2018 in Review.
Tribalism Meets Mercantilism.

Civil wars are, of course, a lot more disruptive than other wars. You’re much closer to the front than you ever were to Bastogne or Inchon or Da Nang. You’re not fighting over oil or land or to keep dominoes from falling. You’re fighting with your neighbor over fundamental values—who will determine the new republic?

The 2018 articles anthologized here cover diverse topics, from the Catholic Church scandal to Elon Musk’s ongoing surprises. Yet, taken together, a singular thread connects most of them. These varied articles bespeak the latest stage in our current ongoing culture war. In this stage, cultural conflicts have engulfed the marketplace as well the socio-political theater. It’s an immense challenge for businesses because, like it or not, they’re increasingly called on to take sides.

The old rules of avoiding politics and positions are harder to follow as we see in the experience of companies ranging from Lyft to Airbnb to Starbucks to WeWork. Your brand is no longer just about the products or services you sell but includes where you advertise; how you engage customers and employees when nearly every interaction is recorded; how quickly you resigned from the President’s business council; how you addressed race or LGBTQ; to whom you donated; or your Corporate Social Responsibility. As in 1907, we are in an Age of Mercantile Activism. At some great companies, leadership is embraced; for others, their time will not come again.

The challenge extends beyond supporting this or that candidate or weighing in on specific political controversies. When last year, for example, Dick’s courageously announced it would no longer sell assault rifles, the company did more than take a stand on one issue. In truth, Dick’s was making a statement about who and what it is, at its core. While still a “pro-gun” company, it found a way to “split the baby,” take a stand, yet still stay true to its core constituency. The market has responded kindly.

All great companies do just that, in one way or another. Starbucks sells more than coffee; it sells a style of life. Apple is a theology, for some people as powerful in its
way as the four gospels. Amazon and Google are practically human body parts, so basic are their technologies to daily existence.

Every decision companies and institutions make, to manage crises or to leverage opportunities, must now be made in the context of the larger questions: Who are we? Why are we in business? How does our brand fit in amid the culture wars swirling around us? It’s a marketplace dynamic that produces extraordinary leaders and conspicuous leadership failures—among the former, Edward Stack at Dick’s; among the latter, the University of Maryland Regents who, when confronted with the need to respond to the tragic death of an athlete, forgot every rule of crisis communications. They especially forgot a key equation: Speed plus transparency plus execution equals trust. Delay and denial get you the devil’s workshop.

We are not living through a technology revolution but rather through an information revolution because it is not about the newest technology and how people receive information, it is how they share it. We are all now Ida Tarbell, Joseph Pulitzer, and even William Randolph Hurst (“You furnish the pictures, I’ll furnish the war.”). Whoever controls the shared information controls the narrative. For the first time in the history of capitalism, information travels from the grassroots upward, not downward from Madison Avenue, Constitution Avenue, or 10 Downing Street. That means we are living in a democracy for the first time, not a republic. This is Andrew Jackson’s vision, not John Adams.

You cannot master those seismic reverberations just by hiring a few tech-savvy 20-somethings to monitor Facebook. You need the kind of total executive engagement by which business leaders like Tim Cook and Jeff Bezos have become the cultural arbiters of the age.

I believe that the articles gathered here can be read, regardless of topic, in the same way one might watch a prizefight. You’ll see winners, you’ll see losers. Hopefully too, you may learn something about the rules of engagement that finally separate the new leaders from those who missed the revolution.

Good Reading.

Richard S. Levick, Esq.
Chairman & CEO
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January 5, 2018

Doing the Right Thing on #MeToo and Gender Equity – Priorities for CEOs and Board Members

by Richard Levick
After decades of silence, sexual harassment and workplace equity have become among the most talked-about issues in American society, in companies, and around the world. This piece outlines key priorities for CEOs and board members seeking to create a fairer and more inclusive workplace.

The #MeToo movement and the Silence Breakers, as Time magazine calls them, have forever transformed the culture of Corporate America. In the not-too-distant past, a senior male executive accused of sexual improprieties by a female colleague would likely have been given a slap on the wrist – or worse, no punishment at all – while the victim would often be treated like a pariah.

“No laws were broken,” the company would mutter as it swept abhorrent behavior under the rug.

All that changed – we hope – when one courageous woman after another came forward this past year to share harrowing stories of workplace harassment and discrimination.

America and Corporate America both sorely need a national conversation on workplace conduct. New “rules” must be developed governing correct and incorrect behavior in and around the workplace.

On the one hand, companies must adopt zero tolerance toward persistent abusers and promote gender equity, making a concerted effort to close the pay and responsibility gap between male and female employees.

On the other, it’s important to remember that everyone is entitled to due process and that, in some instances, a statute of limitations may apply. No one’s career should be shredded over an unjustified accusation or an ill-advised moment at a holiday party two decades ago.

It may take a while before these issues get resolved. In the meantime, given this tumultuous climate, what should companies of conscience be doing to promote gender equity and cultivate a more inclusive workplace?

Here are four key considerations for conscientious CEOs and board members.

PUT THE ONUS ON EVERYONE IN THE ORGANIZATION. First and foremost is to recognize that it’s not just your Human Resources department that has the responsibility to uphold workplace conduct standards – it’s everyone’s job. It’s always been a priority for HR and the General Counsel’s office; now it’s a big concern for every senior executive.

The Wall Street Journal recently pointed out that, like it or not, a company’s financial health is now tied to the efficacy of its workplace discrimination policies. CEOs and board members who don’t face this reality are assuming unacceptable risk.

Deborah P. Kelly, a labor and employment partner at Manatt, puts it this way: “While sexual harassment has been unlawful since at least 1980 when the Equal Opportunity Commission ruled that it violated Title VII of the Civil Rights Act of 1964, now, almost 40 years later, a company’s reputation and financial outlook, as well its capacity to compete for top talent, increasingly hinge on its workplace culture, its determination to stamp out such misconduct whether from rank and file workers or C-Suite executives, and its commitment to diversity at all levels.”

These issues should not pit management against its employees, Kelly notes. If that’s allowed to happen, discrimination will “infect” the workplace, crushing morale, gutting a company’s brand, and prompting valued employees to look for another job.

CONDUCT RIGOROUS “HEALTH CHECKS.” Every institution, Kelly advises, should conduct thorough “health checks” of their workplace policies. Likewise, internal complaint procedures should be straightforward: If there’s a discrepancy between your company’s stated workplace rules and the way they’re enforced, your credibility can be lost.

Employees must receive training in what constitutes improper or unlawful conduct – and be secure in the knowledge that if they lodge a complaint, it will be kept confidential and acted upon in good faith,
no matter how senior the alleged perpetrator. Employees also need to be assured that no retaliation will be taken against them.

**EXAMINE THE RECORD OF YOUR SUPPLY CHAIN PARTNERS.** In today’s climate, with your brand reputation on the line, it’s imperative for executives and board members to make sure your business partners, vendors, consultants, and suppliers are equally committed to harassment-free workplaces.

All of which means strengthening your due diligence. The last thing you want to learn after the fact is that your business partner has a slipshod record on workplace discrimination or that your biggest supplier is embroiled in a horrific harassment lawsuit.

**ACCEPT FULL RESPONSIBILITY – MOVE QUICKLY.** The final imperative for companies confronting workplace discrimination accusations is to recognize the gravity of the situation – and move in a hurry. Board members have a special responsibility to ensure that a viable action plan is in place.

Attorney Vito A. Gagliardi, Jr., the Managing Principal of Porzio, Bromberg & Newman and co-chair of its Employment Team and Litigation Practice Group, argues, “Now that employees have been empowered, no one can turn back the clock.” If companies neglect to take concerted steps to combat discrimination and buttress their due diligence, “they could find themselves in trouble in a hurry,” Gagliardi says.

#MeToo holds the promise of creating healthier workplaces for women and chipping away at the gender wage gap. “Employers need to be vigilant in hewing to new standards of workplace conduct and make sure that those new standards are upheld,” Gagliardi says.

Once the media and public fixation over the celebrities caught in scandals dies down, the focus will settle on companies: “What did they know and when did they know it?”

Executives and board members better have an answer to both questions. The Silence Breakers and #MeToo are now permanent fixtures in our society.
Foreign Companies Face Perils of U.S. Litigiousness and Erratic DOJ/SEC Enforcement

by Richard Levick
The first in a five-part series on the special challenges facing foreign-based companies seeking to do business in the U.S. and U.S.-based companies looking to expand their presence in overseas markets.
was settling corruption charges last fall against Swedish-based telecommunications provider Telia Company AB for just under a billion dollars, among the biggest corporate criminal bribery fines ever imposed by U.S. agencies.

“Despite predictions of a substantial pullback in the FCPA enforcement area,” the Law360 report concludes, “the writing on the wall does not necessarily suggest such a relaxation.”

U.S. product liability laws, moreover, are generally more convoluted than most in Asia and a good chunk of Europe. If foreign firms also have a U.S. securities listing, their exposure get complicated in a hurry, especially for pharmaceutical companies. As Longmore says, “Foreign pharma firms operating in the U.S. can be taken aback when a whistleblower complaint leads to an FDA investigation, which leads to a shareholder suit and then an employment retaliation matter.”

The bottom line, Longmore advises, is that foreign entities should balance the risk-reward relationship, be aware that in the U.S. litigation can seem like a “team sport,” and get the right professional counsel before and after an event occurs. Foreign companies need outside litigation counsel, insurance and accounting specialists, lobbyists who can help them with their legislative and regulatory agendas, and public affairs and communications professional expert at articulating the benefits of foreign investments in the U.S. – and helping them overcome cultural barriers.

All this means that foreign companies should aim high when it comes to governance and transparency, knowing that events may occur at a faster speed and with greater severity when it comes to U.S. business.

When Ulysses heard the Call of the Sirens, he didn’t have a “red team” or a coterie of lawyers to run a risk vs. reward analysis. The U.S. economy continues to be the envy of the world; no wonder it’s attracting investment from abroad. Future columns will outline specific recommendations for foreign companies eyeing expansion in the U.S.

Doing business in the U.S. is not without its perils. The last thing a foreign company wants is to run aground.
Regulatory Labyrinth Can Trap Foreign Companies Doing Business in U.S.

by Richard Levick
The second in a five-part Forbes series addressing the U.S. regulatory labyrinth that can bedevil foreign companies seeking to do business in America.

My first column in this series described the murky litigation waters that threaten to drown foreign-based companies seeking to expand their operations in the U.S. This article addresses the U.S. regulatory labyrinth that can bedevil foreign companies.

International companies that don't prepare for America's regulatory challenges could find themselves lost in a maze, fated never to realize their U.S. potential. Not only are many of the regulations facing foreign companies difficult, but their erratic enforcement by federal, state, and municipal officials can be scary, too. The uneven application of U.S. trade rules and sanctions, moreover – from the Foreign Corrupt Practices Act (FCPA) and export controls to “antidumping” and “countervailing measures” – has long been a source of frustration for foreign companies.

For many foreign companies, the first hurdle is recognizing that in some ways the U.S. is not a single market but rather 50 different markets, each with different laws and different methods of enforcing those laws. New entrants find themselves navigating a complex web of federal, state, and local regulations.

Spencer S. Griffith, a partner in Akin Gump's international trade practice and an expert in helping Asian companies acclimate themselves to American markets, observes that, “The U.S. is a heavily rule-bound and complex market, with both federal- and state-level regulation. Highly regulated industries, such as healthcare, pharmaceuticals, financial services, real estate, and others, face even more regulatory challenges given the patchwork of overlapping regulation.

“In addition, U.S. trade controls, including controls relating to customs, immigration, tax, export controls, and related areas, all impose exacting requirements that must be strictly complied with. Foreign companies investing in the U.S. that are not familiar with these dynamics face particular challenges.”

What strikes Harry G. Broadman, the CEO and Managing Partner of Proa Global Partners LLC, an emerging markets-focused investment transaction strategy firm, “is the naiveté of some foreign investors contemplating entry in the U.S. market – not necessarily about the substance of U.S. legal statutes, but about the way they are enforced, especially the all-too often politicized environment in which their implementation takes place.”

In his days as United States Assistant Trade Representative, Broadman sat on CFIUS (Committee on Foreign Investment in the U.S.), a multi-agency review process that assesses the potential national security impacts of “inbound” U.S. investment. “The workings of CFIUS are often misunderstood by foreign companies and their advisors, both those abroad and, ironically, even those in the U.S.,” notes Broadman, who also serves as Director of the Council on Global Enterprises and Emerging Markets and as a Senior Fellow in the Foreign Policy Institute at Johns Hopkins University. A misunderstanding about the relevance of CFIUS, Broadman notes, contributed to the tension surrounding a Chinese company’s acquisition of Smithfield Foods.

