment of value of compromised data d. Revisit need to revise or supplement public disclosures
17. Conduct final "after action" review and debriefing regarding overall incident and "lessons learned"
18. Evaluate need to revise company information security policies, employee training, and handbook procedures and implement any revised security measures with appropriate communications to employees a. Reaffirm and strengthen company commitment to privacy and information security
19. Consider counseling or disciplinary action for employees or other personnel as appropriate
20. Refine and memorialize enhanced policies and incident response plan

Notes

What CEOs and Directors Need from GCs

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The Role of the General Counsel

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Role of the General Counsel

- Sarbanes-Oxley, Dodd-Frank, increasing FCPA and other compliance regulations and enforcement, as well as increased governance focus and shareholder activism, has made the role of the General Counsel more critical to the enterprise.
- The General Counsel's role is more than just that of the in-house lawyer. General Counsel are becoming business-savvy leaders and members of senior executive teams combining commercial awareness with legal knowledge and experience. They are often strategic business advisors with a strong voice at the Board level.

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Role of the General Counsel

- A recent survey by the Association of Corporate Counsel and the Georgetown Center for the Study of the Legal Profession found that, *the General Counsel's value is to provide legal advice, counsel the CEO and provide strategic input into the business*.[1]
- Today, General Counsel are members of the executive management team at 86% of U.S. publicly traded companies, vs. 56% 10 years ago.[2]
- *"The General Counsel must be both a business partner with senior management as well as the guardian of corporate integrity – and therefore must become a persuasive counselor."* [3]

[1] Source: "Skills for the 21st Century General Counsel (2013)" published by the Association of Corporate Counsel.
[2] Survey of directors conducted by NYSE Governance Services, *Corporate Board Member* and executive recruiting firm BarkerGilmore.
[3] *Indispensable Counsel*, by E. Norman Veasey and Christine T. DiGuglielmo, Oxford, 2012.

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Qualities of a Strong General Counsel

- Trusted counselor to the executive management team and the Board;
- Strategic business partner; solid understanding of the business; ability to provide input on business decisions and effectively communicate legal and business risks to non-lawyers;
- Excellent legal and management skills;
- Collaborative team player;
  - Solution and outcome oriented
- Excellent judgment especially with respect to risk analysis and balancing;
- Willingness and ability to change and innovate; and
- High level of integrity, calmness, discretion and passion.

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Roles of the General Counsel from Management Perspective

- Manage in-house and outside lawyers and legal issues and liabilities;
- Key member of executive team;
- Key player on major deals, trials, financial reporting, and crisis management;
- Advisor to company for SEC, FDA, DOJ, FTC, etc. regulations;
- Assists with Board management; and
- "Keeper of compliance."

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Roles of the GC from the Board Perspective

- Advisor on corporate governance
  - Technical requirements for Board and Committees;
  - Advice on fulfilling ever expanding oversight role, including risk management (e.g., cybersecurity);
  - Advice on activism, including "engagement" with shareholders;
  - Advice on Board self-evaluations;
  - Board education;
  - Developer of agendas and designer of information flow required for major decisions;
  - Careful drafter/reviewer of corporate minutes;
- Advisor on regulatory, compliance, major transactions and litigation matters;
- Guardian of corporate integrity and liability; and
- Trusted business advisor.

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Where do GCs add the most value for Boards?

Source: Survey of directors conducted by NYSE Governance Services, *Corporate Board Member* and executive Recruiting firm BarkerGilmore.

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GENERAL COUNSEL ROUNDTABLE 2014

- General Counsel serve at least two masters
- Some aspects of what CEOs and Directors need or want from GCs may cause a conflict

CEOs

- CEOs need a consigliore/confidante
- CEOs need help managing the Board

Directors

- Directors expect the GC to advise them and represent the corporate entity, not management

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TREND REPORT

THE NEW ERA OF THE GENERAL COUNSEL

While the value of general counsel to the executive management team and the board might be hard to quantify, there's no disputing the fact they have become much more than legal advisers, according to a recent study.

General counsel a decade ago were less integrated with the executive management team of publicly traded companies, but for a variety of reasons, the position has grown in stature and has become a vital component of the top echelon. For example, GCs are members of the executive management team at 86% of U.S. publicly traded companies, up from 56% 10 years ago, according to a survey of directors conducted by NYSE Governance Services, Corporate Board Member, and executive recruiting firm BarkerGilmore.

"Enlightened management now understands that you need a tightly integrated senior team because everyone's issues affect everyone else," says Siri Marshall, former general counsel at General Mills and a current director for Alphatec Holdings, Equifax, and Ameriprise Financial. "You need your senior team to see the bigger picture. They might be taking on too much risk or missing opportunities if they don't see all the implications."

Compared with 20 years ago when the GC was more of a legal expert, today's environment is such that more of a holistic approach is needed, says Robert Barker, a managing partner at BarkerGilmore's main office in Fairport, New York. "Gone is the day when the general counsel was simply managing the legal and regulatory [issues]," he says. "Today's general counsel is expected to be that business-savvy leader who is going to contribute to driving the business, an executive who happens to be a lawyer."

The survey, conducted in January, included responses from roughly 225 directors serving as chairman, committee chairs, or CEOs at U.S. publicly traded companies representing a full range of market capitalizations. GCs scored high marks on their ability to add value to the company and the management team. About 93% of respondents said they "strongly agree" or "agree" that GCs provide sound judgment. Similarly, 90% said they act as a sounding board.

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"CEOs especially recognize the importance of the general counsel to the overall success of the business," says Larry Thompson, general counsel of Purchase, New York–based PepsiCo., a trustee for Templeton Emerging Markets Income Fund, and a former director for Delta Air Lines.

About 87% said they strongly agree or agree that the general counsel acts as a trusted adviser. "Trusted counsel are people that are not going to be yes-men," says Charles Whitehead, professor of law at Cornell Law School, and a former general counsel and director. "They are going to be just as inclined to give a different perspective, potentially one that is inconsistent with what others on the board are doing."

Is your general counsel a member of the management team?

10 YEARS AGO
56% Yes

TODAY
86% Yes

Over the past decade or so, increasing regulatory scrutiny has beset publicly traded companies with more demands. After the fall of companies such as Enron and Worldcom in the early 2000s—failures due essentially to financial shell games—the subsequent passage of the Sarbanes-Oxley Act brought on new reporting requirements and increased liability of executives with regard to financial statements.

How does your general counsel add value?

93% Provides sound judgment

90% Acts as a sounding board

87% Acts as a trusted adviser to the CEO

71% Contributes to business strategy discussion

62% Assists with executing the business plan

Since then, things have piled on top. In recent years, the Justice Department has stepped up enforcement on the Foreign Corrupt Practices Act. The Dodd-Frank Act introduced a whole new layer of rules, including a conflict minerals provision requiring companies to file with the Securities and Exchange Commission sources of certain minerals linked to the Democratic Republic of the Congo and neighboring countries. And now add to the list the recent rise in concerns over data privacy and cybersecurity.

"In light of the regulatory environment and the complexity of doing business these days, having someone with an ability to assess the positives and negatives becomes just that much more critical," Whitehead says. "Most outside lawyers simply can't do this. They don't know the internal workings of the company. They have never been there. Very often they are not trained to make the same sorts of judgment calls that an in-house lawyer has to make."

These decisions include helping companies avoid crises. "There is an expectation that the general counsel is going to do what he or she can do to not only alert senior management to issues that will get the company in trouble, but also help design and implement preventative measures to help them stay out of trouble," Thompson says.

GCs and Boards

Similarly, GCs are also relied on by boards, the study shows. Compliance risk tops the list, with 99% of respondents saying GCs add value in this area. When it comes to governance, 95% of respondents said they strongly agree or agree that GCs offer value, and 86% said GCs help boards with risk issues. Yet the general counsel's role extends well beyond these traditional areas: 86% said GCs act as a sounding board. About 78% said they help with use of analytical skills, asking tough or sensitive questions, and assisting with crisis management. About 85% said GCs add value in merger and acquisition discussions.

"The general counsel has become a profit center for these companies," says John Gilmore, a managing partner at BarkerGilmore. "That is the difference in mentality in looking at it from a business perspective, not just a legal perspective."

There's also a benefit in allowing GCs to serve as directors elsewhere, the survey indicates. About 45% said they strongly agree or agree that having GCs as outside directors adds value because they are experienced with evaluating risk scenarios on a daily basis, and 42% said it strengthens the board's decision-making process.

"Having a GC on the board of another company elevates the role of law within board deliberations," Whitehead says. In fact, having directors with legal training on boards of public, nonfinancial companies also adds 9.5% to a firm's value, according to research published by Whitehead.

Serving on an outside board can also make for a better general counsel, Marshall says. "You should get an enhanced perspective by working with very able people with broad and different experience," she explains. "You learn a lot."

GCs thinking about serving on outside boards should consider the time commitment, Thompson notes. Many just don't have the time. But if they do, he suggests bringing general business acumen to the table rather than strictly legal advice. "It's very important you serve as only a board member," Thompson advises. "Of course you bring your legal training and any other business experience you have to the position, but it's clear you never try to be the company's lawyer."

It's that well-rounded acumen that has elevated GCs over time. "They have amassed a lot more business expertise," Barker says. "They are bringing a lot more to the table."

—Charles Keenan

Notes

Speaker Biographies

SIDLEY AUSTIN LLP
SIDLEY

MICHAEL BROWN

Interim President and Chief Executive Officer

Symantec Corporation

Michael A. Brown was named interim President and Chief Executive Officer of Symantec in March 2014. He remains on Symantec's board of directors, which he joined following the company's merger with VERITAS Software in July 2005.

Mr. Brown previously served as chairman and chief executive officer of Quantum Corporation. Under his leadership, Quantum grew from $3 billion to $6 billion in revenues and held market leadership positions in data back-up and archiving solutions. He has served on the public boards of Maxtor, Digital Impact and Nektar Therapeutics. More recently, Mr. Brown has also been a board chairman and chief executive officer coach for several successful technology companies prior to their acquisitions, including EqualLogic, Line 6, and The Echo Nest among others. In addition to his deep expertise in growing businesses, Mr. Brown has extensive experience in leading and developing executive management teams.

Mr. Brown continues to serve on the board of Quantum. He received his MBA from Stanford University's Graduate School of Business and his BA in Economics from Harvard University. He is married and lives in Palo Alto, California.

THOMAS A. COLE

Partner

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PRACTICES

- Corporate Governance and Executive Compensation
- M&A

ADMISSIONS & CERTIFICATIONS

- Illinois, 1975

EDUCATION

- The University of Chicago Law School (J.D., 1975, with honors, Order of the Coif)
- Johns Hopkins University (A.B., 1970, with honors, *Phi Beta Kappa*)

THOMAS A. COLE is a partner in Sidley's Chicago office. He became a partner of the firm in 1981. For 15 years ended in April 2013, he served as Chair of the firm's Executive Committee, the committee that exercises general authority over the affairs of the firm. In April 2014, he stepped down as a member of the Executive Committee (on which he had served since 1987) and as a member of the firm's Management Committee (on which he had served since 1988).

Mr. Cole focuses his practice on public company mergers and acquisitions and corporate governance. Mr. Cole is consistently recognized by *Chambers USA* and *Chambers Global*, including in their most recent editions. In 2001, Mr. Cole was recognized by *Chambers Global* as one of the 26 U.S. lawyers included in its list of the "Global 100 Lawyers"—"lawyers who stand out from their colleagues and are recognized internationally." He was designated an M&A "Dealmaker of the Year" for 2007 by *The American Lawyer*. He was selected for BTI Consulting's "Client Service All-Star" team in 2008, 2011 and 2014. In 2010 and 2013, he was named to "The Directorship 100," the NACD's list of "the most influential people in the boardroom community."

Corporate governance assignments have included advising public company boards and their standing and special committees on a variety of subjects, including shareholder activism and proxy contests. For the five years ended 1998 and beginning again in 2013, he has taught the seminar on corporate governance at The University of Chicago Law School.