The U.S. remains “one of the world’s most open and accessible markets for foreign companies,” Broadman believes. As part of what he calls “Globalization 2.0,” foreign investors based in emerging markets will increasingly try to enter the attractive U.S. market. “They just need to do so adroitly and with their eyes wide open,” cautions Broadman.

The success of French cosmetics conglomerate L’Oréal is testament to Broadman’s view. Since entering the U.S. a half-century ago, L’Oréal USA has grown its annual sales to upwards of $6 billion, making the U.S. the multinational’s largest market. Yes, the company’s eye for smart acquisitions and its early embrace of digital marketing have been huge, but L’Oréal’s determination to build a “culture of integrity” has helped distinguish it among U.S. consumers and opinion leaders. L’Oréal’s commitment to complying with U.S. Department of Labor Voluntary Protection Program status at all its U.S manufacturing plants is not just happenstance, but a recognition of the value that public stakeholder perceptions play in brand creation.

How can foreign-based companies emulate L’Oréal’s success and gain greater acceptance in the U.S.?
1. **Know the Local Media Rules:** When a company does business in Nigeria or China, the local media rules apply. The same is true when media is centered in the U.S. This rule is easy enough to understand until the foreign headquarters and the new U.S. office disagree on a media matter. This is never truer than when there is a U.S.-based regulatory or high-profile crisis brewing and headquarters demands a home-based media approach. It may feel like leadership, but it may portend a communications disaster.

2. **Recognize the Role of Headquarters:** Quick, name a Japanese company that handled its U.S. high-profile regulatory dispute or crisis well? There are two, maybe three that come to mind, Mitsui on the Gulf oil spill, Hitachi on an FCPA matter, and, occasionally, but by no means most of the time, Toyota. This is the hardest lesson for foreign-based companies because headquarters does and should control most of the time, but not during high-profile matters. The reason for this is two-fold: a) In most foreign markets, the time difference will force the company to be at least a day behind every news cycle, appearing non-responsive; and b) U.S. personnel will have come to appreciate the unique needs of the market. Headquarters is just too far away.

3. **Control the Narrative:** Foreign companies need to recognize the urgency of controlling the narrative that surrounds their company. International companies must forge an American narrative, one that’s responsive to U.S. traditions, culture, and regulatory processes. Foreign emojis which go viral in the home market are unlikely to develop any marketing traction in America. The messages that work in Europe, the Middle East, or Asia won’t necessarily resonate here. Companies need to err on the side of “over-communicating” not “under-.” The old axiom about a company doubling its advertising budget to ensure that it reaches key audiences is certainly true here, although now it is much more likely to be digitally- and socially-driven advertising than traditional. A company’s earned media outreach should trumpet innovation and job creation whenever possible. Price as an advantage is a short-term value that can limit the long-term success of foreign companies and consign them to commoditized margins, hardly worth the effort of entering the U.S. market. When the inevitable regulatory or crisis matter does arise in the media or halls of Congress, job creation and access to innovation will win key allies. Discounted prices will not.

4. **Respect a Truly Free Press:** Companies that come to the U.S. and are used to a state-controlled media, or one that is subject to the desires of its corporations, are in for a big surprise. A professional lifetime working with media that can be controlled by the state or directly influenced by corporate interest leads to a sense that American media can be influenced in the same way, just to a different degree. Of course, U.S. media of all stripes – traditional and digital – can be influenced by advertising, relationships, history, and other factors – but it will have a far greater independence than perhaps media in all other markets. I’ve worked in over seventy countries and with hundreds of foreign corporate executives and heads of state. As much as there is an understanding of the difference of the American media, there is seldom an appreciation for it. More than one foreign corporate executive has been brutally disappointed to learn the consequences of the difference between the “home” and “away” media. Appreciating this difference after the regulatory or crisis matter has been tried in the press is particularly bad timing.

5. **Recognize that America is a Hyper-Democracy, not a Republic:** This is a lesson misunderstood by many American executives, so it will certainly be misjudged by most foreign executives. America existed as a republic for most of its existence. If you knew the gatekeepers – financial analysts, key Members of Congress, the right journalists, or had a large enough advertising budget – you could control the message. While there is still some truth to this, there is less truth every day. America is increasingly becoming a hyper-democracy. The message is controlled from the grassroots up, not the C-suite down. Foreign companies need to develop relationships with third parties and online influencers. Overwhelmingly, Americans do not believe what they read online – until it comes from a trusted source. A company’s message is going to be controlled by the messengers. And when it comes to high profile regulatory and crisis matters, one reputational mistake in the U.S. can be seized on by opinion leaders and the media – or social activists and NGOs – permanently tainting a company’s brand. Citizen activism has a rich tradition in the U.S., made even more powerful in the age of digital democracy.

6. **Understand There Are No Fixers:** There was a time, not so long ago, that America, like many foreign markets, had “fixers,” lawyer-lobbyist types who knew all the key players and could, for a fee, take care of a company’s problems. Washington is filled with great lawyers, lobbyists, and communicators, but you
need a team, not a person. The bias of “who do I need to get to know” is a fruitless search, which takes precious time away from “which team should I be working with to get this done.”

7. **Emphasize CSR.** The larger the company, the more diverse its Corporate Social Responsibility. It is always a good idea to be annually doing a global CSR audit, as CSR should be driven by strategy, not philanthropy. If you are coming to America, use peacetime wisely: develop your American CSR initiative as part of your expansion strategy.

8. **Recognize that Foreign Correspondents Are Not the American Media:** It is not unusual for foreign executives’ first U.S. media experience to be a benign interview with U.S.-based foreign correspondents, often citizens or former citizens of the home country. As a result, it leads to an expectation that all U.S. media will be the same. Once a foreign company moves into working with reporters in other areas – Wall Street, investigations, local media, regulatory, etc. – U.S. “rules” apply and they’re often adversarial.

9. **Choose Your Spokesperson Wisely:** Americans like avuncular spokespersons. CEOs can come across as brash, if the financial results are consistently good; a little aloof (for a while) if they are from Silicon Valley; a little counter-cultural (for a while) if they are pre- or post-IPO; etc. But without doubt, American audiences want a CEO they can easily understand and relate to. Your corporate spokesperson in the home market may not be the right spokesperson in America. And it goes deeper than the spokesperson – Starbucks has been particularly adroit at adopting the local market approach when it enters foreign markets, such as China (where it opens a new store every 15 hours). From the different model of its stores, involvement of employee families, and product choices, to local management, and, of course, spokespersons. The same is true in coming to America. Americans will buy Kombucha tea and drive Volvos, as long as they think they discovered them.

10. **Leave Your Biases at Home:** Every market has its culture and the better we understand it, the more likely we are to think it also applies in the U.S. and other foreign markets as well. Not only will this not work, it can destroy an expansion effort. The love of identifiable brands as a guarantor of success can ensure that the best is replaced by the best known, not the most efficient or important. The insistence on respect for roles can ensure that delays to work up the food chain kill efforts. Missing deadlines because a decision has to go through proper channels back at headquarters may meet cultural norms, but it will not be appreciated by regulators. The refusal to work outside of a comfortable tribe can ensure you don’t have the best team. The most successful companies in the American market are the ones who honestly look in the mirror and know when to dispense with their own cultural biases, no matter how long and how effective that worldview worked in their own domestic market.

The U.S. regulatory and legal systems are indeed convoluted – but it doesn’t have to be a labyrinth for foreign companies. Smart companies can not only extricate themselves but end up excelling in the U.S. marketplace.
The Gift of Safety, Security & Democracy: FBI Detractors Need to Recognize the Damage They’re Wreaking

by Richard Levick
Right now, somewhere in the Midwest, there are undercover FBI agents putting themselves in peril as they stake out a suspected opioid dealer. On the East Coast, a different team of FBI field operatives are surveilling someone armed and dangerous with known connections to organized crime.

On the West Coast, or in the South, or along the Canadian or Mexican borders, or scores of other locations in the U.S., there are FBI agents – right now – planning an early-morning raid on a haven of violent gang members. None of them know exactly what’s behind that door. But they’ll carry out their mission anyway. Because that’s what FBI agents do.

Now think about these scenarios for a second. When FBI agents knock on doors, or track down a suspect’s neighbors or work associates, or approach local law enforcement officials, as they flash their badges and introduce themselves, don’t we want people to instinctively trust them and help them bring criminals to justice?

The politicians and media bloviators currently throwing brickbats at the FBI need to understand the consequences of their accusations. As we’ve learned in recent years, not every American can shrug off reckless rhetoric; too many take it to heart. If the relentless attacks on the bureau’s integrity trigger distrust among ordinary Americans, it could undermine law enforcement in this country, putting agents at an even greater risk, and making our society more dangerous.

Sadly, the attacks seem to be working – at least to a degree. Nearly three-fourths of people who identify as supporters of President Trump believe that the FBI is biased against him, according to an early February poll conducted by HuffPost and YouGov.

Have we reached the point where, while answering a knock on the door, certain Americans would refuse to cooperate with a federal agency that has protected this country for more than a century? Probably not, despite the discouraging poll numbers say friends who happen to be FBI employees.

But if it’s reached the point where we’re even asking ourselves that question, aren’t we treading in dangerous waters? Do the president and his defenders really want to risk drowning the FBI’s reputation?

I won’t get into the Carter Page-FISA controversy, or the national security ramifications of the Nunes memo, or how it all affects Robert Mueller’s investigation into Russia’s meddling in the 2016 elections. There’s no shortage of pundits weighing in on those topics. Their voices are so deafening we often can’t hear what they’re actually saying.

Instead, I want to keep the focus on the bravery and sacrifice of the people who work every day at the FBI – and who will never get the credit they deserve for keeping us safe.

Here’s what my friends want the bureau’s detractors to do: take a deep breath and a big step back and think about the repercussions of impugning the FBI. Certain critics are trying to say, “It’s not the rank-and-file members of the FBI we’re concerned about. It’s the leadership.”

To which my acquaintances and thousands of other FBI employees scratch their heads and say, “Huh? How can you distinguish between the two?”

To FBI employees, whether they work at headquarters in Washington or in field offices, there’s little to no distinction between “leadership” and “rank-and-file.” Most leaders in the FBI rose up through the rank-and-file. Regardless of title, they’re all part of the same mission.

Is there grumbling about the people in charge from the folks down the chain? Sure: they’re human.

Does the FBI make mistakes? “You bet,” wrote former agent Josh Campbell in a February 2 op-ed in The New York Times. “Because they are not infallible, the bureau is subject to a robust system of checks and balances, including its internal affairs division, the Department of Justice inspector general, congressional committees, and the courts.”
The inspector general’s office is currently looking at the bureau’s handling of the Hillary Clinton email matter – as it should. It was a high-profile investigation that could probably have been handled more deftly.

Was former director James Comey at fault for allowing the Clinton probe to be foot-dragged or cherry-picked or mischaracterized? Maybe. But remember: never in our history was there a campaign as volatile as 2016’s; questions and criticisms are inevitable. The inspector general needs to get to the bottom of it – in a calm, dispassionate, methodical way befitting the FBI’s tradition, not in a hothouse atmosphere tainted by recrimination and groundless charges.

I know this much. My friends and most other FBI employees admired and respected Jim Comey, despite what Americans have been told by certain officials. Even if some employees disagreed with Comey’s decision on the Clinton investigation, most still respected his leadership of the FBI.

On one of Comey’s first days in office, he hosted a town hall for the workforce where he outlined his vision for the FBI. He would repeat those messages in his visits to FBI field offices across the country.

Comey emphasized the need for them to find “joy” in their work. After all, they were getting to work at a place that helped break up Soviet spy rings. Now they had to summon that same energy to fight terrorism. “We get paid to do good for a living,” he would famously say.

Comey stressed the need to work hard. After all, taxpayers paid their salaries; the American people were owed a return on their investment.

He went on to highlight the priority of keeping a healthy and rewarding life outside the FBI. Comey drew applause when he said that he expected every individual in the FBI, no matter what they did or what their title, to be treated with the same level of dignity and respect.

Finally, the former director discussed something he called “the gift.” That gift was the reservoir of trust and credibility left by FBI agents and employees who have long since passed. Nothing, he said, was worth jeopardizing that gift.

If only the politicians taking potshots at the FBI could appreciate the importance of that gift.

Josh Campbell, a tireless counterterrorism investigator, chose to leave the FBI so he could speak out against the assault on the bureau’s effectiveness. How many more agents like Campbell have to depart before the deciders realize the damage they’ve wrought? Not just to a federal agency, but to this country’s safety and national security?

New director Christopher Wray recently addressed the workforce in response to the current controversy. He reiterated his support for the FBI’s unique mission, encouraging them to “Keep Calm. And Tackle Hard.”