While a partner in the firm, Mr. Cole was also vice president-law of Northwest Industries, Inc. from 1982 through 1985.

He has been involved in dozens of public company mergers and spin-offs, including the following that were each valued at more than $1 billion:

- IGT/GTECH (pending)
- Beam/Suntory
- MidAmerican Energy/NV Energy
- Commercial Metals (successful defense against lcahn)
- Fortune Brands spin-off of Home and Security Business

- Alberto-Culver/Unilever
- AGL/Nicor (represented independent directors)
- Aon/Hewitt
- EOP/Blackstone
- Clear Channel/THLee and Bain (represented special committee)
- Exelon/PSEG (terminated)
- Exelon/NRG (terminated unsolicited merger proposal)
- Pulte/Centex
- Tribune/ESOP-Zell
- Corn Products/Bunge (terminated)
- Nationwide Financial/Nationwide Mutual (represented special committee)
- ServiceMaster/Clayton Dubilier
- CDW/Madison Dearborn
- CNL Hotels/Morgan Stanley
- Ventana Medical/Roche (began as hostile defense)
- Sally Beauty/Clayton Dubilier
- Tellabs/AFC
- Maverick Tube/Tenaris
- IMC/Cargill
- Williams/Barrett (including the successful defense against Shell)
- Kimberly-Clark/Scott Paper
- Monsanto/DeKalb Genetics
- Jefferson Smurfit/Stone Container
- Interpublic Group/True North
- Wolters Kluwer/CCH
- Fred Meyer/QFC
- Aon/Alexander & Alexander
- IMC Global/Vigoro

- Tribune/Renaissance Communications
- Household International spin-offs of Eljer, Scotsman and Schwitzer
- Northwest Industries/Farley
- Ohio Mattress/Gibbons Green

His other significant public company merger transactions include:

- Central Vermont Public Service/Gaz Met
- Renaissance Learning/Permira (represented independent directors)
- Midwest Air Group/TPG (including the successful defense against Air Tran)
- Sun Capital/ShopKo Stores
- Goldner Hawn/ShopKo Stores (topped by Sun Capital)
- Lyphomed/Fujisawa
- Unilever/Helene Curtis
- Mercantile/Mark Twain
- True North/Bozell (including the successful defense against Publicis)
- Humana/Emphesys
- GE Medical/Marquette
- Stone Container/Southwest Forest
- Barrett/Plains
- SFN/Warburg Pincus (represented special committee)
- Ideal Basic/Holderbank (represented special committee)
- Bell & Howell/Bass
- Aon/Frank B. Hall
- BWAY/Kelso (represented special committee)
- Berisford/Scotsman

MEMBERSHIPS & ACTIVITIES

- Trustee, The University of Chicago
- Former Chairman, Board of Directors, Northwestern Memorial HealthCare
- Director, World Sport Chicago

- The Economic Club of Chicago (and a former member of its Board of Directors)
- The Commercial Club of Chicago
- The Law Club of Chicago
- Former Chair of Northwestern University's Garrett Corporate and Securities Law Institute
- Former Co-chair of the Tulane Corporate Law Institute
- Fellow of the American Bar Foundation
- The American Law Institute

KAREN O. COTTLE

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PRACTICES

- Corporate Governance and Executive Compensation
- Privacy, Data Security and Information Law
- Technology & IP Transactions

AREAS OF FOCUS

- FCPA/Anti-Corruption
- Executive Compensation Disclosure
- Insider Trading
- Electronics and Semiconductors
- SEC Disclosure
- Internet, Social Media and E-Commerce
- Internal Investigations
- Patent Litigation
- Technology, Media and Privacy Law
- Trading in Securities by Officers and Directors
- Section 16 Reporting and Liability
- Trade Secret and Unfair Competition Litigation

ADMISSIONS & CERTIFICATIONS

- California, 1976

EDUCATION

- University of California, Berkeley School of Law (Boalt Hall) (J.D., 1976)
- Pomona College (B.A., 1971)

KAREN COTTLE is a senior counsel in Sidley's Corporate Governance and Executive Compensation group and located in the firm's Palo Alto office. Prior to joining Sidley, she was senior vice president, general counsel and corporate secretary of Adobe Systems Incorporated (NASDAQ: ADBE), for 10 years. Karen brings her years of on the ground experience to the legal issues that are of most concern to management and in-house lawyers at global technology and other growth companies.

As a member of Adobe's senior management team, Karen was involved in all aspects of the company's business, and managed the global legal function with responsibility for all matters including corporate governance, securities, M&A, compliance, intellectual property, licensing, product support, litigation, public policy, privacy and anti-piracy enforcement.

Prior to joining Adobe, Karen served as general counsel for Vitria Technology, Inc., where she served as the first general counsel for the public software company and was responsible for all legal matters. Karen also previously worked at Raychem Corporation as division counsel before being promoted to vice president, general counsel and secretary of the company.

In 2012 Karen received *Corporate Board Member Magazine's* Top General Counsel Award, and a Transformative Leadership Award from *Inside Counsel* magazine. Karen is recommended in Technology: Data Protection and Privacy in the *Legal 500 US* 2014.

Karen served as law clerk to the Honorable Spencer Williams, United States District Court, Northern District of California.

Achievements

Karen speaks at industry events regarding issues of concern to technology companies, most recently as the keynote speaker at the Silicon Valley Association of General Counsel's All Hands Meeting. Additionally, she is a member of the first class of the DirectWomen Institute, part of the DirectWomen Initiative, an effort by the American Bar Association, the ABA Section of Business Law and Catalyst, Inc. to increase the number of women lawyers serving as independent directors on boards of large public companies.

MEMBERSHIPS & ACTIVITIES

- Board Member, Hope Services
- Board Member, American Arbitration Association

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PRACTICES

- Corporate Governance and Executive Compensation
- M&A
- Emerging Companies and Venture Capital
- Securities

AREAS OF FOCUS

- Cleantech

INDUSTRIES

- Technology

ADMISSIONS & CERTIFICATIONS

- California, 1981

EDUCATION

- Stanford Law School (J.D., 1981)
- Stanford University (A.B., B.S., 1978, *Phi Beta Kappa*)

CLERKSHIPS

- U.S. District Court, N.D. of California, Samuel Conti

TOM DEFILIPPS is the managing partner of Sidley's Palo Alto office, global co-chair of the Emerging Companies and Venture Capital practice, and head of the Northern California Corporate group. Tom's practice covers a broad range of legal matters, including corporate formation, venture capital financings, public offerings, strategic partnerships and joint ventures, mergers and acquisitions, and public company governance and disclosure. He represents both U.S. and foreign companies across many technology industries, including software, digital media, telecommunications, Internet infrastructure, e-commerce, social networking, renewable energy, and life sciences.

Prior to joining the firm, Tom worked as a partner at a nationally-known law firm focused on technology and growth enterprises. As company counsel, he managed public offerings for numerous NASDAQ and NYSE-listed corporations. His start-up company clients have received funding from almost every significant venture capital investor in Silicon Valley.

Since coming to Sidley, Tom has managed significant transactions including Corsair Components' IPO process (strategic transaction with private equity firm Francisco Partners before pricing) and Flextronics International's acquisition of Motorola Mobility's global manufacturing operations. Prior to joining Sidley, Tom managed IPOs for industry leading companies, such as Dolby Laboratories, Trimble Navigation, and Altera Corporation.

Recent venture capital investments that Tom has handled for his company clients include West Summit's investment in VeriSilicon, Index Ventures' investment in Centrify Corporation, Softbank Ventures Korea's investment in TVU Networks, and Vantage Point Capital Partners' investment in Pica8.

Tom is recognized in the 2012, 2013, 2014 and 2015 editions of *The Best Lawyers in America* in Corporate Governance, Information Technology and M&A Law.

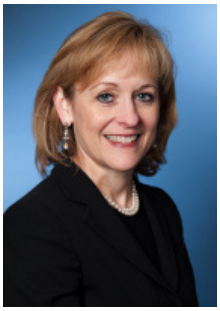
MEMBERSHIPS & ACTIVITIES

- Board of Directors and Pro Bono Legal Counsel, San Francisco Exploratorium
- Volunteer, Stanford Law School-Campaign Steering Committee
- Member, Stanford Athletic Board

LAURA FENNELL

Senior Vice President, General Counsel and Secretary

Intuit Inc.



Laura Fennell is senior vice president, general counsel and secretary, leading Intuit's legal, corporate affairs, information and physical security, privacy, and data services teams.

Before joining Intuit in April 2004, Ms. Fennell served as Sun Microsystems' vice president of corporate legal resources and acting general counsel, directing the company's legal staff of more than 250 people. During 11 years at Sun, she was also responsible for the company's corporate and securities law compliance and the Office of the Secretary of the Board of Directors.

Previously, Ms. Fennell was an associate attorney at Wilson Sonsini Goodrich and Rosati, where her practice included public offerings, mergers and acquisitions, private financings and public and private company representation.

She sits on the board of directors of the Children's Discovery Museum of San Jose, providing learning and discovery opportunities for children, families and schools.

Ms. Fennell earned her law degree from Santa Clara University and received her bachelor's degree in business administration from California State University, Chico.

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PRACTICES

- Corporate Governance and Executive Compensation
- M&A
- Securities

AREAS OF FOCUS

- SEC Disclosure
- Life Sciences Transactions
- Pharmaceuticals
- REITs

INDUSTRIES

- Life Sciences
- Technology
- Financial Services Industry

ADMISSIONS & CERTIFICATIONS

- California, 2001
- Illinois, 1996

EDUCATION

- Harvard Law School (J.D., 1996, *cum laude*)
- Columbia University (B.A., 1992, *summa cum laude*, *Phi Beta Kappa*)

SHARON FLANAGAN has over 15 years of experience representing companies in a broad range of merger and acquisition transactions, securities offerings and corporate governance matters. Some notable transactions include:

- Representing Genentech, a member of the Roche Group, in its agreement to acquire Seragon Pharmaceuticals, Inc. for a cash payment of $725 million, plus additional contingent payments of up to $1 billion based on achievement of certain milestones;
- Representing PayPal, Inc. in its acquisition of global payments company, Braintree for a cash payment of $800 million;
- Representing Roche Molecular Systems in its acquisition of Genia Technologies, a DNA sequencing company, for $125 million in cash and up to $225 million in contingent payments depending on the achievement of certain milestones;
- Representing eBay Inc. in the sale of Skype Technologies to Silver Lake Partners for $2 billion; and
- Representing interactive whiteboard maker, SMART Technologies in its dual-listed initial public offering raising $660 million.

Consistently recognized for her work on a number of significant transactions, Sharon was recognized in the 2012-2014 editions of *Chambers USA* in Capital Markets and Corporate/M&A. She has also been recognized in the 2011 through 2015 editions of *The Best Lawyers in America* in the area of Corporate Law and in 2012, she was named the *Best Lawyers'* 2013 San Francisco Corporate Law "Lawyer of the Year." She was also recommended in Healthcare: Life Sciences, Capital Markets, and M&A in the *Legal 500 US 2013*. In addition, *The American Lawyer* named her as one of "45 Under 45" – "the best of the best among young women lawyers in the Am Law 200." Sharon was named to the *Daily Journal's* list of the Top 25 Women Corporate and Transactional Lawyers in California. In 2011, she was also named by

Law360 as a Rising Star, earning her a spot as one of their 10 corporate finance rising legal stars under 40. In 2013, *The Recorder* recognized her as one of its Women Leaders in Technology Law.

Sharon has experience handling acquisitions, divestitures and strategic alliances for a broad range of companies, with a particular focus on life sciences and technology companies. In addition, she regularly represents companies in their cross-border M&A transactions. For example, she represented PayPal in its acquisition of Zong SA, a mobile payments company in Switzerland. She also represented Genentech in its purchase from Lonza of a cell culture biologic manufacturing facility in Singapore.

Sharon has extensive experience representing issuers and underwriters in a variety of securities offerings, including initial public offerings, follow-on offerings, and registered and 144A debt offerings. She represented DaVita Inc., a Fortune 500 healthcare company, in its acquisition financing for HealthCare Partners, including a $1.25 billion high yield notes offering. She recently represented Merrill Lynch, Pierce, Fenner & Smith Incorporated and Goldman, Sachs & Co. in the initial public offering for retailer, Restoration Hardware.

Sharon advises a number of public companies on corporate governance, disclosure and other SEC compliance matters, as well as ISS/proxy advisory firm matters, stockholder proposals and corporate governance best practices.

Sharon serves as the managing partner of the firm's San Francisco office.

EXPERIENCE

Mergers and Acquisitions:

- Represented PayPal in its acquisition of mobile payments company Card.io
- Represented Genentech in its collaboration and option to acquire Forma Therapeutics
- Represented Hoffmann-La Roche in its collaboration and option to acquire Inception 3
- Represented Aon Corporation in its sale of AIS to Mercury Insurance
- Represented KKR Financial Holdings in its conversion from a REIT into a master LLC structure and the subsequent sale of its REIT subsidiary
- Represented Baxter International Inc. in the spin-off of its worldwide cardiovascular business, Edwards Lifesciences
- Represented Aon Corporation in the sale of the domestic Cananwill business to BB&T
- Represented America West Airlines in its sale of National Leisure Group to USA Networks
- Represented First Data Corporation in its contribution of assets and investment in Home Account Network
- Advised GE Medical Systems in the sale of its global radiotherapy service business to Varian Medical Systems
- Represented IMC Global Inc. in its stock-for-stock merger with Freeport-McMoRan

- Represented MotivePower Industries Inc. in its stock-for-stock merger with Westinghouse Air Brake Company
- Advised Tribune Company in its tender offer for CareerBuilder
- Represented URS Corporation in its acquisition of EG&G Technical Services and Lear Siegler Services from The Carlyle Group

Securities Offerings:

- Represented DaVita Inc. in its $4.6 billion refinancing, including the offering of $1.6 billion of notes
- Represented the underwriter in HCP's $1 billion offering of common stock
- Represented CoreLogic in its $400 million 144A notes offering
- Represented the underwriters in Nationwide Health Properties' $190 million offering of common stock
- Advised DaVita Inc. in its $400 million 144A notes offering
- Represented Allscripts Healthcare Solutions, Inc. in its common stock offering raising $149 million

MEMBERSHIPS & ACTIVITIES

Sharon is a member of the American Bar Association and the California Bar Association. She is a former vice-chairman of the Corporations Committee of the State Bar of California, during which time she drafted legislation signed into law by Governor Schwarzenegger that reconciled a conflict between the SEC proxy rules and California law.

JOSEPH R. GUERRA

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PRACTICES

- Appellate

AREAS OF FOCUS

- Administrative Law Appeals
- Climate Change
- Federal Tax Controversy
- Commercial Litigation Appeals
- Energy and Transportation Law Appeals
- Healthcare and Federal Food, Drug and Cosmetic Act Appeals
- Pension Plan Litigation
- Patent and Intellectual Property Rights Appeals

ADMISSIONS & CERTIFICATIONS

- U.S. Supreme Court
- U.S. Court of Federal Claims, 2013
- U.S. Court of Appeals, 1st Circuit, 2007
- U.S. Court of Appeals, 2nd Circuit
- U.S. Court of Appeals, 3rd Circuit
- U.S. Court of Appeals, 4th Circuit
- U.S. Court of Appeals, 5th Circuit
- U.S. Court of Appeals, 6th Circuit
- U.S. Court of Appeals, 7th Circuit
- U.S. Court of Appeals, 9th Circuit
- U.S. Court of Appeals, 10th Circuit
- U.S. Court of Appeals, D.C. Circuit
- U.S. Court of Appeals, Federal Circuit
- U.S. District Court, District of Columbia
- District of Columbia, 1989

EDUCATION

- Georgetown University Law Center (J.D., 1985, *summa cum laude*)
- University of Virginia (B.A., 1980, with distinction)

CLERKSHIPS

- United States Supreme Court, William J. Brennan, Jr.
- U.S. District Court, District of Columbia, Joyce Green

JOE GUERRA, a co-chair of Sidley's Appellate practice and a former Principal Deputy Associate Attorney General for the U.S. Department of Justice, focuses his practice on both traditional appellate representation and law-intensive, trial-level litigation. As an appellate advocate, Joe has argued a wide range of federal constitutional, statutory and administrative law matters in federal and state courts throughout the country, including the United States Supreme Court and most of the federal courts of appeals. He also helps develop legal strategies and argue dispositive motions at the trial level in high-stakes cases that raise novel and often complex questions of federal or state law.

Joe represents clients across a broad range of industries—including those in the energy, telecommunications, financial and insurance sectors—on an expansive array of legal issues. His recent experience includes:

- Successfully argued before the Supreme Court that the Driver's Privacy Protection Act does not permit class action lawyers to obtain and use personal information in division of motor vehicle records for mass solicitation of clients. *Maracich v. Spears* (U.S. No. 12-25 June 17, 2013). Writing for a five-justice majority, Justice Kennedy adopted Sidley's arguments that lawyer solicitations are governed

by a provision in the DPPA that permits use of DMV information for bulk solicitation only with express consent, which petitioners had not given.

- Argued and won a challenge in the D.C. Circuit to a decision by the Federal Energy Regulatory Commission denying Mobil Pipeline Company's application for authority to charge market-based rates on one of its oil pipelines. *Mobil Pipeline Co. v. Federal Energy Regulatory Comm'n*, 676 F.3d 1098 (D.C. Cir. 2012).
- Argued and won a case in which the Supreme Court held that the Age Discrimination in Employment Act prohibits retaliation against covered federal workers who complain about age discrimination. *Gomez-Perez v. Potter*, 553 U.S. 474 (2008).
- Successfully defended the interpretation of claims in a patent owned by MetLife in an appeal before the Federal Circuit.
- Argued and won appeals for AT&T in the Third Circuit in cases that raised issues under ERISA and questions of preemption and other issues under the Communications Act and federal antitrust laws.
- Argued on behalf of intervenor The National Association of Manufacturers and won dismissal of a suit seeking to compel federal regulation of greenhouse gas emissions under a novel "public trust doctrine" theory. *Alec L. v. Lisa P. Jackson*, 863 F. Supp.2d 11 (D.D.C. 2012).

In addition to his court appearances, Joe has filed numerous briefs in the United States Supreme Court, the D.C. Circuit, the Federal Circuit and other federal and state appellate courts in cases involving, among other matters, takings claims, commercial and political speech restrictions, due process claims, the constitutionality of term limits, federal preemption, patent law principles, the United States' obligations under international treaties, and the scope of liability under the Alien Tort Statute.

Joe has been commended as a "Litigation Star" in the District of Columbia by *Benchmark Litigation* (2012-2014), recognized in *The Legal 500 US* (2012-2014) and included in the 2013-2015 editions of *The Best Lawyers in America*. In addition, Joe is ranked in *Chambers USA 2014* in Appellate Law.

EXPERIENCE

The breadth of Joe's practice is reflected in the following sampling of his representative engagements.

- Assisted Duke Energy, Bank of America and other clients to obtain dismissal of various class action claims that attacked the legality of cash balance pension plans under ERISA and other federal laws.
- Was the architect—for clients Duke Energy and American Electric Power—of successful arguments challenging the ability of states and private plaintiffs to use federal common law or state nuisance law to seek remedies for the alleged public nuisance of global climate change – including a displacement argument that ultimately prevailed before the Supreme Court.
- Obtained a dismissal of an ERISA class action challenging the pension aspects of AT&T's spin-off of Lucent Technologies, then successfully defended that dismissal in the D.C. Circuit.
- Won dismissal of a case alleging that AT&T defrauded the Federal Circuit in a patent infringement appeal, and successfully defended that dismissal before the Fifth Circuit.

- Won dismissal of a state class action raising commerce clause challenges to AT&T's collection of local telephone taxes.
- Succeeded in a Fourth Circuit appeal challenging the imposition of municipal franchise fees on AT&T's interstate cable.
- Represented AT&T in enforcing telecommunications services patents in U.S. District Court.
- Handled appeals for AT&T of state arbitration orders in federal district court under section 252 of the Telecommunications Act of 1996.
- Briefed and argued a successful motion to dismiss a suit against manufacturers of Agent Orange brought by Vietnamese citizens under the Alien Tort Statute.

Joe returned to Sidley in 2011 after serving for almost two years as Principal Deputy Associate Attorney General for the U.S. Department of Justice. In that position, he supervised, on behalf of the Associate Attorney General, major civil litigation involving the United States, helped formulate Justice Department policies with respect to such litigation, and served as a liaison to the Department's senior management offices, the White House Counsel's Office and the general counsel offices of client agencies.

From July 1999 until January 2001, Joe served as a Deputy Assistant Attorney General in the Office of Legal Counsel, United States Department of Justice, where he worked on a broad range of constitutional, statutory and administrative law matters. Joe also served as a law clerk to Associate Justice William J. Brennan, Jr. of the United States Supreme Court, and to the Honorable Joyce Hens Green of the U.S. District Court for the District of Columbia. While in law school, he served as an intern to the Honorable Harry T. Edwards of the United States Court of Appeals for the District of Columbia Circuit.

PUBLICATIONS

- "Q&A With Sidley Austin's Joe Guerra," *Law360*, (February 19, 2013)

MEMBERSHIPS & ACTIVITIES

Joe is a global coordinator of Sidley's Appellate Practice, a member of the firm's Office of General Counsel, and an elected Master of the Edward Coke Appellate Inn of Court.

MARK E. HADDAD

Partner

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PRACTICES

- Appellate

AREAS OF FOCUS

- Administrative Law Appeals
- Antitrust and Unfair Competition
- Antitrust Litigation
- Business Torts
- Clinical Trials
- Commercial Litigation Appeals
- Energy and Transportation Law Appeals
- Consumer Fraud/Product Class Actions
- Communications Law Appeals
- Copyright and Theft of Idea Litigation
- Financial Institutions Litigation
- Healthcare and Federal Food, Drug and Cosmetic Act Appeals
- False Advertising Litigation
- Multidistrict Litigation
- False Claims Act
- Healthcare Enforcement
- Patent and Intellectual Property Rights Appeals
- Pharmaceuticals
- Technology, Media and Privacy Law
- Trade Secret and Unfair Competition Litigation
- Healthcare Antitrust
- Law Firm Representation
- Healthcare Fraud
- Healthcare Litigation
- Preemption
- Insurance and Reinsurance Appeals
- Products Liability and Class Actions Appeals
- Pro Bono Appeals

INDUSTRIES

- Life Sciences

ADMISSIONS & CERTIFICATIONS

- U.S. Supreme Court, 1992
- U.S. Court of Appeals, D.C. Circuit, 1995
- U.S. Court of Appeals, Federal Circuit, 1996
- U.S. Court of Appeals, 1st Circuit, 2008
- U.S. Court of Appeals, 2nd Circuit, 2008
- U.S. Court of Appeals, 3rd Circuit, 2001
- U.S. Court of Appeals, 5th Circuit, 1990
- U.S. Court of Appeals, 9th Circuit, 1991
- U.S. District Court, C.D. of California, 2000
- U.S. District Court, E.D. of California, 2004
- U.S. District Court, N.D. of California, 2000
- U.S. District Court, S.D. of California, 2000
- U.S. District Court, District of Columbia, 1995
- District of Columbia, 1994
- California, 2000

EDUCATION

- Yale Law School (J.D., 1985, Editor-in-Chief, Yale Law Journal)
- Oxford University (M.A., 1980, Rhodes Scholar)
- Stanford University (A.B., 1978, with honors, with distinction)

CLERKSHIPS

- United States Supreme Court, William J. Brennan, Jr.
- U.S. District Court, E.D. of Pennsylvania, Louis Pollak

MARK HADDAD leads the Appellate practice in the Los Angeles office and is a co-chair of Sidley's global Appellate practice. Mark has briefed numerous cases in the United States Supreme Court, and regularly practices in federal and state appellate courts throughout the country. His matters frequently involve the impact of federal constitutional, statutory, and regulatory provisions on the scope of business liability, and arise in a variety of areas, including administrative law, antitrust law, constitutional law (commerce clause, due process, equal protection, First Amendment, federalism and preemption), intellectual property, products liability, and professional responsibility.