The FBI tackled hard when it got Dillinger and Baby-Face Nelson. It nabbed Hitler’s saboteurs before they could blow up our military bases or munitions plants. It helped us win the Cold War.

FBI agents helped clear the rubble at Ground Zero, sifting through the remains to find victims and clues. They canvassed the world to interview people who may have seen something, or knew someone, or heard anything that may have been relevant to the 9/11 attacks.

The FBI has a long Wall of Honor that commemorates those agents that have made the ultimate sacrifice.

I share my friends’ conviction that the FBI will ultimately survive today’s political attacks. But at what cost? And what do those attacks say about us?
How Can Foreign Firms Avoid Corruption in U.S.?

by Richard Levick
Consider the ways that foreign-based companies can communicate messages that will enhance their prospects of gaining greater acceptance among U.S. decision-makers.

Born in the first year of the Carter administration, the Foreign Corrupt Practices Act (FCPA) has now entered middle age, a time when people and institutions begin showing signs of wear. Despite assumptions that enforcement of the act might slow to a crawl, nothing could be further from the truth.

A December 2017 Law360 analysis should cause FCPA watchers more than a few palpitations. It demonstrates that the Department of Justice and the Securities and Exchange Commission have accelerated their FCPA scrutiny. During the last six months of 2017, the two agencies “have resolved more than 15 cases against corporations and individuals, issued several declinations, and initiated at least five new investigations under the [FCPA] statute.”

The amount of money that FCPA penalties generate for the U.S. Treasury is not insignificant. In 2016, the U.S. collected more than $2.4 billion in fines from nearly two dozen companies charged with FCPA violations. The Department of Justice has underscored its commitment to enforce the FCPA, including a continuation of the prior administration’s focus on prosecuting individuals and encouraging self-disclosure, asserts Leslie A. Shubert, co-leader of Sidley & Austin’s FCPA and anticorruption practice.

“Enforcement of the FCPA has been a DoJ and SEC priority for decades now, cutting across both Democratic and Republican administrations,” observes Mark Mendelsohn of Paul Weiss, an FCPA expert who served as deputy chief of the Fraud Section of the Department of Justice’s Criminal Division from 2005-2010. “But the level of resources committed has steadily increased over time. And DoJ and SEC have employed more expansive and novel theories in recent years. While it is highly unlikely that the U.S.’s core commitment to enforcement of the FCPA will wane, we could see some adjustments at the margins that could be significant for companies operating global businesses.”

With its complex web of erratically enforced federal and state regulations, the U.S. market can be daunting for foreign companies to penetrate.

Spencer S. Griffith, a partner in Akin Gump’s international trade practice and an expert in Asian trade relations, volunteers that, “The U.S. is a heavily rule-bound and complex market, with both federal- and state-level regulation. Highly regulated industries, such as healthcare, pharmaceuticals, financial services, real estate, and others, face even more regulatory challenges given the patchwork of overlapping federal and state regulations.”

Harry G. Broadman, the CEO and managing partner of Proa Global Partners LLC, an emerging markets-focused investment transaction strategy firm, echoes Mr. Griffith’s views. In Mr. Broadman’s estimation, foreign companies tend to be “naïve” as they contemplate entry in the U.S. market, “not necessarily about the substance of U.S. legal statutes, but about the way they are enforced, especially the all-too-often politicized environment in which their implementation takes place.”

How can foreign-based companies communicate messages that will enhance their prospects of gaining greater acceptance among U.S. decision-makers? Here are some tips.

1. Know the local media rules: When a company does business in Nigeria or China, the local media rules apply. The same is true when media is centered in the U.S. This rule is easy enough to understand until the foreign headquarters and the new U.S. office disagree on a media matter. This is never truer than when there is a U.S.-based regulatory or high-profile crisis brewing and headquarters demands a home-biased media approach.

2. Recognize the role of headquarters: Headquarters does and should control most of the time but not during high-profile matters when corruption allegations are levied. The reason for this is twofold: a) In most foreign markets, the time difference will force the company to be at least a day behind every news cycle, appearing nonresponsive; and b) U.S. personnel will have come to appreciate the unique needs of the market. Headquarters is just too far away.
3. Mold the narrative: Foreign companies need to recognize the urgency of molding the narrative that surrounds their company. International companies must forge an American narrative, one that’s responsive to U.S. traditions, culture, and regulatory processes. Foreign emojis that go viral in the home market are unlikely to develop any marketing traction in America.

4. Respect a truly free press: Companies that come to the U.S. and are used to a state-controlled media, or one that is subject to the desires of its corporations, are in for a big surprise if corruption allegations are made. A professional lifetime working with media that can be controlled by the state or directly influenced by corporate interest leads to a sense that American media can be influenced in the same way, just to a different degree. Of course, U.S. media of all stripes—traditional and digital—can be influenced by advertising, relationships, history, and other factors, but it has a far greater independence than perhaps media in all other markets. I’ve worked in over seventy countries and with hundreds of foreign corporate executives and heads of state. As much as there is an understanding of the difference of the American media, there is seldom an appreciation for it. More than one foreign corporate executive has been brutally disappointed to learn the consequences of the difference between the “home” and “away” media. Appreciating this difference after the regulatory or corruption matter has been tried in the press is particularly difficult.

5. Recognize that America is a hyper-democracy, not a republic: This is a lesson misunderstood by many American executives, so it will certainly be misjudged by most foreign executives. America existed as a republic for most of its existence. If you knew the gatekeepers—financial analysts, key members of Congress, the right journalists, or had a large enough advertising budget—you could control the message. While there is still some truth to this, there is less truth every day. America is increasingly becoming a hyper-democracy. The message is controlled from the grassroots up, not the C-suite down. Foreign companies need to develop relationships with third parties and online influencers. Overwhelmingly, Americans do not believe what they read online—until it comes from a trusted source. A company’s message is going to be controlled by the messengers. And when it comes to high profile regulatory and crisis matters, one reputational mistake in the U.S. can be seized on by opinion leaders and the media—or social activists and NGOs—permanently tainting a company’s brand. Citizen activism has a rich tradition in the U.S., made even more powerful in the age of digital democracy.

6. Understand there are no fixers: There was a time, not so long ago, that America, like many foreign markets, had “fixers,” lawyer-lobbyist types who knew all the key players and could, for a fee, take care of a company’s problems. Not so when dealing with the FCPA. Washington is filled with great lawyers, lobbyists, and communicators, but you need a team, not a person. The bias of “who do I need to get to know” is a fruitless search that takes precious time away from “which team should I be working with to get this done.”

7. Emphasize CSR. The larger the company, the more diverse its corporate social responsibility. It is always a good idea to do an annual global CSR audit, as CSR should be driven by strategy, not philanthropy. If you are coming to America, use peacetime wisely: develop your American CSR initiative as part of your expansion strategy. Should the worst happen, you will have a stockpile of goodwill to draw on.

8. Recognize that foreign correspondents are not the American media: It is not unusual for foreign executives’ first U.S. media experience to be a benign interview with U.S.-based foreign correspondents, often citizens or former citizens of the home country. As a result, it leads to an expectation that all U.S. media will be the same. Once a foreign company moves into working with reporters in other areas—Wall Street, investigations, local media, regulatory, corruption, etc.—U.S. “rules” apply and they’re often adversarial.

9. Choose your spokesperson wisely: American audiences want a CEO they can easily understand and relate to. Your corporate spokesperson in the home market may not be the right spokesperson in America. If corruption allegations are made, suddenly that spokesperson decision becomes the one you champion or deeply regret.

10. Leave your biases at home: Understanding the cultural complexities within every market builds trust and will be important to trade on, if corruption allegations are made. The love of identifiable brands as a guarantor of success can ensure that the best is replaced by the best known, not the most efficient or important. The insistence on respect for roles can ensure that delays to work up the food chain kill efforts. Missing deadlines because a
decision has to go through proper channels back at headquarters may meet operational norms, but it will not be appreciated by regulators. The most successful communications efforts by companies in FCPA matters are the ones who honestly look in the mirror and know when to dispense with their own cultural biases, no matter how long and how effective that worldview worked in their own domestic market.

The bottom line is that the FCPA, CFIUS, and other regulatory mechanisms governing foreign investment in the U.S. are not having a midlife crisis—far from it. With the focus on corruption not going away anytime soon, knowing how to communicate in America is not only the wise thing to do, it is a business imperative. The senior executives of foreign companies would be well advised to take some deep breaths—and hire smart counsel.
U.S. Plaintiffs' Bar Targets Foreign-Based Companies

by Richard Levick
For foreign companies entering the U.S. market, our society’s litigiousness is something that is understood, but not fully appreciated – especially now. Between the Internet, which makes it far easier for the plaintiffs’ bar to attract clients, and the unique contingency fee arrangements in the U.S., foreign companies should anticipate litigation at a far higher level than in their home countries. And the trend is getting worse, not better.

Whether it’s complying with the Foreign Corrupt Practices Act or wrestling with regulations in 50 different state jurisdictions plus the federal government, foreign-based companies face thorny challenges as they approach the U.S. market. But ask international CEOs to name their biggest apprehension about doing business in the U.S. and most will point to one fear: the specter of being successfully sued by the U.S. plaintiffs’ bar.

Other countries have their share of litigious lawyers, but they don’t have anything as intimidating or potentially lethal as the U.S. plaintiffs’ bar, especially its capacity to file securities class action lawsuits on behalf of disgruntled shareholders.

Just ask Brazil’s state-controlled oil company, Petroleo Brasileiro SA (Petrobras), which earlier this year was forced to pay nearly $3 billion to settle a U.S. class action securities corruption lawsuit, the largest such payout by a foreign entity in U.S. history. Petrobras has been embroiled for years in a related corruption scandal back home that has tainted two former Brazilian presidents and dozens of ex-executives. And yet, the U.S. securities class action settlement is six times greater than the fines Petrobras has been assessed to date in Brazil.

Petrobras isn’t alone. A recent study conducted by NERA Economic Consulting suggests that foreign-based companies are being named in a “disproportionate number” of securities class actions.

In 2017, NERA found that the number of standard securities class actions filed against foreign issuers had significantly increased over previous years. Most of those securities class actions were triggered by supposed “regulatory” violations, another index that is trending distressingly upward for foreign-based companies.

“The U.S. securities litigation plaintiffs’ bar have non-U.S. companies squarely in their target zone,” confirms David Kistenbroker, Global Co-Leader of Dechert LLP’s white collar and securities litigation practice and managing partner of its Chicago office.

“Using the companies’ ADRs (American depositary receipts) and ADSs (American depositary shares) to obtain jurisdiction in the U.S., the plaintiffs’ bar filed 42 shareholder actions in the U.S. in 2017 against non-U.S. issuers. This is nearly double the historical average and there is no cooling off of the trend in sight,” he observes.

What is it that makes the U.S. plaintiffs’ bar so daunting? And why are foreign companies being so aggressively targeted?

Ann Longmore, the Managing Director of FINPRO, Marsh & McLennan’s Financial and Professional Liability Practice, points out that, “While the FCPA does not provide individuals with a private right of action, the U.S. plaintiffs’ bar is not slow to consider whether the company may have to restate its financials and/or reduce future earnings estimates – which may impact stock price leading to a civil suit. Similarly, substantial settlements may result in follow-on derivative litigation.”

Americans are fair-minded: most want a civil court system in which people who have been legitimately harmed can seek and be awarded fair compensation. But as Longmore suggests, too many suits filed by the plaintiffs’ bar are precipitated not by genuine grievances, but by the depth of pockets of select corporations, especially if those companies happen to be foreign-based.

At the root of this uniquely American quandary are contingency fees – arrangements by which plaintiffs’ lawyers decline up-front payment and instead take a healthy percentage of any eventual judgment or settlement. These contingency scenarios, detractors
say, create such strong incentives for lawyers that they pervert the process. The plaintiffs’ bar pinpoints wealthy corporations, then rummages around for data that documents how the companies have “victimized” people, then aggressively recruits clients who fit the class action profile.

Longmore notes that, “The most current data on U.S. directors-and-officers (D&O) securities class actions, especially as to frequency, is particularly surprising when considering the drop in the number of publicly-traded companies and that the stock market had been during exceptionally well until very recently.”

“With stock prices high, one would not anticipate that cases would be up. This may go to show that the plaintiffs’ bar has made this a full-time business. Year-in and year-out, one should not expect the number of suits to fall even when evidence would point to the contrary,” she predicts.