Mark is recognized as a leading California Appellate lawyer in *Chambers USA: America's Leading Lawyers for Business* 2014-2015 and 2013-2014, is named a "LMG Life Science Star" for Litigation & Enforcement (2013), is listed as a leading lawyer in Supreme Court and Appellate practices in *The Legal 500* US (2012-2014), and in Commercial Litigation in *Who's Who in International Business Law* (2011, 2012). Mark has had many notable appellate successes, recently including:

- *Wyatt Technology Corp. v. Malvern Instruments Inc.,* No. 10-55343 (9th Cir. 2013) (affirming judgment for client on all issues of copyright infringement, theft of trade secrets, and Lanham Act claims);
- *Ischemia Research and Education Foundation Inc. v. Pfizer, Inc.* No. H034653, (Cal. Ct. App., 6th Dist., 2013) (affirming trial court's order granting client's motion for new trial and vacating judgment of damages and interest totaling $58 million);
- *AstraZeneca Pharmaceuticals LP v. Commonwealth of Kentucky*, No. 2011-CA-000225 (Ky. Ct. App. 2012) (lead counsel in successful appeal from adverse jury verdict and award of damages/penalties exceeding $20 million in pharmaceutical price reporting case; court ordered entry of judgment for AstraZeneca); and
- *Transport Insurance Co. v. TIG Insurance Co.*, 202 Cal. App. 4th 984 (Cal. Ct. App. 2012) (an article in California's Daily Journal observed that this reinsurance decision clarified an "important limitation" to the acquiescence exception to the doctrine of invited error, an issue significant to many appeals).

Pending appeals include:

- *Grail Semiconductor Inc. v. Mitsubishi Electric & Electronics USA, Inc.*, No. H038714 (Cal. Ct. App. 6th Dist., April 22, 2014) (initially retained to argue post-trial motions, which led to order vacating $124 million jury verdict; lead counsel in appeal and now in petition for review seeking entry of judgment for defendants);
- *United States ex rel. Schumann v. AstraZeneca Pharmaceuticals LP*, No. 13-1489 (3d Cir. 2013) (lead counsel for defendant/appellee in relator's appeal from district court's dismissal of complaint under federal and state false claims acts);
- *Harkonen v. United States Dep't of Justice, No.* (No. 13-15197) (9th Cir.) (addressing public's right to seek and obtain in federal court the correction of a federal agency's false statements of fact).
- *Scheinberg v. County of Sonoma, No*. A135286 (Cal. Ct. App. 1st Dist., brief filed Dec. 12, 2012) (retained to handle appeal of adverse jury verdict; issues on appeal include taking of property without just compensation, instructional error, and juror misconduct); and
- *FremantleMedia NA Inc. v. Cochran*, No. B247541 (Cal. Ct. App. 2d, 2013) (appeal from motion denying JNOV in employment discrimination matter involving former television model; initially retained post-trial and successfully briefed and argued motion for new trial vacating award of over $8 million in compensatory and punitive damages).

EXPERIENCE

He joined Sidley's Washington, DC office in 1987 and has been resident in the Los Angeles office since 1999. Mark's other notable appellate victories include:

- *In re Actimmune Marketing Litigation,* Nos. 10-17237, 10-17239 (9th Cir. Dec. 30, 2011) (affirming dismissal of civil fraud claims of putative classes of consumers and third-party healthcare payors against Sidley client W. Scott Harkonen, as well as against InterMune Inc. and Genentech); and
- *AT&T Communications of California, Inc. v. PacWest Telecomm, Inc.*, 651 F.3d 980 (9th Cir. 2011) (reversing district court, and holding that federal law preempts order of California Public Utilities Commission).

In 2009, two of Mark's matters were ranked as the two most important decisions of 2009 by "Drug and Device Law," a widely read life-sciences blog:

- *AstraZeneca Pharm., LP v. State of Alabama*, 41 So.3d 15 (Ala. 2009) (reversing $160 million award and rendering judgment after a jury trial challenging pharmaceutical price reporting); and
- *DePriest v. AstraZeneca Pharm., LP,* 351 S.W.3d 168 (Ark. 2009) (dismissal of putative national consumer class action under safe harbor to state deceptive trade practices act).

Additional notable appellate victories include:

- *Hurlic v. Southern California Gas Company*, 539 F.3d 1024 (9th Cir. 2008) (affirming dismissal of several ERISA-based challenges to conversion to cash balance plan, and preemption of state law claim);
- *Pennsylvania Employee Benefits Trust Fund v. Zeneca Inc.*, 499 F.3d 239 (3d Cir. 2007) (affirming dismissal on preemption grounds of putative national class action challenging the marketing of a prescription drug), vacated and remanded for further consideration in light of Wyeth v. Levine, 129 S.Ct. 1187 (2009) (dismissed on other grounds, May 2010);
- *Prohias v. AstraZeneca Pharmaceuticals LP*, 958 So.2d 1054 (Fla. 3d DCA 2007) (affirming dismissal of putative state consumer class action on preemption and state law grounds);
- *State of California ex rel. Grayson v. Pac. Bell Tel. Co et al.*, 142 Cal. App. 4th 741, 48 Cal. Rptr. 3d 427 (2006) (affirming dismissal of false claims act complaint arising out of alleged failure to escheat funds); and
- *Ferguson Transp. Inc. v. North American Van Lines*, 687 So.2d 821 (Fla. 1997) (reversing $13 million punitive damages award).

PUBLICATIONS

Mark is the author of articles in *Top 20 Food and Drug Cases And Cases To Watch*, (published annually by the Food & Drug Law Institute in 2014, 2012, 2011, and 2010), including articles on first amendment protection for commercial speech, preemption, and average wholesale pricing litigation.

MEMBERSHIPS & ACTIVITIES

In addition to leading the Appellate practice in Sidley's Los Angeles office and serving as a co-chair of the firm's global Appellate practice, Mark serves on Sidley's Committee Professional Liability and Risk Management. He is a member of the Board of Directors of Public Counsel and a member of the Board of Directors of Town Hall-Los Angeles.

PRO BONO

Mark has an extensive pro bono appellate practice. His pending and recent pro bono matters include: *Schuette v. Coalition to Defend Affirmative Action*, No. 12-682 (U.S.S.C. brief filed Aug. 30, 2013, on behalf of The Leadership Conference on Civil and Human Rights, The Leadership Conference Education Fund, and 31 additional signatories in support of the determination by the Sixth Circuit that a Michigan ballot initiative ("Proposal 2"), which amended the state constitution to prohibit affirmative action in education, violates equal protection under the *Hunter/Seattle* political restructuring doctrine; representation of leading bipartisan current and former Members of Congress as *amicus curiae* in *Agency for International Development v. Alliance for Open Society Int'l, Inc.*, No. 12-10, involving first amendment issues (filed Apr. 3, 2013); representation of 21 National Latino Organizations as *amici curiae* in *Shelby County, Alabama v. Holder*, No. 12-96 (filed Feb. 1, 2013), involving the constitutionality of Congress's extension of Section 5 of the Voting Rights Act; representation of 47 current and former Members of Congress as *amici curiae* in *Coleman v. Court of Appeals of Maryland*, No. 10-1016 (U.S. Sup. Ct. Mar. 12, 2012). Mark is the recipient of awards from the ACLU Foundation for Southern California and from the National Association of Protection and Advocacy Systems for prior pro bono appellate work in the areas of criminal justice and protection of the rights of persons with disabilities.

EVENTS

Mark frequently speaks at client retreats, general counsel roundtables, and continuing legal education events on recent decisions of the Supreme Court. His speaking engagements include serving as a panel member at the 2013 annual meeting of the Institute for Conflict Prevention and Resolution on arbitration-related cases pending in the Supreme Court and Ninth Circuit; at the Rand Corporation on "Palliative Care: Facing Tough Choices," where he addressed the Supreme Court's right-to-die jurisprudence; and "In Conversation with Justice Scalia," where he interviewed the Justice at a meeting at Town-Hall Los Angeles.

DAVID H. HOFFMAN

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PRACTICES

- Complex Commercial Litigation
- Intellectual Property Litigation
- Privacy, Data Security and Information Law
- White Collar: Government Litigation & Investigations

AREAS OF FOCUS

- Copyright and Theft of Idea Litigation
- False Claims Act
- Compliance Counseling - White Collar
- Cybersecurity, Cybercrime and Data Breaches
- FCPA/Anti-Corruption
- Internal Investigations
- Patent Litigation
- Technology, Media and Privacy Law
- Trade Secret and Unfair Competition Litigation
- Trials
- Sports
- Trademark Litigation

ADMISSIONS & CERTIFICATIONS

- U.S. District Court, N.D. of Illinois - General, 1998
- Illinois, 1995

EDUCATION

- The University of Chicago Law School (J.D., 1995, with high honors; Articles Editor, Law Review; Order of the Coif)
- Yale University (B.A., 1988, *cum laude*)

CLERKSHIPS

- United States Supreme Court, William H. Rehnquist
- U.S. Court of Appeals, 2nd Circuit, Dennis G. Jacobs

DAVID H. HOFFMAN is a former Inspector General, federal prosecutor, and Supreme Court clerk. He has tried over a dozen federal jury cases, argued and briefed multiple appeals in the U.S. Court of Appeals, directed hundreds of investigations, and advised numerous public and private entities on ethics and compliance matters. His practice focuses on complex commercial litigation at both the trial and appellate levels, internal investigations and other white collar matters, and work relating to data breaches and cybersecurity.

Litigation: David is an experienced trial and appellate lawyer, having tried 14 federal jury trials, most as first chair, and acted as lead counsel in over 100 evidentiary hearings and other contested proceedings in federal and state court. His recent representations in private practice for large publicly-traded companies have ranged from intellectual property litigation to commodities fraud litigation to False Claims Act matters. For instance, he has served as lead or co-lead trial counsel for Sidley teams that won recent litigation victories for two Fortune 50 companies. In one, he served as lead counsel for a Fortune 50 financial services and risk management company that was sued for fraud in relation to large renewable-energy-credit transactions, winning a summary judgment motion after extensive discovery but before any depositions were taken. In another, he served as co-lead counsel in the successful defense of a Fortune 50 retailer in a computer software trade secret case involving eleven claimed trade secrets and the company's hiring of one of the plaintiff's employees. Shortly before the scheduled trial, summary judgment was granted for the company on all claims.

Data breaches and cybersecurity: David has led a multidisciplinary team of Sidley lawyers who have represented Neiman Marcus in relation to the cybersecurity attack it experienced and the resulting class-action litigation and governmental investigations and inquiries. Among other work, David led the Sidley team representing Neiman Marcus in congressional hearings and inquiries, has led forensic investigations

relating to the cybersecurity attack, has worked closely with forensic experts on all related issues regarding PCI compliance, and serves as lead counsel in the consolidated class-action litigation.

Internal investigations and white collar matters: David's white collar work focuses on internal investigations and the representation of corporations in government investigations by DOJ, the SEC, state Attorneys General, and other agencies involving allegations of corruption, fraud, False Claims Act violations, and trade secret theft. He has conducted and directed many internal investigations involving serious allegations of fraud and corruption, frequently under intense media scrutiny, and he has experience working closely with crisis communications firms. His investigative experience in the public and private sectors has ranged from long-term, multi-national federal criminal investigations involving large teams of investigators and many wiretaps, to internal investigations involving senior corporate and political officials, lower-level employees, corporate entities, and others. His understanding of compliance, audit, and internal control issues as a former Inspector General gives him additional depth in handling investigative matters involving fraud or financial improprieties. He is especially experienced in corruption and bribery issues, and has taught *Public Corruption and the Law* at the University of Chicago Law School for the past five years. Among other recent internal investigations, he has led investigations for two Fortune 50 companies, one Fortune 500 company, a prominent family investment fund, and the Audit Committee of an Australian public company on topics including fraud, embezzlement, bribery and other corruption allegations against company executives and employees, public officials, and third-party vendors.

Compliance, governance, and ethics counseling: As Inspector General of the City of Chicago, David established, hired, and supervised an external audit team that examined internal controls and compliance procedures throughout a $7-billion-per-year, 36,000-employee entity. At Sidley, as Inspector General, and as a member of the Illinois Reform Commission, he has helped design compliance systems and procedures for a large number of entities, ranging from Fortune 500 companies to large government divisions to publicly traded companies. He is highly experienced in designing systems to deter corruption and misconduct and encourage ethical behavior. In 2011, he was appointed to the Audit Committee of the Board of Directors of the U.S. Legal Services Corporation (LSC), after helping design governance, compliance, and ethics systems and procedures for LSC as a member of the Fiscal Oversight Task Force.

Full Professional Biography: David graduated from Yale University with a B.A. *cum laude* in History in 1988, where he was captain of the rugby team. He subsequently served as press secretary and foreign policy legislative assistant to U.S. Senator David L. Boren (D-OK). David graduated from the University of Chicago Law School in 1995 with High Honors, *Order of the Coif*, and served as Articles Editor of the *Law Review*. He was a Tony Patino Fellow, received the University President's Award for Volunteer Service, and founded the community service group Neighbors that partners with the adjacent Woodlawn community.

David served as a law clerk for Chief Justice William H. Rehnquist in October Term 1996, and for Judge Dennis G. Jacobs of the U.S. Court Appeals for the Second Circuit from 1995 to 1996.

From 1998 to 2005, David served as an Assistant U.S. Attorney with the U.S. Attorney's Office in Chicago. David led investigations and prosecutions involving health care fraud, bank fraud, and other types of fraud, civil rights violations, organized gang conspiracies, and interstate weapons trafficking, among other matters. David tried over a dozen jury trials, most as first chair, and briefed and argued multiple appeals in the U.S. Court of Appeals for the Seventh Circuit. In 2002, U.S. Attorney Pat Fitzgerald

promoted David to be a Deputy Chief to supervise a newly-created gang unit. David also served as co-head of the office's Project Safe Neighborhoods anti-gun-violence program and was a recipient of the Justice Department's Director's Award. In editorials, the *Chicago Tribune* praised David as "an uncommonly accomplished crime-fighter" who was an "architect of strategies that have slashed this city's murder rate" from 2002 to 2005.

From 2005 to 2009, David served as the Inspector General for the City of Chicago, following appointment by the Mayor and confirmation by the City Council. David transformed the office into a strong, independent anti-corruption agency that conducted investigations, audits, and analyses involving all operations of the City of Chicago, a $7-billion-per-year municipal corporation with 36,000 employees. Under David's leadership, the office for the first time conducted high-level criminal investigations, including large joint investigations with the U.S. Attorney's Office, the FBI, the Antitrust Section of DOJ, and federal Inspector General offices. He also moved the office away from being a purely investigative office, and hired a team of auditors which, for the first time, began conducting independent audits relating to compliance, efficiency, and other issues.

In 2009, while Inspector General, David was appointed by Governor Pat Quinn to serve as a Commissioner on the Illinois Reform Commission, the independent body created after the arrest of Governor Blagojevich to recommend anti-corruption and ethics reforms for Illinois. The Commission issued its report in April 2009, recommending sweeping legislative changes, some of which were enacted by the state legislature.

David was a candidate for the United States Senate in 2010, placing second in the Democratic primary by a margin of 39% to 34%. David was endorsed by all the major daily newspapers in Illinois, with the *Chicago Tribune* calling him "an incorruptible man who tells truth to power," and *Crain's Chicago Business* praising his "independence and integrity."

Since Spring 2010, David has been a Lecturer in Law at the University of Chicago Law School, where he teaches *Public Corruption and the Law*. He has been a guest lecturer at Northwestern University Law School, Notre Dame Law School, and the Department of Justice training academy.

David was appointed in 2011 to the Audit Committee of the Board of Directors of the U.S. Legal Services Corporation. From 2010 to 2011, he served as a member of the LSC's Fiscal Oversight Task Force, which issued a report in August 2011 recommending new governance, compliance, and ethics systems and procedures for LSC.

In July 2012, Mayor Rahm Emanuel appointed David to serve as one of five Board members of the newly-created Chicago Infrastructure Trust, a not-for-profit entity designed to assess the wisdom and feasibility of private financing for public infrastructure projects, and to provide a vehicle for such financing when it is consistent with the public interest.

David co-chairs the Civil Rights Executive Committee of the Anti-Defamation League (Midwest Chapter), is a member of the Visiting Committee of the University of Chicago Harris School of Public Policy, and serves on the Board of Directors of the American Constitution Society's Chicago Lawyer Chapter (Advisory Board), the Better Government Association, the John Howard Association (Advisory Board), Providence St-Mel School, and SGA Youth & Family Services.

David received the John Gardner Public Service Award in 2012 from Common Cause, the Champion of the Public Interest award in 2010 from BPI (Business and Professional People for the Public Interest), and was chosen for *Crain's 40 Under 40* in 2006.

Selected Speeches, Presentations, and News

- "SEC and DOJ Hot Topics 2014," Panel Presentation, The Metropolitan Club, Chicago (Feb. 11, 2014)
- "Law Firm Cyber Risk Conference," Panel Presentation, The Metropolitan Club, Chicago (Dec. 10, 2013)
- "Safety, Security, & Privacy After Boston," Panel Presentation, Chicago Union League Club (May 15, 2013)
- "Redflex Outlines Bribe Probe in Chicago Contract," Chicago Tribune (March 4, 2013)
- "Anti-Corruption Developments in the BRICS," Panel presentation, American Bar Association's National Institute on the FCPA (Oct. 18, 2012).
- "Post Dodd-Frank: The Rise and Focus of Commodities Enforcement," Panel presentation, American Bar Association annual meeting, Criminal Justice Section (Aug. 3, 2012).
- "How to Get More Ethics and Less Corruption In Government," Keynote address, Illinois City/County Management Association (June 29, 2012).
- Speech at Common Cause Good Government Awards, Chicago, IL (May 10, 2012).
- Sidley Hosts Illinois Supreme Court Forum (February 27, 2012).
- "Enforcement Trends and Their Impact on Compliance Programs," Presentation to the National Forensic Accounting Conference, American Institute of CPA's (Sept. 21, 2011).
- David Hoffman Moderates Investigative Journalism Panel (July 28, 2011).
- The Federal Bar Association's Second Annual Members-Only Ethics Program (May 3, 2011).
- David Hoffman to Join Sidley Austin LLP (February 15, 2011).

MICHAEL JACOBSON

Senior Vice President, Legal Affairs, General Counsel and Secretary

eBay Inc.

Mike Jacobson joined eBay Inc. in August 1998 and is responsible for overseeing the company's legal department and government relations groups. He is responsible for interactions with legislators, and law enforcement and for the company's commercial, compliance, IP, litigation, and other legal matters. His group consists of approximately 360 lawyers and other professionals in 22 countries around the world.

Prior to eBay, Mr. Jacobson was a partner with Cooley Godward LLP (now Cooley LLP) where he was recognized as an expert in securities law. His responsibilities included corporate and securities transactions, including mergers and acquisition transactions, public offerings, and venture capital financings.

Mr. Jacobson earned an A.B. in Economics, Magna Cum Laude, in 1975 from Harvard College, where he was a member of Phi Beta Kappa. He subsequently received his law degree from Stanford University in 1981, where he was a Nathan Abbot Scholar and a member of Order of the Coif.

PETER D. KEISLER

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PRACTICES

- Appellate

AREAS OF FOCUS

- Administrative Law Appeals
- Commercial Litigation Appeals
- Communications Law Appeals
- Energy and Transportation Law Appeals
- National Security
- Telecommunications, Broadband and Video

ADMISSIONS & CERTIFICATIONS

- U.S. Supreme Court, 1992
- U.S. Court of Appeals, 2nd Circuit, 2000
- U.S. Court of Appeals, 5th Circuit, 2004
- U.S. Court of Appeals, 6th Circuit, 1999
- U.S. Court of Appeals, 7th Circuit, 1991
- U.S. Court of Appeals, 8th Circuit, 1991
- U.S. Court of Appeals, 9th Circuit, 2009
- U.S. Court of Appeals, 10th Circuit, 1997
- U.S. Court of Appeals, 11th Circuit, 1994
- U.S. Court of Appeals, D.C. Circuit, 1989
- U.S. Court of Appeals, Federal Circuit, 2008
- U.S. District Court, District of Columbia, 1990
- District of Columbia, 1989

EDUCATION

- Yale Law School (J.D., 1985)
- Yale University (B.A., 1981, *magna cum laude*, with distinction)

CLERKSHIPS

- United States Supreme Court, Anthony Kennedy
- U.S. Court of Appeals, D.C. Circuit, Robert Bork

PETER D. KEISLER, a former Acting Attorney General of the United States and a co-chair of Sidley's Appellate practice, has successfully represented some of the country's largest companies in the telecommunications, transportation, energy and healthcare industries, as well as a host of national trade associations, providing extensive insight and experience gained from his more than 25 years of private and public sector experience. Including him in its top-tier of the nation's appellate lawyers, *Chambers USA* 2014 notes that clients told the directory that Peter "is one of the top appellate litigators in the country at this time. He has incredible mastery of appellate argument, and how to submit the most compelling case to federal judges."

Peter has argued a wide range of federal constitutional, statutory, and administrative law cases. His practice representing clients before the United States Supreme Court, federal courts of appeals and federal district courts has included the leading role in the nation's most important energy lawsuits of the past several years, including *UARG v. EPA, AEP v. Connecticut*, *EME Homer City Generation LP v. EPA*, and *United States v. Cinergy Corp*.

Peter's recent arguments before the U.S. Supreme Court include:

- *Utility Air Regulatory Group v. Environmental Protection Agency (UARG v. EPA)*. Peter successfully argued that the EPA has no authority to impose permitting obligations on a source based solely on its emissions of greenhouse gases.

- *American Electric Power Co. v. Connecticut*. Peter successfully represented four utility companies in this case, in which the Court unanimously reversed the court of appeals and held that states and private parties could not seek judicially-imposed reductions in greenhouse gas emissions against electric utilities under a federal common-law nuisance theory. The leading Supreme Court blog called this litigation "the biggest-ever case on the issue of global warming" and AmLaw Media named Peter its "Appellate Lawyer of the Week" for the argument, calling the case "one of the biggest environmental cases of the decade, if not the century."

- *National Cable & Telecommunications Association v. Gulf Power*. Peter successfully argued on behalf of the cable television industry in this case, in which the Court held that cable operators offering high-speed Internet service are entitled to access to electric utility poles at regulated rates.

- *Roberts v. Sea-Land Services, Inc.* Peter successfully argued on behalf of the respondent in this case involving the construction and application of federal worker compensation laws.

Peter is widely recognized as a leader in his field. In 2012, the *National Law Journal/Legal Times* named Peter to its list of "Champions & Visionaries," a select group of "attorneys whose business foresight or legal acumen has expanded their firms, advanced the law or improved government." The *NLJ* noted that Peter "has been front and center in almost every major energy lawsuit in the past two years." Since 2011, Peter has been recognized in *Benchmark Litigation* for his appellate practice and has also been included in the "Best Lawyers in America" directory for his appellate, commercial litigation and media law work. Peter also was named one of the 2011 "MVPs" for Energy by *Law360*. *Chambers USA* 2013 noted that Peter "is singled out as 'one of the most extraordinary advocates' for his outstanding work on behalf of clients from a wide range of industries." *Washingtonian* magazine has included Peter on its 2013 list of Washington's Best Lawyers as one of the region's "best legal minds" for his Supreme Court practice.