Kistenbroker and Longmore are correct: securities class action suits against foreign companies aren’t going to disappear anytime soon. How can foreign-based entities lessen the likelihood of being targeted by the U.S. plaintiffs’ bar? Here’s a quick primer:

- **Know Thy Adversary:** Immerse yourself in the tactics of the plaintiffs’ bar. Many plaintiffs’ lawyers have media footprints that give you advance warning of their communications strategies. Historically, we have found the plaintiffs’ bar and activist investors to be among the most communications-savvy in the world, often using the integration of technology and strategy that companies, with their silo-based divisions, have a hard time combating. Foreign companies, particularly ones with cultures that require careful attention to hierarchy, are often even more slow to recognize the threat. Tragically, the speed and sophistication of U.S. based plaintiff litigation and media strategy is often at odds with a century or more of effective and acceptable business-cultural norms. Once a lawsuit has been filed against you, don’t just look at the legal strategies of the plaintiffs’ firm, but their media ones, as well. Study the past media activities of each plaintiffs’ lawyer. It will often tell you what to expect next. As a regular practice, also track the website of the American Association for Justice because it will reveal what the plaintiffs’ bar is thinking and where they are focusing efforts.

- **Redefine Risk:** Most companies still think about risk in historical terms. What was true in the past must be prologue. But the plaintiffs’ bar is constantly redefining risk. Assess the enterprise’s risk profile through a detailed “map” that moves beyond financial compliance and looks more broadly at potential event-driven and operational-related risks. What liability trends are you seeing? What is happening to your competitors? What is happening in similarly situated industries? Are you seeing new theories of law attempted by the plaintiffs’ bar against other companies that could be used against you? View the risk holistically. Sexual harassment, for example, was until recently considered a lower risk by some boards; now it is obviously of highest concern. The recent actions of New York State Attorney General Eric T. Schneiderman are beginning to raise the question as to whether ignored sexual harassment behaviors are even an insurable risk. Markets change quickly, spend more time looking forward and sideways and less time backwards.

- **Look for the Canary-in-the-Coal Mine:** Institute a sophisticated monitoring and early-warning system that identifies trends in social media, by hashtag, and by issue. Rely on human intelligence to make sense of what you are seeing, not just the “big data.” You of course need to track lawsuits and competitor liability trends, but you also need to track in social and digital media key words and terms that relate to your risk. Put them on some form of a heat map – making it easy to recognize growing trends, rather than relying exclusively on written reports. The eye sees what the mind cannot. Track your risk terms daily: If you see a term only once on Google or with little impact in social media one week, but an uptick the next, it should set off an alarm. The plaintiffs’ bar has to optimize key words to find clients. It should serve as one of your early warning systems. Have appropriate reporting procedures/process in place to alert senior management as quickly as possible to a potential event.

- **Beware of the “Humanizing” Video:** The plaintiffs’ bar is genius at taking complex issues and distilling them into emotive videos. Make sure that you’re monitoring all platforms that could transmit these videos, since the plaintiffs’ bar uses them to recruit potential class-action litigants. The peanut recall in the U.S. was accelerated dramatically by a two-plaintiff lawyer firm video which went viral and caught the attention of parents everywhere.

- **Understand that Everything is Evidence:** Cultural norms may dictate differently, but “everything” is discoverable in America. If you write it down – including texts and emails – it may come back later as evidence. As a result, try to keep in mind that whatever you write – and many things you say – might someday be read by critical audiences.
• **Strengthen Your Defense:** Mitigate your liability by focusing on disclosure issues in your Securities and Exchange Commission (SEC) filings. The plaintiffs’ bar views SEC filings as potential red meat. Keep that uppermost in mind as you prepare SEC documents. Conduct a training exercise to test the company’s response to a formal investigation or informal inquiry from the SEC or other regulators. Educate directors annually on their fiduciary duties, and make it clear that they will be subject to U.S. law.

• **Preach Transparency, Practice Transparency:** Throughout your organization, at every level, promote a culture of compliance and transparency. Don’t pay mere lip service. Reward employees for standout work that reflects those values.

Given America’s size, technological savvy, and access to capital, the growing U.S. market remains a potentially lucrative place to do business for foreign companies. But like any attractive market, it has its risk. Foreign companies need to culturally appreciate the difference in an aggressive U.S. plaintiffs’ bar and fortify themselves against its machinations.
Judicial Winking, Security Fees and Other Litigation Hurdles Facing U.S. Companies Abroad

by Richard Levick
From mastering exotic currency rates and accounting systems to complying with convoluted local taxes and export fees, there’s no shortage of rugged barriers facing U.S. corporations looking to enhance their business operations abroad. Yet those issues pale in comparison to the litigation and regulatory hurdles that await U.S. businesses overseas.

Make no mistake: “going global” can be a lucrative enterprise. Ask such high-performing global players as Marriott, IBM, and Coca-Cola, as well as the 87 percent of U.S. firms that believe international expansion is essential for long-term growth.

But it can also be perilous. Ask McDonald’s, whose drawn-out legal dispute with a former business partner in India has dulled its capacity to expand, allowing Domino’s, KFC, and Subway to eat into McDonald’s market dominance.

Or study the legal losses sustained by $80 billion powerhouse Philip Morris in Uruguay, Australia, and the U.K., which forced the company to pay millions of dollars to each government after failed suits against national tobacco packaging laws.

This column will focus on the issues that proved daunting even for these mega-corporations: the legal and litigation challenges facing U.S. businesses endeavoring to gain greater market share overseas. The fifth and final column in this series will revolve around the regulatory obstacles facing U.S. companies as they do business abroad.

Although the German and European Union (EU) markets are not as litigious as America’s, lawsuits there are every bit as far-reaching. Berlin-based litigation communications expert Uwe Wolff, the head of NALMA Strategic Legal Services, points out that American companies “new” to Germany and the EU are often surprised to learn that once a German court has rendered a judgment against a U.S. firm, it has the capacity to be enforced in all other EU member states.

“You have to keep that uppermost in mind if you want to keep on doing business in the EU,” says Wolff, whose firm is part of the Crisis Litigations Communications Alliance (CLCA), a global alliance of communications firms (of which my firm is also a member).

The speed with which European courts act can also throw U.S. companies askew. “We hear it again and again from American companies who find themselves in front of a German court: decisions are made often faster than in the U.S.,” Wolff says.

In German civil litigation, for example, judges operate without juries. Early in the proceedings, judges often “hint” as to the ultimate outcome for the plaintiff or the defendant, which is not, to put it charitably, the custom in the U.S.

“It is also rather unusual for an American company that there is no pre-trial discovery or disclosure in which the other party has to present evidence,” Wolff notes. “Anyone who claims something here in Germany and through much of Europe must be able to prove it.”

As documented in a February 5 article in Law.com’s “The Legal Intelligencer,” the entire EU discovery process presents “compliance headaches” for U.S. litigants. American companies and individuals are especially flummoxed by the discovery procedures surrounding personal data held in the EU – a significant departure from U.S. tradition.

Moreover, an American company initiating a civil case in Europe must be prepared to commit a substantial fee as “process cost security” before the courts start to work. If the plaintiff wins, the unsuccessful party repays the costs, but with one big qualifier: legal fees are reimbursed at rates regardless of any negotiated agreements between the plaintiff and attorney.

“Legal fees are reimbursed, but on the basis of the Federal Attorney Remuneration Fees Act and not according to the actually required hourly rates of lawyers. That can be a huge difference,” Wolff cautions.

Ann Longmore, the Managing Director of FINPRO, Marsh & McLennan’s Financial and Professional Liability Practice, adds, “Whether buying out minority investors (where the protections tend...
to be high) or assuming that antitrust and cartel enforcement will be a smooth ride, U.S. firms and their executives can unexpectedly find themselves in hot water abroad.”

How can U.S. firms avoid this legal hot water and the brand-bruising losses that come with it?

First and foremost is the need for 360-degree contingency planning. Before launching any initiative overseas, U.S. companies need to retain outside counsel expert in local language, law, and custom to advise them through every likely scenario – and plan for the worst case. Even slight unfamiliarity with indigenous levies and fees could quickly lead to lawsuits. U.S. companies entering foreign markets need to rely on local expertise.

Another key is to recognize the value that many markets in Europe, Asia, Africa, and Australia place on corporate social responsibility (CSR) and the private sector’s commitment to sustainability. Articulating messages about community involvement and environmental protection can help a company condition the marketplace and cultivate solid relations with elected officials and regulators. Planning an international CSR strategy with existing and planned foreign markets can go a long way to using your peacetime wisely.

And when trouble is on the horizon, Longmore warns, attorney-client privilege may NOT apply to conversations with one’s local in-house counsel. Always check in advance to avoid giving away the “game” to the other side, she advises.

Localized brand awareness and understanding, paired with a deep understanding of local laws from trade to employment, are essential in providing a holistic view of what is not only unlawful, but also considered culturally and reputationally damaging for a new market player.

Foreign market hurdles can be overcome. But it demands knowledge of the local terrain. Without it, U.S. firms may find themselves at the caprice of “process cost security” and judges that wink.
March 3, 2018

The New 'Mercantile Activism': From Dick's to Delta, Companies are Stepping in For Government

by Richard Levick
The U.S. Supreme Court’s controversial decision in Citizens United gave American corporations far greater latitude in shaping our country’s political and public policy deliberations. But companies are also beginning to recognize that the unintended consequences of the Court’s decision to give them “corporate personage” also means they have a corporate personality, not just a brand.

Meanwhile, Internet-driven transparency, instantaneous grassroots activism, and a balkanized electorate make everything “political,” from drinking a Starbucks to wearing Ivanka Trump boots. There are no sidelines anymore. Everything is political speech.

When coupled with the current dysfunction of the U.S. government and companies’ unprecedented capacity to reach customers and stakeholders through digital platforms, the post-Citizens United world has spawned a new age of “mercantile activism.” It’s a new and daunting obligation, premised on the conviction that companies possess “personalities” that extend well beyond their brands.

Mercantile activism is either led by the company when its executive leadership says, “We stand for something beyond profits and shareholder value,” such as in the case of Dick’s Sporting Goods and Delta Air Lines, or when the market decides for the company, which is seldom good, as in the case of FedEx. Only a decade ago, companies largely controlled their brand through advertising; now companies are the totality of their brands, including not only advertisements, but where they advertise (e.g., the old “O’Reilly Factor”), their lobbying activities, their environmental footprint, corporate social responsibility, affinity marketing, and on and on. One misstep and the long knives come out.

John Pierpont (J.P.) Morgan, Sr., would have scoffed at folderol about “corporate personality.” But the banking baron instinctively understood the need for mercantile activism. His famous lock-the-door-until-a-deal-has-been-cut conclave of America’s business magnates in 1907 helped end a financial panic and led to the establishment of the Federal Reserve. Corporations can lead when government can’t or won’t.

Mercantile activism today is the antithesis of Morgan’s locked door. It now means that companies assert open-door leadership and cultivate better relations with customers and constituents by “speaking” with both their pocketbooks and their marketplace and community initiatives.

Want a stirring example? Look no further than the courage being exhibited by Edward W. Stack, the Chief Executive Officer of Dick’s. When Stack and his board announced that their company would no longer sell assault rifles and was instituting age restrictions on the sale of firearms, they weren’t just responding to the grassroots outrage embodied in #BoycottNRA. In the wake of the heart-rending Parkland, Florida, school massacre, they were stepping into America’s gaping void, our government’s appalling inability to combat the epidemic of gun violence – or virtually anything else, for that matter.

Dick’s asserted the kind of strong moral leadership that dispirited Americans crave right now. And it was a pioneer. It didn’t have the advantage of following a herd.

To be sure, Dick’s wasn’t the first company to respond to society’s call for leadership. The First National Bank of Omaha, Avis Budget Group, and Delta, among others, all unveiled actions that ranged from canceling National Rifle Association-authorized credit cards to ending or curbing discounted rates for NRA members.

Dick’s was, however, the first firearms retailer to take up the Parkland kids’ rallying cry, “Enough is Enough!” Within 48 hours, Dick’s was followed by Walmart, America’s largest retailer, and outdoor recreation icon L.L. Bean. Dick’s move took special moxie because it’s headquartered in Pittsburgh, the heart of Western Pennsylvania’s deer-hunting country.

Its familiarity with Pennsylvania’s hunting culture buttressed Dick’s credibility. Dick’s assured core customers that it wasn’t saying “no to hunting” or “no to gun sales.” Instead, Stack could say with authority that Dick’s continues to support Second Amendment rights, that it wants to making hunting
safer by discouraging the use of assault rifles, and that it wants to keep mentally unstable teenagers from purchasing weapons.

Legitimate hunting rifles and other firearms will still be sold at Dick’s, Stack was quick to point out. The fact that Parkland shooter Nikolas Cruz purchased a gun from Dick’s in late 2017 (but not the automatic weapon used in the melee) weighed on Stack’s conscience. “We don’t want to be a part of a mass shooting,” he explained.

In seizing the mantle of leadership, Stack and his board were also being faithful to Dick’s DNA, its philosophy of corporate social responsibility. The same cannot be said, however, for FedEx, which refused to end the discounts it provides NRA members using its shipping services while purchasing firearms and has gotten into an unseemly war of words with rival UPS over which company has the closest ties to the NRA.