Peter started his career at Sidley as an associate in 1989 after completing a clerkship for Justice Anthony Kennedy. In 2002 he joined the Department of Justice (DOJ) as the Principal Deputy Associate Attorney General. Peter spent most of his more than five-year tenure at DOJ as the Assistant Attorney General for the Civil Division, and ultimately served as Acting Attorney General of the United States. He returned to Sidley in 2008.

EXPERIENCE

Recent cases handled by Peter include:

- *Utility Air Regulatory Group v. EPA,* No. 12-1146 (L).

- *United States ex rel. Fair Laboratory Practices Associates v. Quest Diagnostics Incorporated,* 734 F.3d 154 (2d Cir. 2013).

- *National Association of Manufacturers v. SEC,* No. 13-5252.

- *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011).

- *National Cable & Telecommunications Association v. Gulf Power*, 534 U.S. 327 (2002).

- *Roberts v. Sea-Land Services*, Inc., 132 S. Ct. 1350 (2012).

- *United States v. Cinergy Corp.*, 623 F.3d 455 (7th Cir. 2010).

- *Medicines Company v. Kappos.*, 462 F. App'x 974 (Fed. Cir. 2012), 731 F. Supp. 2d 470 (2010).

In these and other matters, Peter draws upon a wealth of experience gained from his notable government service. As Acting Attorney General of the United States—the chief law enforcement officer of the country—Peter directed the work of the Department of Justice, including its investigative agencies and litigating divisions. In his role as Assistant Attorney General for the Civil Division, Peter oversaw the work of the Justice Department's largest litigating division, consisting of approximately 700 attorneys who represent the interests of the United States in federal and state courts throughout the country on a wide range of cases, including cases relating to administrative law, constitutional law, government contracts, False Claims Act and other civil fraud enforcement, bankruptcy, intellectual property, tort law, immigration law, foreign law, the constitutionality of federal statutes, the lawfulness of government programs and their implementation, national security matters, and civil and criminal enforcement of the Food, Drug and Cosmetic Act and other consumer protection laws. As head of the Civil Division, Peter personally argued a number of significant cases on behalf of the government involving issues of constitutional, statutory, regulatory and common law.

Peter also served as Associate Counsel to the President in the Office of White House Counsel under President Ronald Reagan.

MEMBERSHIPS & ACTIVITIES

In addition to his role as a global coordinator of Sidley's nationally recognized Appellate practice, Peter is a member of the firm's Executive Committee.

Peter serves as a member of the Advisory Committee on Civil Rules, the Committee which studies and develops proposed amendments to the Federal Rules of Civil Procedure for submission to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

CAMERON F. KERRY

Senior Counsel

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PRACTICES

- Complex Commercial Litigation
- Government Strategies
- International Trade
- Privacy, Data Security and Information Law

ADMISSIONS & CERTIFICATIONS

- U.S. Supreme Court, 1998
- U.S. Court of Appeals, 1st Circuit, 2000
- U.S. Court of Appeals, 2nd Circuit, 1983
- U.S. Court of Appeals, 6th Circuit, 1996
- U.S. Court of Appeals, D.C. Circuit, 1980
- U.S. District Court, District of Columbia, 1980
- U.S. District Court, District of Massachusetts, 1983
- District of Columbia, 1979
- Massachusetts, 1978
- New York, 2009

EDUCATION

- Boston College Law School (J.D., 1978, *magna cum laude*, Executive Editor of the Boston College Law Review)
- Harvard University (A.B., 1972, *cum laude*)

CLERKSHIPS

- U.S. Court of Appeals, 5th Circuit, Elbert P. Tuttle

CAM KERRY, former General Counsel and Acting Secretary of the United States Department of Commerce, has played a leadership role in addressing many of the biggest challenges facing business today, including consumer privacy issues and international discussions regarding the U.S. legal system for data protection. His broad practice operates at the intersection of law and technology and is informed by his years of government service and over three decades in private practice. Cam joins his wealth of experience in the highest levels of government with the global and inter-disciplinary resources of Sidley's highly regarded Privacy, Data Security and Information Law team. In addition, Cam works on complex matters involving international trade relations, intellectual property policy, litigation, government affairs and communications.

Cam's practice involves strategic counseling, regulatory guidance and litigation, and includes:

- Providing general counsels, chief privacy officers and boards of directors with strategic advice on global privacy and data protection compliance programs and information governance protocols.
- Advising on corporate cybersecurity preparedness, including deployment of the NIST Framework developed at the Department of Commerce.
- Representing companies in litigation and government investigations concerning alleged unfair or deceptive business practices regarding privacy and other consumer protection issues.
- Assisting clients to advance their objectives to promote international digital trade, cross-border data transfers, cloud services and innovative Big Data and new technology applications.

- Advising and representing U.S. and multinational companies regarding new EU Data Protection Regulation, and global "binding corporate rules."

Throughout his life, Cam has been deeply involved in politics. During the 2004 presidential campaign, he was a close advisor and national surrogate for his brother, Democratic nominee John Kerry. The period when Cam served as Acting Commerce Secretary while his brother served as Secretary of State marked the first time in U.S. history that two brothers served in the Cabinet at the same time.

EXPERIENCE

While at the United States Department of Commerce, Cam:

- Oversaw the work of more than 400 lawyers across the National Institute of Standards & Technology, National Telecommunications & Information Administration, Patent & Trademark Office, National Oceanic & Atmospheric Administration and the International Trade Administration.
- Served as the co-chair of the National Sciences & Technology Counsel Subcommittee on Privacy and Internet Policy, and spearheaded the development and implementation of the White House blueprint on consumer privacy, drafting privacy legislation and engaging with international partners on privacy issues.
- Coordinated U.S. government strategy on global Internet governance and was involved in the Administration's response to the European Commission's proposed regulation on data privacy and discussion of the US-EU Safe Harbor Framework.
- Served as the Commerce representative to the National Security Council Deputies Committee on cybersecurity issues, including the development of legislation and the President's February, 2013 Executive Order, telecommunications supply chain security and cyber operations.
- Established and co-chaired the Secretary's Internet Policy Task Force, which focused on the impact of digital technology on privacy, cybersecurity, copyright and the flow of information across international borders.
- Led the Commercial Law Working Group under the Joint Commission on Commerce and Trade (JCCT), which addressed access to the legal services market and difficulties in obtaining licenses necessary to do business.
- Led the U.S. delegation to the celebration of the 10th Anniversary of the Anti-Bribery Convention and conducted various bilateral meetings with other countries to urge them to adopt or enforce foreign bribery laws.
- Supervised anti-dumping and countervailing duty proceedings before the Commerce Department, the International Trade Commission (ITC), or federal courts and proceedings before international bodies.

Before joining the government, Cam was a partner with a Boston-headquartered national law firm and, early in his career, an associate with a Washington, D.C.-based law firm.

MEMBERSHIPS & ACTIVITIES

Cam is the Ann R. and Andrew H. Tisch Distinguished Visiting Fellow in Governance Studies and the Center for Technology Innovation at Brookings Institution. He also is a visiting scholar with the MIT Media Lab.

He currently serves on the State Department Advisory Committee on International Communications & Information Policy. He is also a member of the advisory boards for the Future of Privacy Forum, the International Association of Privacy Professionals (IAPP) and the Innovation Partnership Network.

CATHERINE LEGO

Director

SanDisk/Lam Research/Fairchild

Catherine P. Lego is the founder of Lego Ventures LLC, a consulting services firm for early stage technology companies, formed in 1992. From December 1999 to December 2009, she was the General Partner of The Photonics Fund, LLP, an early stage venture capital investment firm focused on investing in components, modules and systems companies for the fiber optics telecommunications market, which she founded. Ms. Lego was a general partner at Oak Investment Partners, a venture capital firm, from 1981 to 1992. Prior to Oak Investment Partners, she practiced as a Certified Public Accountant with Coopers & Lybrand, an accounting firm.

Ms. Lego has served as a member of the board of directors and as the chair of the audit committee of SanDisk Corporation, a global developer of flash memory storage solutions, since 2004 and was a director there from 1989 to 2002. Since 2006 she has been a member of the board of Lam Research a leading semiconductor equipment provider. She is currently the chair of its audit committee. In August, 2013 she joined the board of Fairchild Semiconductor a fabricator of power management devices and sits on its nominating and governance and compensation committees. She is also a member of the NACD Audit Committee Chair Advisory Council.

She has previously served on the board of directors of the following public companies: ETEC Corporation, a producer of electron beam lithography tools, from 1991 through 1997; Uniphase Corporation (presently JDS Uniphase Corporation), a designer and manufacturer of components and modules for the fiber optic based telecommunications industry and laser-based semiconductor defect examination and analysis equipment, from 1994 until 1999, when it merged with JDS-Fitel; MicroLinear, a fabless analog semiconductor company in the early 90s and Zitel Corporation, an information technology company, from 1995 to 2000. Ms. Lego also served as a member of the board of directors and as the chair of the audit committee of the Cosworth Group, a private United Kingdom-based precision engineering products and services company, from March 2011 to June 2013, StrataLight Communications, Inc., a private fiber transmission subsystems developer, from September 2007 to January 2009 and WJ Communications, Inc., a broadband communications company, from October 2004 to May 2008.

Ms. Lego received a B.A. degree in economics and biology from Williams College and served as a trustee at the College from 1994 to 1999. Her M.S. degree in accounting was earned at the New York University Stern School of Business.

SARAH O'DOWD

Senior Vice President and Chief Legal Officer

Lam Research Corporation

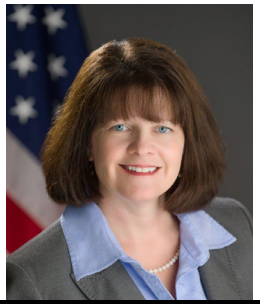
Sarah A. O'Dowd joined Lam Research in September 2008 and is the company's Senior Vice President and Chief Legal Officer. In this position, she is responsible for general legal matters, intellectual property, foreign trade, and ethics and compliance. In April 2009, she was appointed Vice President of Human Resources and, in addition to her legal function, served in this capacity through May 2012.

Prior to joining Lam Research, Ms. O'Dowd was Vice President and General Counsel for FibroGen, Inc. from February 2007 until September 2008. Until February 2007, Ms. O'Dowd was a shareholder in the law firm of Heller Ehrman LLP for more than 20 years, practicing in the areas of corporate securities, governance, and M&A for a variety of clients, principally publicly traded high technology companies.

MAUREEN K. OHLHAUSEN

Commissioner

Federal Trade Commission



The Honorable Maureen K. Ohlhausen was sworn in as a Commissioner of the Federal Trade Commission on April 4, 2012, to a term that expires in September 2018.

Prior to joining the Commission, Ms. Ohlhausen was a partner at Wilkinson Barker Knauer, LLP, where she focused on FTC issues, including privacy, data protection, and cybersecurity.

Ms. Ohlhausen previously served at the Commission for 11 years, most recently as Director of the Office of Policy Planning from 2004 to 2008, where she led the FTC's Internet Access Task Force. She was also Deputy Director of that office. From 1998 to 2001, Ms. Ohlhausen was an attorney advisor for former FTC Commissioner Orson Swindle, advising him on competition and consumer protection matters. She started at the FTC General Counsel's Office in 1997.

Before coming to the FTC, Ms. Ohlhausen spent five years at the U.S. Court of Appeals for the D.C. Circuit, serving as a law clerk for Judge David B. Sentelle and as a staff attorney. Ms. Ohlhausen also clerked for Judge Robert Yock of the U.S. Court of Federal Claims from 1991 to 1992.

Ms. Ohlhausen graduated with distinction from George Mason University School of Law in 1991 and graduated with honors from the University of Virginia in 1984.

Ms. Ohlhausen was on the adjunct faculty at George Mason University School of Law, where she taught privacy law and unfair trade practices. She served as a Senior Editor of the Antitrust Law Journal and a member of the American Bar Association Task Force on Competition and Public Policy. She has authored a variety of articles on competition law, privacy, and technology matters.

Ms. Ohlhausen lives in Virginia with her husband, Peter Ohlhausen, and their four children.

ALAN CHARLES RAUL

Partner

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PRACTICES

- Government Strategies
- Privacy, Data Security and Information Law
- White Collar: Government Litigation & Investigations

AREAS OF FOCUS

- Administrative Law Appeals
- Compliance Counseling - White Collar
- Congressional Investigations
- Consumer Fraud/17200 Class Actions
- Consumer Protection and Unfair Trade Practices
- EU Law and Regulation
- Digital Media and Entertainment
- EU and International Privacy
- Electronic and Mobile Commerce
- False Advertising Litigation
- False Claims Act
- Healthcare and Federal Food, Drug and Cosmetic Act Appeals
- International Commercial Arbitration
- Internet, Social Media and E-Commerce
- National Security
- Technology, Media and Privacy Law
- Financial Information and Privacy Law
- Information Security and Data Breaches
- Healthcare Information and Privacy
- Trade Secret and Unfair Competition Litigation
- Government Contracts
- Trademark Litigation

INDUSTRIES

- Life Sciences
- Technology

ADMISSIONS & CERTIFICATIONS

- U.S. Supreme Court, 1988
- U.S. Court of Appeals, 2nd Circuit, 2009
- U.S. Court of Appeals, D.C. Circuit, 1982
- U.S. District Court, S.D. of New York, 2003
- District of Columbia, 1982
- New York, 1982

EDUCATION

- Yale Law School (J.D., 1980)
- Harvard University (M.P.A., 1977)
- Harvard University (A.B., 1975, *magna cum laude*)

CLERKSHIPS

- U.S. Court of Appeals, D.C. Circuit, Malcolm R. Wilkey

ALAN RAUL is the founder and lead global coordinator of Sidley's highly ranked Privacy, Data Security and Information Law practice. He represents companies on federal, state and international privacy issues, including global data protection and compliance programs, data breaches, cybersecurity, consumer protection issues and Internet law. Alan's practice involves litigation and counseling regarding consumer class actions, FTC, State Attorney General, Department of Justice and other government investigations, enforcement actions and regulation. Alan provides clients with perspective gained from extensive government services, as well. He previously served as Vice Chairman of the White House Privacy and Civil Liberties Oversight Board, General Counsel of the Office of Management and Budget, and of the U.S. Department of Agriculture, and Associate Counsel to the President.

Alan serves as a member of the Privacy, Intellectual Property, Technology, and Antitrust Litigation Advisory Committee of the National Chamber Litigation Center (affiliated with the U.S. Chamber of

Commerce). Alan also serves on the American Bar Association's Cybersecurity Legal Task Force by appointment of the ABA President.

Illustrative of the breadth of Alan's practice, representative types of matters handled include:

- Privacy and cybersecurity litigation, data breach incidents, regulatory investigations and compliance counseling.
- International data protection compliance programs and cross-border transfers.
- FTC and State Attorney General investigations involving consumer protection, privacy, data security and unfair or deceptive business practices.
- Cybersecurity, government information requests and national security issues.
- Internet litigation and counseling under Electronic Communications Privacy Act and the Computer Fraud and Abuse Act.
- Administrative Procedure Act and False Claims Act litigation, regulatory advocacy and counseling.
- Congressional and Inspector General investigations.

In addition to leading a "Privacy and Data Security" practice nationally rated by *Chambers Global* and *Chambers USA*, Alan is ranked by Chambers in its top tier of Privacy and Data Security practitioners. *Chambers USA* has described Alan as a "true 'ambassador' for the privacy sector" who "attracts praise for his deep knowledge of the field. Interviewees stress that 'he gives invaluable advice' and is known to be a strong litigator. He also earns plaudits for his regulatory compliance and data protection policy expertise." He has been named as a leading international Internet and E-Commerce Lawyer in *Who's Who Legal*. Alan was also named to *Ethisphere Institute's* "Attorneys Who Matter" in Data Privacy/Security, which recognizes lawyers with the highest commitment to public service, legal community engagement and academic involvement.

In 1991, Alan co-founded the "Lawyers Have Heart" 10K run and walk, to benefit the American Heart Association. He continues his active involvement with the event.

EXPERIENCE

Privacy; Data Security; Consumer Protection; FTC/State AGs; Internet; eCommerce

- *In the Matter of a Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corporation* (SDNY 2014) – filed amicus brief and presented oral argument on behalf of AT&T Corp. in support of Microsoft; brief argued that search warrant may not be executed for data stored on foreign-based servers absent a substantial nexus with the U.S.
- *Kelley v. Federal Bureau of Investigation, et al.*, (DDC 2013) – privacy litigation (Privacy Act, US Constitution, state privacy torts); representing individual plaintiffs alleging privacy rights violations
- *In re: Google Inc. Cookie Placement Consumer Privacy Litigation* (MDL D. Del. 2013) – privacy litigation (ECPA, SCA, CFAA); filed as a class action; representing an Internet advertising company defendant.

- *Addison Automatics, Inc. v. The RTC Group, Inc.*, (N.D. IL 2013) – privacy litigation involving alleged unsolicited faxed advertisements (TCPA); filed as a class action; representing a defendant technology company.
- *Verzani v. Costco Wholesale Corp.* (2d Cir. and SDNY 2011) – consumer protection action; filed as a class action; represented defendant.
- *One Stella Maris Corp. v. SeamlessWeb Professional Solutions LLC et al.,* (NY Sup. Ct 2011) – consumer fraud, unfair business practice, and contract claims filed as a class action; Sidley represented an Internet company/eCommerce defendant.
- *FCC v. AT&T Inc.* (U.S. 2011) – Amicus brief in FOIA case supporting AT&T; represented trade association (Business Roundtable).
- *Randolph v. ING Life Ins. and Annuity Co.* (D.D.C. and DC Super. Ct 2007) – privacy and data breach litigation; filed as a class action; represented financial company defendant.
- *AT&T Corp. v. 2PrePaid Inc.*, (M.D. Fla. 2006) – Internet and eCommerce injunction; represented plaintiff in a copyright and IP infringement action.
- *Metro-Goldwyn-Mayer Studios Inc., et al. v. Grokster, Ltd. et al.*, (U.S. 2005) – Amicus brief in support of copyright holders filed on behalf of Americans for Tax Reform in Support of Petitioners.
- *Retail Servs. v. Freebies Pub.* (4th Cir. and ED VA 2004) – Lanham Act and Anticybersquatting Consumer Protection Act (ACPA); represented plaintiff seeking declaration that use of the term "freebie" in domain name did not infringe defendants' registered trademark, and that the term "freebies" was generic and not protectable as a trademark.
- *AT&T v. Sprint* (SDNY 2004); represented plaintiff in unfair competition, trademark infringement and Anticybersquatting Consumer Protection Act litigation.
- *In re Pharmatrak, Inc. Privacy Litigation* (D. MA and 1st Cir. 2003) – privacy litigation (ECPA, SCA, CFAA); filed as class action; represented pharmaceutical company defendant.
- *Physicians Interactive v. Lathian Systems Inc., et al.*, (E.D. VA 2003) – Privacy and computer fraud litigation involving alleged hacking, unauthorized use of customer information and theft of trade secrets; Sidley obtained TRO and injunctive relief against competitor that hacked client's website.
- *AT&T Corp. v. ATT&T, Inc.,* (D. Del. 2002) – Litigation regarding use of infringing mark; Sidley obtained TRO and summary judgment under Anticybersquatting Consumer Protection Act (ACPA).
- *AT&T Corp. v. AT-T.COM* (E.D. VA 2002) – Sidley obtained transfer of infringing domain name, and order disabling associated IP address under ACPA.

Government Litigation: False Claims Act; Administrative Law, Regulatory Enforcement, International Arbitration

- *U.S. ex rel. Steven Mateski v. Raytheon Co.* (C.D. CA and 9th Cir. 2013) – represent defendant in False Claims Act (FCA) litigation.

- *Duke Energy International Peru Investments No. 1 Ltd. v. Republic of Peru* (ICSID 2011) – international arbitration involving investment dispute over energy sector privatization; represented foreign sovereign (Peru).

- *Tyson Foods, Inc. v. U.S. Department of Agriculture* (DDC 2008) – regulatory litigation; represented plaintiff seeking to enjoin USDA.

Alan's government service is extensive. He served as Vice Chairman of the White House Privacy and Civil Liberties Oversight Board, a panel established by the legislation implementing the recommendations of the 9/11 Commission, from March 2006 through January 2008. Alan was appointed to this part-time position by President George W. Bush following confirmation by the United States Senate. The Board advises the President and heads of Executive departments and agencies, and reports to Congress, to ensure that privacy and civil liberties are appropriately considered in the development and implementation of laws, regulations and Executive branch policies related to efforts to protect the Nation against terrorism. In a December 2001 article in the *Los Angeles Times*, he had recommended the creation of a similar council to advise the President on the civil liberties implications of anti-terrorism measures. More recently, Alan has published pieces in the *Washington Post*, *New York Times*, and *The Hill* exhorting the President and Congress to re-invigorate the Privacy Board.

Alan also served in the White House as Associate Counsel to the President (1986-1988). During his tenure as Associate Counsel to President Ronald Reagan, Alan represented the White House in connection with the Iran-Contra investigations. He subsequently served as General Counsel of the Office of Management and Budget in the Executive Office of the President (1988-1989), and then was appointed by President George H. W. Bush, with Senate confirmation, as General Counsel of the U.S. Department of Agriculture (1989-1993).

PUBLICATIONS

Alan is a frequent author and speaker on privacy and related issues. He is the author of the book, *Privacy and the Digital State: Balancing Public Information and Personal Privacy* (Kluwer Academic Publishers 2001), and a co-author of the book, *Administrative Law of the European Union: Oversight* (ABA 2008). He has appeared frequently as a legal commentator on television and radio, and testifies before Congress on various issues.

Alan also writes and speaks regularly on Internet and information law topics, "junk science," and federal regulatory policy, as well as on constitutional, political and social issues. He has published numerous articles in legal periodicals, as well as pieces in the *Wall Street Journal*, *Washington Post*, *Los Angeles Times*, *New York Times*, *Washington Times*, *Politico*, *The Hill* and various Bloomberg BNA publications. He is the lead author of "Regulatory Daubert: A Proposal to Enhance Judicial Review of Agency Science by Incorporating Daubert Principles into Administrative Law," in the *Journal of Law and Contemporary Problems* (Fall 2003).