Newsflash: in an environment as highly charged as #BoycottNRA, pointing accusatory fingers at a competitor is probably not the best way to enhance your stature with the three-fourths of the American people who favor reasonable controls on gun purchases.

FedEx’s CSR mission statement emphasizes that its “global Code of Business Conduct and Ethics sets a high standard for behavioral conduct in areas that include workplace health, safety, and environment, human rights, harassment and discrimination.” Isn’t reasonable gun control an integral part of protecting the health and safety of the workplace?

FedEx’s official explanation that as a common carrier under Federal law it “will not deny service or discriminate against any legal entity regardless of their policy positions or political views,” seems to fly in the face of its own CSR policy. If a company is looking to walk the fine line between the NRA and gun control advocates, it’s incumbent on them to come up with a more compelling rationale than a platitude about respecting their customers’ privacy.

All speech, and that includes a company’s marketing, advertising, and community outreach, is political these days. Seemingly innocuous television commercials from State Farm, the Gap, and others that featured interracial and gay couples may have unwittingly contributed to Donald Trump’s surprise presidential victory. For most of us, the specter of a same-sex or interracial couple is hard to distinguish from more traditional commercials. For many folks – though few who would likely admit it openly – it likely fueled a fear that a way of life was being threatened.

The gun debate swirls in a similar vortex. That’s why Dick’s offers such a heroic template. Dick’s was able to frame its move in traditional values, not as a denigration of the Second Amendment, but as a way to protect schoolchildren and community safety. “When we saw what happened in Parkland,” Stack said, “we were so disturbed and upset. . . It got to us.”

Dick’s position is remarkable for another reason as well, in that it has taken mercantile activism a step further. It is embracing gun rights, just not the NRA. In other words, it’s going directly to the grassroots, not the grasstops groups that claim to represent them. That’s the difference between a republic and a democracy. If corporations can go directly to constituents and increasingly bypass governments and organizations, what’s next?

The tragedy of Parkland has gotten to a lot of Americans – and a lot of American institutions. Some three dozen companies have distanced themselves from the NRA in one form or another, with more going public every day. The herd is getting larger.

Whatever the ultimate results for FedEx in customer loyalty, brand value, and stock price, they don’t have the protection of the herd. Just a company, standing alone and without clarity of community mission, which has now come to represent the best way to hurt the NRA. Being first demands great courage and leadership. Being last? Not so much.

Since Dick’s announced its new policies, it has been deluged with calls, tweets, and online commentary – about 80 percent of which has been positive. Will the trend continue? No one knows, but the betting here is that Dick’s will benefit from its embrace of mercantile activism. More companies should do the same. After all, an impatient populace and an intransigent government leave little choice but to fill the void.
March 14, 2018

The Risk of Litigation Overseas — And How to Avoid It

by Richard Levick
Global expansion can be a lucrative enterprise for U.S. companies. Nearly 90 percent of U.S. firms believe international expansion is essential for their long-term success.

But it can also be risky. Major litigation and regulatory challenges can await U.S. businesses abroad. Recent examples include legal battles between an American company and a former Indian business partner which hamstrung the company’s expansion on the subcontinent, and a multinational company forced to pay millions of dollars in fines following court battles in Uruguay, Australia, and the UK.

Germany as a Case Study

Although Germany and the European Union tend not to be as litigious as America, lawsuits in the EU are every bit as consequential. German-based litigation communications expert Uwe Wolff, the head of NAIMA Strategic Legal Services, says that U.S. firms “new” to his country and the EU are often surprised to learn that once a German court has issued a decision, it can be enforced throughout the EU.

“You have to keep that uppermost in mind if you want to keep on doing business in the EU,” says Mr. Wolff, whose firm is part of the Crisis & Litigation Communicators Alliance, a global alliance of communications firms (of which LEVICK is also a member).

Judges Who Hint

The relative rapidity of European judicial actions surprises U.S. firms, too. “We hear it again and again from American companies who find themselves in front of a German court: Decisions are made often faster than in the U.S.,” Mr. Wolff says.

In German civil litigation, for example, judges operate without juries. Judges often “hint” early on as to which way they’re leaning, another custom unfamiliar to American litigants. “It is also rather unusual for an American company that there is no pretrial discovery or disclosure in which the other party has to present evidence,” Mr. Wolff notes. “Anyone who claims something here in Germany and through much of Europe must be able to prove it.”

An article in Law.com’s The Legal Intelligencer argues that the EU discovery process is a big “compliance headache” for U.S. litigants. Americans are especially confused by the discovery procedures surrounding personal data held in the EU—another significant departure from U.S. tradition.

Watch Out for Legal Fees

Moreover, an American company initiating a civil case in Europe must be prepared to commit a substantial fee as “process cost security” before the courts start to work. If the plaintiff wins, the unsuccessful party repays the costs, but with one big qualifier: Legal fees are reimbursed at rates regardless of any negotiated agreements between the plaintiff and attorney. “Legal fees are reimbursed, but on the basis of the Federal Attorney Remuneration Fees Act and not according to the actually required hourly rates of lawyers. That can be a huge difference,” Mr. Wolff cautions.

Local Knowledge is Essential

So how do you prepare for these risks? First and foremost is the need for comprehensive contingency planning. Before entering a foreign market, U.S. companies need to retain outside counsel expert in local language, law, and custom to advise them through every likely scenario—and plan for the worst case. A lack of familiarity with native levies, fees, and regulations could trigger ill will and lawsuits.

And when conflicts brew, Ms. Longmore warns, attorney-client privilege may not apply to conversations with local in-house counsel. She urges companies to check in advance, to avoid giving away the “game” to the other side.
CSR Can Help

Another key factor is to recognize the importance of corporate social responsibility in foreign markets, especially a commitment to environmental sustainability. Delivering messages that reinforce a company’s devotion to community organizations and environmental protection can enhance its stature and earn the goodwill of elected officials and regulators. Companies that game plan their international CSR strategy are using their time wisely.

Localized brand awareness and understanding, paired with a deep understanding of local laws and regulations from trade to employment, are essential for providing a holistic view of what is not only unlawful, but also considered culturally and reputationally damaging for a new market player. Foreign market barriers can be overcome. But success demands knowledge of the local terrain.
March 20, 2018

Let’s Address the Real Problem of Government Financial Waste

by Dan Rene
This piece addresses the real cause of excessive government spending: the broken procurement process.

For decades, the poor optics of lavish government spending have dominated headlines and embarrassed politicians. Nearly fifty years ago, the late Senator William Proxmire awarded offending spenders the “Golden Fleece” to recognize those who wasted taxpayer funds in especially abusive ways. The tradition of exposing government officials for breaking budgets and shattering public trust continues to be carried on today by groups like Citizens Against Government Waste and Taxpayers for Common Sense. Despite the public exposure and shaming by these (and other) organizations, combined with White House efforts to “drain the swamp,” stories about government waste abound.

Carefully guarding against the squandering of public resources should be important to any politician and government official simply because it is the right thing to do. Further, scrutiny of spending by various watchdog organizations (on the right and left) should be enough incentive for officials to want to avoid the embarrassment. So why is keeping spending in check such a challenge once one arrives in Washington?

Former Health and Human Services Secretary Tom Price was forced out in September for chartering private jets. Regardless if these trips were for official business and approved by the legal and ethics staff at the agency, the taxpayer surely never saw the value of these expenses. To his credit, Price did repay his costs for these trips.

Inquiries about other official travel and expenses continue to be made across multiple agencies.

So why do some officials get a pink slip and others get a free pass when excessive spending allegations are raised? Perhaps more importantly, why does it cost so much more for the government to procure basic products and services?

Why would it cost $139,000 to upgrade the double doors in Ryan Zinke’s Interior Department office? How is it possible that the Environmental Protection Agency could spend $43,000 on a “secure phone booth” for Scott Pruitt? How could the Department of Housing and Urban Development under Ben Carson even think about spending $31,000 on new furniture, before Dr. Carson finally stepped in to cancel the order under mounting scrutiny?

Government leaders should have seen the expensive lesson learned by Tom Price and the Golden Fleece winners before him, that if you waste taxpayer dollars, your days on the job are numbered – yet these eye-popping expenses continue – in large part because of the way the federal procurement process is – there is no alternative.

Something rarely mentioned by legislators on the attack over high price tags is the fact that nowhere is the federal bureaucracy as burdensome as it is in the procurement process. The bureaucracy created to manage the procurement process inflates prices, diminishing the value of taxpayer dollars.

Ironically, many of the same politicians who complain about excessive expenditures are the ones who support the process of government procurement at the General Services Administration (GSA).

Perhaps it is not always lavish, unnecessary spending that leads to these expenses. Replacing furniture that was used during the Nixon Administration is reasonable – and while the high prices often are not, the prices are driven up because the government bureaucracy dramatically inflated the costs of what could be an ordinary, legitimate expense.

It takes leadership to guard against the fleecing of the taxpayer. The GSA must be on the front lines in the battle to protect taxpayer dollars and keep prices low.

Rather than trying to play “gotcha” with the purchase of a “lavish,” high priced item, perhaps it’s time to address the root of the problem: the federal procurement process. Demonizing good public servants because of a broken procurement process is not fair.

Addressing the real cause of excessive spending, the broken procurement process, and empowering GSA to fix it, would make it easier for public servants to be more productive, save money, and benefit us all.

Let’s Address the Real Problem of Government Financial Waste | March 30, 2018

This piece addresses the real cause of excessive government spending: the broken procurement process.
The Window for Facebook to Make Amends with the Public is Quickly Closing

by Richard Levick
This time it’s different.

The Facebook-Cambridge Analytica scandal has the potential to shatter business models and permanently shake up Silicon Valley.

When Facebook COO Sheryl Sandberg came to Washington, D.C. last fall and said, “We’re a tech company ... we don’t hire journalists,” then subsequently sent in the company’s lawyers for hearings, it didn’t sit well with Congress and institutional Washington — but elected officials and regulators had little to plant a flag in. Now they do.

I spent last Friday evening after Facebook’s tumultuous week flying back from California with a senior FAANG (Facebook, Alphabet, Apple, Netflix, Google) executive. She said it was time to “entirely reimagine their relationship with Washington.” She was right. But I’m not sure how many other tech executives appreciate this moment.

The March 27 announcement that Mark Zuckerberg, Facebook’s reluctant-warrior CEO, has agreed — in principle — to testify before the Senate Judiciary Committee’s hearing next month on fears that our data privacy has been shredded gives him and his company a chance to begin the long-overdue process of “reimagining” their relationship with federal legislators and regulators.

Keep in mind, however, that the elusive Mr. Zuckerberg has not yet confirmed with any of the three congressional committees that he will appear. Pressure is simultaneously building on Google CEO Sundar Pichai and Twitter CEO Jack Dorsey to appear, as well. One of them should take the steering wheel now if Zuckerberg refuses.

Convincing Congress, the Federal Trade Commission (FTC), the state attorneys general, European regulators, and, of course, users and shareholders, is a big hill — but they’ve got to start climbing it sometime. It will only get harder.

Zuckerberg has a long list of imperatives he needs to accomplish if he is going to testify (leaving his hubris in Menlo Park might be a good place to start), but, above all, he’s got to do what he has so far failed to do in this crisis that threatens to de-monetize much of his financial model: Assert. Inspire. Convey Leadership.

Right now, he looks all of his 33 years.

Sen. Mark Warner (D-Va.), the ranking Democrat on the Senate Intelligence Committee and a technology entrepreneur in his own right, is a measured legislator not prone to hyperbolic language. So, when the centrist Warner declares, “I am ... flabbergasted that the CEOs of these companies seem to be happy to answer questions from their shareholders, but not from the lawmakers who represent all Americans,” Silicon Valley moguls should pay close attention.

“Companies like Facebook and Twitter and Google are American icons,” Warner continued. “I don’t have any interest in regulating them into oblivion. But as they’ve grown from dorm room startups into media behemoths ... they haven’t acknowledged that that kind of power comes with responsibility.”

Warner’s comments happened to come on the same day that Senate Judiciary Committee Chairman Chuck Grassley (R-Iowa) extended his invitation to Zuckerberg, Pichai, and Dorsey to the panel’s April 10 hearing on “the future of data privacy in the social media industry and how to develop ‘rules of the road.’”

Let me decipher that: “rules of the road” is how a conservative Republican euphemistically says “tough new regulations.” In today’s hyper-partisan climate, it’s nothing short of remarkable that prominent Republicans and Democrats are so united on a hot-button issue. In today’s Washington, when an issue commands bipartisan support, a company’s general counsel had better have the wherewithal to get the CEO, the executive team, and the board of directors on the same page.

After more than two decades, we are all starting to realize that the web has its dark side, from cybercrimes and bullying to privacy evisceration and election tampering. In capitals like Washington, Brussels, and London, where no one wants to be first but everyone wants to be second, this latest Facebook crisis is known as “cover.” There will be new regulations and perhaps new financial models. Why not get in front of it?
Washington’s scrutiny of Facebook extends beyond next month’s hearing. On March 26, the FTC confirmed a probe into Facebook’s privacy practices. If the FTC finds that Facebook has maliciously impinged on consumer privacy, it can exact significant fines.

State officials are also alarmed. A bipartisan group of 37 state attorneys general this week sent a no-nonsense letter to Facebook, demanding information about the company’s business practices and seemingly anemic efforts to protect privacy.

All this is happening against the backdrop of Facebook and other Silicon Valley giants having to adapt to the European Union’s sweeping new privacy constraints that take effect this spring.

In crisis there is opportunity. While this may look like a lynch mob, it is really a platform.

Why continue to keep the committee chairs waiting? Confirm your appearance with clarity. Set out the agenda. Envision a near future where privacy and access can be balanced. Why slowly parse out news with quasi-commitments and half-hearted apologies? They haven’t fooled anyone and have only made Facebook look uncertain and, dare I say, frightened.

For Mr. Zuckerberg and his FAANG partners this is an opportunity to lead. Enough of the “we want to get it right” (even though we have known about this for three years) and “we promise to do better next time.” How about stating clearly a Silicon Valley-wide approach to privacy? That would be called leadership and help regulators and politicians get onside. It’s what the bankers did a century ago when they helped form the Federal Reserve in 1907. It’s what Bob Carr did after the Heartland data loss, which was the largest of its time when it occurred in 2009. It is what Jim Burke did in the Tylenol crisis of 1982. You don’t wait for the regulators and lawmakers, you lead them.

When the crisis hit nerves in Menlo Park early last week and Facebook employees gathered to hear their leadership, well, lead, neither Mark Zuckerberg nor Sheryl Sandberg thought it critical that they attend. Instead, they sent Paul Grewal, their vice president and deputy general counsel.

Let’s hope they recognize the fallacy of that approach. Such passivity may be an acceptable strategy in peacetime; it is reckless in crisis. The question Mr. Zuckerberg must now answer is, “Are we the customer or the product?” If we are the customer, then privacy is paramount. If we are the product, then data harvesting is.

Facebook may be a free service, but it has no more right to play fast and loose with its users’ privacy than house guests do in stealing family photos or rummaging through financial records. If Washington chooses to follow Brussels’ lead in tightening privacy rules or intensifying regulations, Silicon Valley’s business model is at stake. So is its integrity.
Overcoming Censorship, 'Geoblocking' and Hubris While Doing Business Abroad

by Richard Levick
As if headaches over language barriers, tax codes, export fees, evolving “transparency” rules, and litigation exposure weren’t enough, another set of rugged hurdles confront U.S. corporations looking to expand their presence overseas: a panoply of financial, operational, and environmental regulations so complicated that companies need scorecards to keep track of them all.

European and Asian countries are noted for imposing thorny regulations on foreign companies, especially those engaged in Internet commerce. Ask such Silicon Valley stalwarts as Netflix, Facebook, and Uber, all of which have found themselves caught in choppy regulatory waters overseas.

In Indonesia, Netflix ran afoul of the county’s film censorship board for disseminating “inappropriate” content. Telkom, Indonesia’s state-owned telecom company, blocked Netflix until it agreed to abide by local regulations. Ultimately, Netflix had little choice but to enter into a partnership where Telkom essentially dictates content.

Content licensing restrictions have also proven problematic for Netflix from Seoul to Brussels. Its video streaming platform has gotten crosswise with the European Parliament’s recent actions on “geoblocking,” where access to Internet content is restricted based upon the users’ location, hurting Netflix’s mobility within the European Union’s single market and complicating its global integration strategy.

As if the withering criticism it faces in the U.S. over the Russia election scandal weren’t enough, Facebook confronts formidable privacy and data sharing challenges across the globe. According to The New York Times, more than 50 countries have passed laws and protocols over the last five years aimed at censoring or curbing use of the Internet.

In late 2016, all 28 of Europe’s national data-protection authorities called on Facebook to stop collecting user data from WhatsApp, a Facebook-owned messaging app that was helping the company tailor its ad targeting. Facebook’s swift accommodation demonstrates the potency of European regulation.

Uwe Wolff, the head of German-based NAÏMA Strategic Legal Services, and a member of the Crisis and Litigation Communicators’ Alliance (of which LEVICK is also a member) observes that, “The list of large American companies that have run into regulatory roadblocks in their attempted entry into the European and German markets is getting longer.”

The “hubris” that Uber displayed in trying to crack the European market is a cautionary tale for American firms, Wolff notes.

“Obviously, Uber had not done its homework and seemed oblivious to the fact that the taxi market in France and Germany is highly regulated with a whole list of local and national requirements. What works in the U.S. does not necessarily work the same way in Germany,” Wolff cautions.

In Wolff’s experience, cultural differences also pose major regulatory barriers for U.S. companies. “Germany’s extremely strong data protection laws sometimes cause American executives to shake their heads. But there are historical reasons that Germans are so reluctant to share personal data with companies. They date back to Germany’s unfortunate past. Control, surveillance, and personal data collection all remind Germans of the Nazi police state,” he says.

Ann Longmore, a Managing Director within Marsh’s Financial and Professional Liability Practice (FINPRO), believes that the BRIC countries (Brazil, Russia, India, and China) could pose tough challenges for U.S. companies operating abroad. For example, some attempts by governments to address corruption have left U.S. companies and executives at risk.

New Brazil “rules” have “taken ‘transparency’ to another level,” says Longmore. “They’ve gone from zero to 90 in the last five or six years.”

In the post-Panama Papers world, where virtually everything is considered fair game, U.S. companies and individuals are exposed in ways they’ve never been before.

“Even in striving to do the right thing, U.S. publicly traded companies could be caught in a compliance hard place,” says Longmore. “For
example, if local compliance rules are lower for those operating in other jurisdictions, it could be something of a surprise that U.S. authorities are still likely to insist that they maintain the higher U.S. corporate governance standards that are adhered to at home.”

Wolff, Longmore, and other experts point to a company’s capacity to immerse itself in a foreign culture as a critical factor in its success overseas. Starbucks’ brilliant decision to embrace local partners and the “tea culture” ethos has been instrumental in enabling the company to open a store a day in China, with thousands more in the planning stages.

How can U.S. companies avoid getting entangled in regulatory complications overseas?

• Leave your “attitude” on this side of the pond. Don’t repeat the mistakes made by Uber and numerous other American firms. Approach foreign dignitaries and business leaders with the deference they’ve earned. Listen. As simple as it sounds, local culture rules. Chinese restaurants are different in the U.S. than in China for a reason.

• Do your homework – and don’t do it solo. Cracking overseas markets demands a sophisticated plan and local expertise. Emulate Starbucks in China. Retain smart legal, public affairs, and communications counsel who specialize in that locale to help you navigate the thicket.

• Identify the biggest hurdles early in the process. Come up with a targeted plan to overcome them. Do a risk assessment and map that zeroes in on your biggest vulnerabilities.

• Recognize that America’s view of freedom of expression and other rights does not necessarily jibe with the rest of the world’s. As Wolff notes, other countries are just as proud of their customs and rights as Americans are of ours. Reconcile your company’s offerings to their view of censorship and what constitutes permissible speech.

• Don’t just appease local culture, embrace it. Putting seaweed on a donut wouldn’t work in Secaucus, but it does in Seoul for Dunkin’ Donuts. The ubiquitous American chain has enjoyed considerable success in Asia because they’ve infused local tastes into their brand’s positioning.

• Double up on your corporate social responsibility (CSR) and public affairs outreach. The most effective way for an American institution to enhance its stature among overseas officials is to demonstrate a genuine commitment to local communities. Johnson & Johnson’s devotion to human rights causes has enhanced its stature across the globe.

• Implement strong corporate governance, internal controls, and compliance processes. Use peacetime wisely: it will help ensure that your foreign operations don’t run afoul of foreign regulations that could create headaches for businesses back in the U.S.

There’s no question that overseas markets can be lucrative for U.S. firms and integral to their long-term growth and success. There’s also no question that the wrong approach to foreign markets can backfire, creating unacceptable risk and exposing the company to harsh setbacks in the courtroom and in the marketplace.

“Risk comes from not knowing what you are doing,” Warren Buffett is fond of saying. That’s doubly true when it comes to U.S. companies expanding their foreign operations. The key for American executives is to mitigate that risk through smart planning and hiring people in the know.
The hazards of intellectual property (IP) present increasingly large risks. What can companies do to facilitate smarter internal and external approaches to IP?

Whether it’s neglecting to study existing patents, procrastinating while filing for trademark protection, failing to recognize the threat of copyright infringement litigation or a cyber breach, or not being zealous enough in preserving trade secrets, few issues can injure an established corporation or bring down a promising venture more quickly than mishandled intellectual property concerns.

Expensive Court Time

Ask Apple, which just last week was forced by a Texas jury to pay $502.6 million in damages after it was determined that FaceTime, iMessage, and other Apple offerings infringed on VirnetX’s patents in a dispute that has bounced between the district court, the patent office, and federal circuit courts over the past eight years.

Or ask Google, which recently lost an appeals verdict in a multibillion-dollar copyright infringement case against Oracle that strongly endorses copyright protections and could have sweeping implications on the technology software industry if the ruling stands.

In a hyper-competitive global marketplace, keeping abreast of emerging IP trends, avoiding IP potholes, and adopting proactive communications measures can be the element in a company’s long-term success. CEOs and board members have no bigger priority than to accurately assess IP risk and take bold steps to mitigate it.

The stakes are getting higher. It’s clear from recent studies such as The 2017 Global Patent & IP Trends Indicator that overall IP activity is significantly up worldwide, with the U.S., Europe, and China generating most new filings.

A Single European Patent System

It’s also clear that corporate counsels the world over are concerned about the impact of the prospective European Unitary Patent (UP) and its Unified Patent Court (UPC) efforts aimed at simplifying (and thereby reducing the cost of) patent filing in Europe. European IP officials are seeking to create a single patent across the EU that can be enforced by a single court.

The UP and the UPC were scheduled to come into being later in 2018. But their implementation has been delayed due to the fallout over the UK’s Brexit vote and recent opposition voiced by Germany’s Federal Constitutional Court.

The patent system changes in the EU are symptomatic of the tug-of-war going on worldwide and the fact that IP commands so much time and energy in corporate suites. Intellectual property due diligence must be exercised in every sector, including in conventional bricks-and-mortar establishments. Indeed, the exercise of pinpointing all IP assets and confirming their ownership and/or availability is integral to any merger, acquisition, or investment, argues Gaston Kroub, a founding partner of Kroub, Silbersher & Kolmykov PLLC, and the author of a recent Above the Law article on 2018 IP trends.

“Of special concern are the high costs of defending against intellectual property claims brought by others, both in terms of hard costs in the form of legal fees, and the like, and soft costs in the form of unwanted business disruption and negative publicity. As with most things, being proactive when it comes to IP issues can help reduce the impact of potential business problems arising out of unforeseen events like an infringement claim,” he says.

Given Mr. Kroub’s admonition, what can companies from a communications standpoint do to reduce their IP risks and facilitate a smarter internal and external approach to IP?

• Match the IP due diligence to the importance of the deal. If the stakes are high, then double down on the IP due diligence. Don’t wait until the deal is practically done to identify competitive patents or begin thinking about the exposure of your proprietary offerings. Identify key risks and vulnerabilities on day one and constantly update the list.

• Break down the silos. Given confidentiality concerns, not every executive can be part of the IP exercise, but to the extent possible, engage every division. Legal, public affairs, communications, marketing, and IT should all be part of your
IP task force. With the potential of artificial intelligence to revolutionize labor-intensive IP administrative tasks, shorten lengthy decision-making processes, and increase the ability to analyze large amounts of data, companies now have the ability to put strategic decision-making first without worrying that there are too many cooks in the kitchen.

- **Identify your own “state secrets”—and take extraordinary steps to protect them.** If there isn’t consensus on those patents, trademarks, service marks, et al., that are integral to your continued marketplace success, you need to develop it in a hurry. Your untouchables list—and the protection action that list demands—needs to be understood by every top- and junior-level staffer in the company.

- **Generate wider visibility for your proprietary IP.** If it would further your business objectives to give wider visibility to your trademarks, service marks and other intellectual property, then engage marketing, communications, and advertising in some smart outreach. Such visibility could pay dividends for a deal down the road or just now in the planning stages.