Books

- "Cybersecurity for Law Firms," Chapter in *The ABA Cybersecurity Handbook* (ABA Cybersecurity Legal Task Force 2013) (with Jonathan P. Adams)

- *Administrative Law of the European Union: Oversight* (Peter L. Lindseth, Alfred C. Aman and Alan C. Raul: George Bermann, et al., series eds.; ABA Publishing 2008.
- *Privacy and the Digital State: Balancing Public Information and Personal Privacy* (Kluwer 2001).
- "Privacy and Data Protection in the United States," Chapter in *The Debate on Privacy and Security Over the Network: Regulation and Markets* (Fundacion Telefonica 2012)

Representative Articles

- "European Court of Justice Finds 'Right to Be Forgotten' and Compels Google to Remove Links to Lawful Information," in *NY Business Law Journal*, (Summer 2014) (with W. Long, E. McNicholas and G. Scali)
- "Don't Throw the Big Data Out With the Bath Water," *Politico* (April 29, 2014)
- "Spying on Foreigners Needs Controls; Failing to see the benefits to the U.S. of extending some privacy protections to foreigners is shortsighted," *Wall Street Journal* (January 31, 2014)
- "After NSA Revelations, a Privacy Czar is Needed," in *The Washington Post* (September 22, 2013)
- "Lost and Found in Cyberspace," in *The Hill's Congress Blog* (April 5, 2013)
- "What Firms Need to Know About U.S. and EU Moves to Tackle Cybersecurity," in *BNA* (February 22, 2013) (with M. Haarburger)
- "For Republicans, Less Purity and More Reality," in *The Washington Post* (November 8, 2012)
- "Break the Impasse on Cybersecurity," in *The Hill's Congress Blog* (June 11, 2012)
- "Going American on Privacy," in *The Daily Caller* (April 13, 2012)
- "U.S., EU Offer Guidance on Due Diligence for Cloud Computing Arrangements," in *BNA's Daily Report for Executives* (August 16, 2012) (with E. McNicholas)
- "CFPB Lacks Constitutional Checks and Balances," in *The Hill's Congress Blog* (January 25, 2012)
- "Scoffing at Privacy Law," in *The Hill's Congress Blog* (July 11, 2011)
- "Obama Review of Regulatory Burden to Be Weighed in Cost-Benefit Analysis," in *BNA's Daily Report for Executives* (February 9, 2011)
- "European Shift to Concrete Cost Analysis of Data Protection," in *Privacy & Security Law* (March 14, 2011) (with J. Casanova, E. McNicholas, and W. Long)
- "Real Harmony in Cloud Computing Between U.S., EU Closer Than You Think," in *BNA's Daily Report for Executives* (July 26, 2011)
- "New Momentum for U.S. Privacy Legislation with Introduction of Major Bills in Both House and Senate," in *BNA Insights* (July 26, 2011)
- "Obama's Regulatory Powers," in *Politico* (August 8, 2011)

- "Preventing Digital Trade War in the Cloud; New International Data-Sharing Barriers Would Deepen Global Economic Gloom," in *The Washington Times* (October 31, 2011)
- "First Look: Leaked Draft of New EU Data Protection Regulation Suggests Significant Impacts for Global Businesses," in *BNA* (December 12, 2011) (with J. Casanova, E. McNicholas and W. Long)
- "Time to Revive Privacy Board to Protect Civil Liberties," in *The New York Times* (November 22, 2010)
- "SEC Sanctions Broker-Dealer/Investment Advisor for Willfully Failing to Safeguard Customers' Personal Data," in *Privacy & Data Security Law Journal* (January 2009) (with E. McNicholas)
- "Assessing the EU Working Party's Guidance on Harmonizing U.S. Discovery and EU data Protection Requirements," in *BNA's Privacy & Security Law Report* (March 9, 2009) (E. McNicholas, et al.)
- "Reconciling European Data Privacy Concerns with US Discovery Rules: Conflict and Comity," in *Global Competition Litigation Review* (July 2009) (with E. McNicholas, et al.)
- "End of the Notice Paradigm:" FTC's Proposed Sears Settlement Casts Doubt On the Sufficiency of Disclosures in Privacy Policies and User Agreements," in *BNA's Electronic Commerce & Law Report* (July 15, 2009) (with E. McNicholas)
- "Developments in Data Breach Liability," in *Privacy & Data Security Law Journal* (September 2009) (with E. McNicholas, et al.)
- "Privacy and Civil Liberties," in *The Washington Post* (October 23, 2009)
- "Damages for the Harm of Data Breaches and Other Privacy Claims," in *BNA's Privacy & Security Law Report* (September 15, 2008) (with E. McNicholas and J. Tatel)
- "A Path to Resolving European Data Protection Concerns With U.S. Discovery," in *Privacy and Security Law* (October 15, 2007) (with E. McNicholas and J. Dwyer)
- "Undermining Society's Morals," in *The Washington Post* (November 28, 2003)
- "Annoying Judicial Calls On the Do-Not-Call List," in *The Wall Street Journal* (October 6, 2003)
- "Regulatory Daubert: A Proposal to Enhance Judicial Review of Agency Science by Incorporating Daubert Principles Into Administrative Law," in *Law and Contemporary Problems*, School of Law, Duke University, Vol. 66 (Autumn 2003) (with J. Zampa Dwyer)
- "Deeper Judicial Scrutiny Needed for Agencies' Use of Science," in *Legal Backgrounder* (January 25, 2002) (with J. Zampa)
- "In Era of Broken Rules, Society Breaks," in *Los Angeles Times* (October 11, 2002)
- "Anti-Terror Plan Is No Loose Cannon," in *Newsday* (December 6, 2001)
- "Cheer Ashcroft On, With a Little Friendly Oversight, A Civil Liberties Panel Would Help Quell the Naysayers in the Fight Against Terrorism," in *Los Angeles Times* (December 5, 2001.)
- "Privacy Needn't Crumble Before Cookies and Spam," in *Los Angeles Times* (March 1, 2001)

- "Time To Clean House (Let's Make Sure That Our Regulations Jibe With Common Sense)," in *Legal Times* (February 19, 2001)
- "Science and Reason Must Guide Rulemaking in New Administration," in *Legal Opinion Letter* (January 12, 2001)
- "Liability for Computer Glitches and Online Security Lapses," in *BNA's Electronic Commerce Law Report*, 6(31):849 (2001) (with F. Volpe and G. Meyer)
- "Science, Agencies, and the Courts: Is Three A Crowd?" in *ELR* (2001) (with E. Elliott, R. Pierce Jr., T. McGarity and W. Wagner)
- "Ignoring the Constitution Is A Bad Habit," in *The Wall Street Journal* (March 22, 2000)
- "The Courts Thwart the EPA's Power Grab," in *The Wall Street Journal* (May 18, 1999) (with C. Gray)
- "A Privilege for Secret Service Subverts Justice; Agents for Nixon, Reagan, Bush and even Clinton have Testified Before," in *Los Angeles Times* (April 30, 1998)
- "It's Time for Congress to Fire the Independent Counsel," in *The Hill* (May 6, 1998)
- "That "Celestial Fire Called Conscience," in *The Washington Post* (July 27, 1998)
- "Unanimous Censure, Immediate Shunning; Impeachment: There are Better ways to Condemn Clinton's Disgraceful Behavior," in *Los Angeles Times* (December 10, 1998)

MEMBERSHIPS & ACTIVITIES

Alan serves as a member of the Privacy, Intellectual Property, Technology, and Antitrust Litigation Advisory Committee of the National Chamber Litigation Center (affiliated with U.S. Chamber of Commerce).

Alan serves as a Board Member and Secretary of the National China Garden Foundation, which is a non-profit organization established to support the joint efforts of the U.S. and Chinese governments to build and operate a China Garden in the U.S. National Arboretum in Washington, D.C. The Garden is intended to serve as a cultural exchange and as a symbol of bilateral friendship between the two countries.

Alan's other memberships include:

- Washington DC Board of Directors, American Heart Association
- Advisory Council, Atlantic Legal Foundation
- Council on Foreign Relations
- Executive Committee for Administrative Law and Regulation Group, Federalist Society
- Washington Tennis and Education Foundation (former Board Member)
- American Bar Association, Section of Administrative Law and Regulatory Practice (Former Council Member)
- American Bar Association, Section of International Law and Practice (Former Council Member)
- National China Garden Foundation, Board Member and Secretary

CHARLES ROBEL

Director

Go Daddy, Jive Software, Informatica Corporation, Palo Alto Networks Inc.

Chuck Robel is a private investor and was the Chairman of the Board of McAfee Inc. prior to its acquisition by Intel Corporation. He currently serves as the Lead Director of Informatica, Inc., the largest independent data integration company, Jive Software, the leading social business software platform and Model N. In addition, he currently serves on the Board of Directors of Palo Alto Networks, AppDynamics and Go Daddy.

He previously had served as a general partner and chief operating officer at Hummer Winblad Venture Partners, a venture capital fund focused on early stage software company investments, from 2000 to 2005. During his tenure, Hummer Winblad managed an investment portfolio of approximately $1 billion.

Mr. Robel began his career in 1974 at PricewaterhouseCoopers LLP, from which he retired as a partner in 2000. From 1985 to 1995 he managed the PWC Software Services group in Silicon Valley and from 1995 to 2000 he managed the Technology Mergers and Acquisitions group.

Mr. Robel holds a Bachelor of Science degree in Accounting from Arizona State University.

Current Board of Directors Memberships

AppDynamics, Inc.
Member of the Board of Directors
April 2014– Present

That Man May See Foundation – UCSF
Member of the Board of Directors
October 2012– Present

Palo Alto Networks, Inc.
Member of the Board of Directors
June 2011– Present

Jive Software
Lead Director for the Board of Directors
January 2011– Present

Go Daddy Group
Member of the Board of Directors
August 2008– Present

Model N, Inc.
Lead Director for the Board of Directors

January 2007– Present

Informatica Corporation
Lead Director for the Board of Directors
November 2005– Present

Prior Board Memberships and Other Experience

Autodesk, Inc.
Member of the Board of Directors
September 2007– June 2013

DemandTec
Member of the Board of Directors (prior to IBM's $500 million acquisition)
September 2006– February 2012 (5 years 6 months)

McAfee, Inc.
Chairman of the Board
June 2006– February 2011

Adaptec Corporation
Member of the Board of Directors
March 2006– October 2007

Hummer Winblad Venture Partners LLC
General Partner and Chief of Operations
June 2000– December 2005

Borland Software Corporation
Member of the Board of Directors
2003– 2005

PricewaterhouseCoopers LLP
Partner
January 1974– June 2000
Managed the Silicon Valley Software Services practice from 1985-1995 and managed the Mergers and Acquisitions Practice from 1995 - 2000.

ERIKA ROTTENBERG

Former Vice President, General Counsel and Secretary, LinkedIn Corporation

Erika Rottenberg was responsible for worldwide legal affairs at LinkedIn. As General Counsel and Secretary of LinkedIn Corporation (NYSE LNKD), the world's largest professional networking company, she helped drive LinkedIn's mission of connecting the world's professionals to make them more productive and successful. She was responsible for worldwide legal affairs, including corporate, privacy, public policy, commercial, litigation, intellectual property, employment, compliance, regulatory matters and non-U.S. matters, as well as all other matters facing a fast-paced growing, public global internet company.

Before joining LinkedIn, Ms. Rottenberg served as Senior Vice President, General Counsel and Secretary, for SumTotal Systems, a talent development enterprise software company and Vice President, Strategic Development and General Counsel at Creative Labs, the company that brought multimedia to the PC. She helped both companies navigate the regulatory policies and challenges specific to technology-centric public companies.

Ms. Rottenberg began her legal career at the Silicon Valley-based law firm of Cooley Godward Kronish in the litigation practice, focusing on employment law and corporate law, focusing on venture–backed companies, public offerings, newly public company issues, and M&A. Upon graduation from college, she lived in Anchorage, Alaska for five years where she taught junior high school special education, and was actively involved in the teachers' union, including being the Chief Negotiator for the 2400 member strong local union teachers' contract valued at US $250 Million. She holds a law degree from University of California Berkeley's Boalt Hall School of Law, and a BS in Special and Elementary Education from State University of New York at Geneseo.

Ms. Rottenberg serves on the Board of Directors of the Girl Scouts of Northern California and the Silicon Valley Law Foundation.

BRUCE SEWELL

General Counsel and Senior Vice President

Apple Inc.

Bruce Sewell is Apple's general counsel and senior vice president of Legal and Government Affairs, reporting to Apple's CEO. Mr. Sewell serves on the company's executive team and oversees all legal matters, including corporate governance, intellectual property, litigation and securities compliance, as well as government affairs.

Mr. Sewell joined Apple from Intel Corporation in September 2009. At Intel, he was responsible for leading all of Intel's legal, corporate affairs and corporate social responsibility programs, managing attorneys and policy professionals located in over 30 countries around the world. He joined Intel in 1995 as a senior attorney assigned to counsel various business groups in areas such as antitrust compliance, licensing and intellectual property. In 2001, Mr. Sewell was promoted to vice president and deputy general counsel, managing Intel's litigation portfolio, and handled corporate transactions including M&A activities.

Prior to joining Intel, Mr. Sewell was a partner in the litigation firm of Brown & Bain P.C. He was admitted to the California Bar in 1986 and to the Washington D.C. Bar in 1987. He is also admitted to practice before the United States Court of Appeals for the Federal Circuit.

Mr. Sewell received his J.D. from George Washington University in 1986, and a Bachelor of Science degree from the University of Lancaster, in the United Kingdom, in 1979.