- **Study overseas laws, regulations, and customs.** If going global in any way is part of your business plan, then your company needs to adopt a global approach to IP strategy. If your company applies for single patent protection in many different countries, then you need to be advised on country-specific processes and challenges. As the EU’s current confusion demonstrates, the IP field requires constant monitoring. Regulatory and litigation risks vary from locale to locale.

- **Dumb it down.** There are few issues more complicated than IP law. Most non-IP lawyers on your team will nod in agreement with your strategy rather than risk asking what they fear is a stupid question. Continuously dumb down the issues at stake so that you are certain everyone on the team understands the issues.

In today’s business climate, no company can afford to be caught unawares on IP. Better to take to heart the adage that “By failing to prepare, you are preparing to fail.”

Averting IP Debacles: A 'Lessons Learned' Checklist For Smart Companies

by Richard Levick
Intellectual property (IP) challenges for U.S. corporations can take many forms. Companies need to be mindful of how few issues can injure them more quickly than mishandled intellectual property (IP) concerns.

The UP and its court affiliate were slated to go into effect in 2018. But both have been delayed, in part because of the U.K.'s Brexit vote and in part because of misgiving leveled by Germany's Federal Constitutional Court.

The EU controversy illustrates the tension surrounding patent rules and why IP remains such a big priority in corporate suites. Companies, even those in bricks-and-mortar industries, have little choice but to exercise IP due diligence. Indeed, identifying IP assets and confirming their availability is part and parcel to any business transaction, maintains Gaston Kroub, a founding partner of Kroub, Silbersher & Kolmykov PLLC, an IP boutique firm in New York.

“Whether it’s in the area of patents, trademarks, copyrights, or trade secrets, the evolving nature of IP law demands that companies of all sizes take a proactive approach to dealing with IP issues,” says Kroub, the author of a recent Above the Law article on 2018 IP trends.

“Of special concern are the high costs of defending against intellectual property claims brought by others, both in terms of hard costs in the form of legal fees and the like, and soft costs in the form of unwanted business disruption and negative publicity. It is critical, therefore, for companies to work with internal or outside IP counsel to ensure that appropriate levels of attention are paid to IP issues in a timely manner, especially when it comes to assessing the risk of receiving an infringement claim because of a specific product or service offering.

“As with most things, being proactive when it comes to IP issues can help reduce the impact of potential business problems arising out of unforeseen events like an infringement claim,” he says.

With Kroub’s warning in mind, what communications lessons can companies implement to reduce their IP risks and create a smarter internal and external approach to IP?

• Give IP the priority it deserves. The higher the stakes, the more important the IP due diligence. Don’t wait until the transaction is practically finished to identify competitive patents
or begin considering the exposure of your proprietary offerings. Identify key risks and vulnerabilities on day one and constantly update the list.

• **Give every division a stake.** Given confidentiality, not every member of your executive team can be part of the IP exercise, but every division ought to be. Legal, marketing, communications, public affairs and IT should all be part of your IP task force. With the potential of artificial intelligence (AI) to revolutionize labor-intensive IP administrative tasks, shorten decision-making processes, and increase the ability to analyze large amounts of data, companies now have the ability to put strategic decision-making first, without worrying that there are too many cooks in the kitchen.

• **Protect your own “state secrets” first.** If there isn’t consensus on those patents, trademarks, service marks, et al., that are integral to your continued marketplace success, you need to develop it in a hurry. Your untouchables list – and the protection action that list demands – needs to be understood by every top- and junior-level staffer in the company. Look at the March 2018 suit filed by Match Group against dating app Bumble, which was founded by former employees of Match’s Tinder dating service. Trade secret misappropriation allegations stand out, especially when you note that features of Bumble allegedly mirrored ideas developed for Tinder right before the employee severance agreements were up.

• **Get some credit for your own IP.** If it would further your business objectives to give wider visibility to your trade- and service marks and other intellectual property, then engage marketing, communications and advertising in some smart outreach. Such visibility could pay dividends for a deal down the road or just now in the planning stages.

• **Make sure you know what’s going on overseas.** If going global in any way is part of your business plan, then your company needs to adopt a global approach to IP strategy. If your company applies for single patent protection in many different countries, then you need to be advised on country-specific processes and challenges. As the EU’s current confusion demonstrates, the IP field requires constant monitoring. Regulatory and litigation risks vary from locale to locale.

• **Keep it simple.** There are few issues more complicated than IP law. You will be wise to remember Proverbs 17:28: “Even a fool is thought wise if he keeps silent, and discerning if he holds his tongue.” Most non-IP lawyers on your team will nod in agreement with your strategy rather than risk asking what they fear is a stupid question. Continuously dumb down the issues at stake so that you are certain everyone on the team understands the issues. Remember, IP is traditionally the combination of legal and scientific training. But IP litigation is fought in the worlds of business, law, politics, and communications.

In today’s hyper-competitive business climate, no company can afford to fall behind the IP curve. Better to take to heart Benjamin Franklin’s adage that “By failing to prepare you are preparing to fail.”
Drone Industry Just Beginning to Take Off | May 15, 2018

Though holding great commercial potential, the drone industry faces a series of market challenges as well. What can we expect to see, and what will need to be done?

Drones, a.k.a. “unmanned aircraft systems (UAS),” tend to be commonly misunderstood. Many people view them as playthings of the rich, a leftover gag from the old cartoon series The Jetsons or a sinister surveillance weapon used by a Bond villain.

None of these myths, however, does justice to a technology that is – quite literally – just beginning to take off. With their onboard computer-controlled cameras and their capacity to go places that people and other machines cannot, drones hold enormous promise to sharpen law enforcement, crack down on terrorism, help farmers monitor crops, assist insurance agents in assessing damaged assets, and, all in all, buoy the retail, transportation and entertainment industries, among others. If the Internet can deliver information, then drones can deliver almost everything else.

Drones may end up being one of the most productive and lucrative uses of autonomous technology and robotics, argues Matt Scassero, director of the University of Maryland’s UAS Test Site.

“Think about it,” Scassero says. “In barely a century, the world has gone from inventing manned flight to pioneering unmanned flight. It’s breathtaking.

As Microsoft founder and technologist Bill Gates puts it, “Drones overall will be more impactful than I think people recognize, in positive ways to help society.” Microsoft is among the tech companies making a concerted push on UAS.

A December 2017 McKinsey & Company study echoes Gates’ view, documenting the dramatic commercial growth of the U.S. drone industry, from a mere $40 million in 2012 to well north of a billion dollars in 2017. Some 300 companies – including such aviation and aerospace behemoths as General Electric, Lockheed Martin and Northrop Grumman – are making substantial investments of time and resources in drones, points out Mark A. Ryan, the founder and CEO of Ryan Media Lab, Inc.

By 2026, McKinsey estimates that “commercial drones – both corporate and consumer applications – will have an annual impact of $31 billion to $46 billion on the country’s Gross Domestic Product.” As Ryan notes, “UAS may be a disruptive industry in that it displaces less efficient players. But it also has the potential to be a constructive industry, because drones can create tens of thousands of new jobs and achieve much societal good.”

To be sure, the UAS market, like any developing market, is experiencing growing pains. Yes, investment is soaring, but the industry’s most visible application – so-called “air taxis” – is still in its nascent form, hamstrung by untested technology and infrastructure, plus thorny regulatory hurdles at the local, state and federal levels.

But Anne Swanson of Wilkinson Barker & Knauer, the chair of the D.C. Capital Chapter of the Association of Unmanned Vehicles Systems International, maintains that the hurdles in terms of drones can be overcome. “The mindset of the Federal Aviation Administration (FAA) has come a long way in the last couple of years,” Swanson says.

Since 2016, she notes, the FAA has taken steps to strengthen UAS research, grant waivers for expanded commercial operations and improve the safety of the national airspace for both manned and unmanned users. The FAA also created the Drone Advisory Committee (DAC) to ensure that prominent stakeholders from aviation, government and academia all help fashion the UAS rules for safety and security on which the industry’s future hinges.

“Much has been accomplished, but much more needs to be done – through both congressional action and UAS rulemaking,” Swanson says.

In early May, federal Transportation Secretary Elaine Chao, whose Cabinet department oversees the FAA, announced the winners of an unprecedented fast-track UAS pilot program, which Ryan describes as “a major boost for rapid commercial testing and
clearance of drones over the next few years.” Ten different teams of entrepreneurs will now have an opportunity to expand drone operations under the supervision of state and local authorities working in concert with the FAA and DOT.

The future for drones is promising, all three experts say. It just might take us a while to get there. Drone technology may not be readily or widely available for a few more years. But it’s coming – and when it gets here it will utterly transform society.

“That gives all industry stakeholders a large impetus to identify roadblocks and realistically consider potential applications now.” That’s not George Jetson talking. It’s McKinsey & Company.
May 22, 2018

Does GDPR Matter If You’re Based in the U.S?

by Richard Levick
How many United States firms are paying attention to what is happening across the pond with GDPR? According to a RealWire survey, only 16 percent of companies in the Americas believe they must comply with GDPR—a percentage far less than the number of companies actually subject to the new regulations. If your company relies on the creation or processing of data to succeed in the marketplace (and what company doesn’t?), then keeping abreast of global GDPR developments—especially the near-term enforcement of EU’s new GDPR rules—ought to drive deliberations in your executive suites and boardroom.

An Inalienable Right

The evolution of GDPR in the EU has taken various twists and turns the past few years, but the bottom line is that Europeans view data privacy as an inalienable human right, and companies handling such data have an abiding responsibility to protect it. Under the EU’s new GDPR regimen, the scope of data considered “private” is much broader than in the U.S., and the new rules grant European citizens considerably stronger legal rights to sue for alleged privacy violation. European consumers now have the right “to be forgotten,” in essence, to have their online footprint expunged.

“The GDPR appears daunting to U.S. companies,” says Kenneth Rashbaum, head of the GDPR Compliance Group at Barton LLP in New York. “But it can be summed up in one sentence: Tell the data subject what you are doing with her data, provide her with certain rights with regard to how you use that data, keep it securely, get rid of it when you have no further need for it and only share it with those you trust to safeguard it as you would. In the wake of the recent Facebook incident, many U.S. companies have implemented, or will soon implement, these concepts on a global scale because global markets will demand it.”

The Revolution to Come

If the world is indeed going to follow the EU’s lead on GDPR, then U.S. companies need to ready themselves for the revolution to come. We’re at the cusp of that revolution right now. Your company may be U.S.-based, but if you process the personal data of EU nationals, you are still compelled to be compliant with GDPR as of this month, May 2018. If you’re not, you could face some stiff fines: up to 20 million euros or 4 percent of your company’s global turnover, whichever is greater.

“Too many companies have concentrated on trying to find an argument for saying that GDPR does not apply to them,” said Jonathan Armstrong, a partner at Cordery in London who specializes in GDPR and technology policy.

“Almost certainly, GDPR does apply. Companies need to get a properly prioritized plan together.

The key element in GDPR planning is focus. We’ve seen lots of GDPR ‘fake news’ that has distracted attention from the real risks facing companies.

“At the same time, many organizations are swayed by vendors telling them to do the wrong things. Companies must focus on where their big pressure points will be—issues such as data security, how they relate to data subjects, how they handle data properly and how they assess risk. If they can get those four things right, maybe 80 percent of their GDPR program will be done, but the key is focus,” Armstrong says.

Impact on Your Cybersecurity Practice

Mark Mermelstein, the Los Angeles-based Global Co-chair of Orrick’s Cyber, Privacy & Data Innovation practice, worries about GDPR’s impact on companies’ cybersecurity practices.

“To me, what stands out about GDPR is the combination of the speed with which covered companies will need to report a breach—72 hours after becoming aware of it—and the size of the penalties associated with noncompliance. Severe breaches will be subject to potential fines of up to 4 percent of worldwide turnover. Whenever you have a situation where you force disclosure upon the penalty of a significant
A Year in Review: Brink

fine, you get companies reporting, but the quality of the information being reported falls.

“No one wants to be incorrect when reporting a breach, but they also need to report quickly. That tends to result in breach notifications that are vague. So while the spirit of the law is certainly positive, one must ask whether it will result in useful information being shared with the marketplace,” Mermelstein said.

Cybersecurity concerns should be at or near the top of your company’s GDPR preparation list. If your company is not currently able to adequately respond to data breach incidents or subjects exercising their rights, now is the time to start implementing additional controls and strengthen your cyber breach crisis communications plans.

Companies doing the right thing on GDPR have an obligation to share their commitment to privacy protection with customers, prospective customers, business partners, investors and other key stakeholders. If protecting customer privacy is now an integral part of your brand positioning, you need to trumpet it through concerted marketing, earned and paid media and a steady drumbeat on social and digital media.

What’s Your Privacy Policy?

My counsel would be to differentiate your privacy policy by giving it its own identity and inviting customers and stakeholders to critique it. Accountability and transparency are key. Consider implementing the following:

- Prepare a data inventory and map before you start drafting a privacy policy, so the policy relates to your actual uses of data in business practices.
- Conduct an online survey that invites customers and prospective customers to identify the features that they would like to see in privacy protection policy.
- Appoint a privacy ombudsman to become a visible advocate for the company and the cause.
- Commit the CEO to a series of high-profile initiatives to spotlight the company’s renewed commitment to privacy.

Like it or not, GDPR is coming to a continent near and dear to your bottom line. Get ready for the revolution; it’s already here.
The GDPR Revolution – What Smart Companies Should Be Doing to Get Ready

by Richard Levick
The acronym may sound innocuous enough – what could be the harm in something called G-D-P-R? – but few business issues these days cause as much global disruption and boardroom angst as General Data Protection Regulation.

As instituted by the European Union (EU), GDPR not only poses a regulatory barrier that U.S. and other non-EU companies must overcome this spring, but its underlying issues animate the privacy debate surrounding Facebook and other social media giants. When commentators ask if the U.S. will embrace the “European model” for privacy protection in the wake of recent revelations about data abuse, what they’re really talking about is GDPR.

So where does that leave us? And how many U.S. firms are aware of what is happening in Europe? A recent RealWire survey suggests that only 16 percent of companies in the Americas believe they must comply with GDPR, which doesn’t jibe with marketplace reality. If your company relies on the creation or processing of data (and what company these days doesn’t?), then paying attention to global GDPR developments – especially the rollout of EU’s new GDPR rules – ought to be one of the top priorities in your executive suites and boardroom.

The bottom line is that Europeans view data privacy as a fundamental human right – and that companies handling such data have a grave responsibility to protect it. Under the EU’s new rules, the data considered “private” is much broader than in the U.S. These new rules, moreover, give European citizens stronger legal rights to sue for alleged privacy violation. European consumers now have the right “to be forgotten” – in essence, to have their online presence erased.

“GDPR appears daunting to U.S. companies,” says Kenneth Rashbaum, head of the GDPR Compliance Group at Barton LLP in New York. “But it can be summed up in one sentence: Tell the data subject what you are doing with her data, provide her with certain rights with regard to how you use that data, keep it securely, get rid of it when you have no further need for it, and only share it with those you trust to safeguard it as you would. In the wake of the recent Facebook incident, many U.S. companies have implemented, or will soon implement, these concepts on a global scale because global markets will demand it.”

If other countries are going to follow the EU’s lead on GDPR, then U.S. companies need to prepare for the revolution.

Your company may be U.S.-based, but if you manage personal data from EU nationals, you must be compliant with GDPR as of May 2018. If you’re not, you could face some stiff fines – up to 20 million euros, or four percent of your company’s global turnover, whichever is greater.

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“At the same time, many organizations are swayed by vendors telling them to do the wrong things. Companies must focus on where their big pressure points will be – issues such as data security, how they relate to data subjects, how they handle data properly and how they assess risk. If they can get those four things right, maybe 80 percent of their GDPR program will be done, but the key is focus,” Armstrong says.

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size of the penalties associates with noncompliance. Severe breaches will be subject to potential fines of up to four percent of worldwide turnover. Whenever you have a situation where you force disclosure upon the penalty of a significant fine, you get companies reporting, but the quality of the information being reported falls.

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Cybersecurity concerns ought to be near the top of your company’s GDPR get-ready list. Now is the time to embrace additional controls and strengthen your cyberbreach crisis communications plans.

For companies looking for a road map on GDPR, Cordery has prepared short films on what it describes as “four cornerstones of GDPR.” They’re available here and here.

Companies seeking to do right by GDPR have an obligation to share that commitment with customers, prospective customers, business partners, investors and other key stakeholders. If protecting customer privacy is now an integral part of your brand positioning, you need to trumpet it through concerted marketing, earned and paid media and a steady drumbeat on social and digital media.

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Like it or not, GDPR is coming to a continent near and dear to your bottom line. Get ready for the revolution. L
How Do CEOs Align Internal Resources to Meet External Challenges?

by Richard Levick
Resource management has always been a crucial concern for businesses. How can CEOs work to ensure that a company’s internal resources are being adequately marshaled to meet outside demands?

"You’ll never know a line is crooked unless you have a straight line to put next to it." - Socrates

Management guru Peter Drucker passed away more than a decade ago, but his observations about the responsibilities of the modern corporate CEO echo Socrates and remain prescient. The acronym C-E-O, Drucker was fond of pointing out, stands for "Chief Executive Officer," not "Chief Everything Officer" or "Chief Enabling Officer."

It may sound rudimentary, but chief executives must execute on their companies’ chief priorities, while not allowing themselves to get sidetracked or bogged down in the weeds. In Drucker’s estimation, that meant forging a link between those Inside the Organization and those Outside the Organization, which Drucker defined as society at large, customers and prospective customers, business partners, economic decision-makers, opinion leaders, the media and a multiplicity of other stakeholders.

"Inside, there are only costs. Results are only on the Outside," Drucker famously opined.

But given the constant flux in which companies find themselves in our hypercompetitive global marketplace, what Outside forces truly matter? And how, ultimately, can a CEO ensure that the company’s Inside resources are being adequately marshaled to meet Outside demands? In other words, how can CEOs establish employee goals and performance expectations that instill discipline and esprit de corps while still spurring sales, innovation and growth?

In my three-plus decades of experience in counseling corporate CEOs through crises, I’ve learned that a fair number of them tend to lose sight of their core values and the Inside-Outside nexus – especially when trouble surfaces. How can CEOs, their executive teams and their boards stay on track, even when inevitable bumps occur?

"Trust is everything and it’s hard to create trust in a high-paced accelerated world," observes old friend and business consultant Peter Strople. "Being on the same page is critical and knowing as quickly as possible when you’re not is the difference between success and failure. People will create excuses as to why things aren’t working or why they haven’t performed. It’s important for a CEO and a leader to have conversations with key people before it’s too late."

A company whose board I recently joined and Strople helped create may have part of the answer. Khorus, an Austin-based software and management consulting firm, has devised a solution specifically to help CEOs deliver what it calls "predictable performance."

The premise is simple: surveys show that nine out of ten employees don’t understand their company’s business strategy. Khorus has found a way to make a company’s strategic plan transparent to everyone by having the CEO establish strategic objectives with team leaders and managers setting their own supporting goals.

Khorus’s aim is to ensure that the CEO is “not the last to know.” Its software gathers predictive performance updates from the entire workforce, giving CEOs an early-warning system.

The system has yielded encouraging results. Joel Trammell, the CEO of Black Box Network Services, was Khorus’s original founder and is now a client. "Khorus helps get all of my people on the same page," says Trammell, the author of The CEO Tightrope. “Board members want CEOs to see the future – or at least predict what’s going to happen in the next quarter. Khorus is the only software I know that makes your people focus on the future – not the past. So you can predict with accuracy what the next quarter or the next year are going to bring. It helps bring everyone together toward a common set of goals and expectations,” says Trammell.

Bob Bean, cofounder and CEO of TransnetYX, an automated genotyping firm, observes, “Being able to see a project succeed or fail before it actually succeeds or fails is very important.

“Another Khorus feature that has been extremely valuable to us is the ability to troubleshoot problems or adjust resource management needs as things go awry. The help that this system has provided us in
standardizing work flow and clarity is making our goal-setting more strategic and far more realistic,” Bean says.

Bryant Renn, the Vice President of Strategic Initiatives for healthcare technology solutions consultants SKYGEN USA, says that, “Khorus’s system has helped bring to light key issues and risks that otherwise would not have received attention. Above all, it has helped connect the dots between our executives, business operations and software development teams. As they are now conversing more frequently, our speed to development has increased significantly.”

If “conversing” means listening and learning, then it’s the key to breaking down silos and overcoming the snags that prevent businesses from aligning their Inside to their Outside. It serves, as Socrates would have appreciated, as a “straight line” for a CEO that’s serious about improving “crooked line” performance and results. It’s Drucker 101.
SCOTUS, For Now, Largely Chooses to Punt on Partisan Gerrymandering

by Richard Levick
Many experts have pointed to the rise of computers and mapping technology for their ability to draw hyper-partisan electoral maps. Does this cause elected representatives to be less responsive to the needs of their constituents?

Political junkies and constitutional law professors coast to coast have been waiting with bated breath for the Supreme Court of the United States (SCOTUS) to issue a pair of rulings this term that could – certain observers have maintained – profoundly affect future congressional and state legislative redistricting.

SCOTUS finally rendered its decisions June 18 on two alleged gerrymandering cases – one from Maryland (Benisek v. Lamone), where Republicans cried foul on Democratic-controlled congressional redistricting; the other from Wisconsin (Gill v. Whitford), where Democrats accused state GOP leaders of mischief in state assembly redistricting.

So, political science mavens, was it worth the wait? Has the Court forever reined in partisan gerrymandering? And should non-political types care about redistricting allegedly run amok and what it may portend for our future?

The respective answers are: “Not really – SCOTUS essentially ‘punted.’” “No with a capital ‘N.’” And “Yes – but with a caveat.”

Federalist Society members and skeptics of judicial activism can breathe easy. SCOTUS in these decisions has not unleashed the courts, armed them with calculators and maps, and directed them to trample in the political thicket of redistricting. Instead, SCOTUS has issued narrow rulings that make it clear that: (1) a plaintiff must demonstrate that he or she has sustained direct and individualized harm before seeking to establish that partisan gerrymandering violates his/her constitutional rights; and (2) a plaintiff claiming such an injury must act promptly to vindicate his or her rights.

“What the Court did not do, as many expected, or perhaps even hoped, was to specifically decide whether partisan gerrymandering claims are currently even justiciable and, if so, articulate the test(s) under which such claims will be assessed. SCOTUS has, to date, been loath to establish a ‘governing test’ for partisan gerrymandering claims. Indeed, its jurisprudence has not recognized a viable partisan gerrymandering claim in more than 30 years,” Paszamant notes.

In Gill, the Wisconsin case, SCOTUS unanimously ruled that the 12 Democratic plaintiffs who had gone to court over an allegedly unfair state legislative map did not have the requisite standing to sue because they had not demonstrated how they had been specifically harmed. SCOTUS remanded the case back to the lower court to allow the challengers to potentially revamp their lawsuit. To demonstrate standing, the Court said, the challengers must show “specific harm” to the weight of their votes.

“[W]e leave for another day consideration of other possible theories of harm not presented here and whether those theories might present justiciable claims giving rise to statewide remedies,” Chief Justice Roberts wrote in his Gill decision.

In Benisek, the Maryland case, SCOTUS hewed to a similarly narrow path and sidestepped any larger ruling that would have invalidated the Congressional District at issue. Instead, the Court simply concluded that the lower court had not abused its discretion in refusing to grant the requested injunction, in part because it
concluded that the challengers had not acted reasonably promptly in trying to vindicate their rights.

As Paszamant points out, there are good reasons for SCOTUS to leave redistricting to the political process: “The Framers knew from the outset that redistricting would be an intensely political undertaking—and they chose to keep it that way.”

Nevertheless, today’s gerrymandering feels different and more disquieting than old-school redistricting, doesn’t it? It’s not just con law professors who are worried about the direction that no-holds-barred gerrymandering is taking the country.

In recent years, thanks to computers and our now-malignant politics, partisan gerrymandering has purportedly metastasized from an irritating sore to a cancer that allegedly not only threatens our system of politics, but could jeopardize economic security for consumers living in distorted districts and undermine growth opportunities for businesses located in urban areas. Indeed, Justice Kagan, in her Gill concurrence, explicitly credits computers and their profound impact on districting for the rapid evolution of partisan gerrymandering. According to some, much of today’s redistricting could empower rural and exurban areas at the expense of cities and closed-in suburbs.

Rawley Z. Heimer, an assistant professor of finance at Boston College’s Carroll School of Management, recently conducted an analysis of how consumers lose access to credit when they reside in irregularly redrawn congressional and state legislative districts. “Gerrymandering makes politicians less accountable to voters, because politicians can redraw the district’s boundaries to get re-elected without necessarily helping voters get things they may want,” Heimer said in an early June 2018 interview.

“Lenders have significant reason to favor the constituents of particular politicians, because these politicians can enact policies and influence the behavior of financial regulators. Therefore, lenders have less incentive to provide credit to constituents that are less capable of holding their politicians accountable at the polls due to gerrymandering,” Heimer says.

The same troubling reality could hurt businesses in urban areas. Less responsive legislators could mean that local exigencies such as infrastructure improvements, education and job training might go unaddressed.

Decades ago, political parties did not have at their disposal reapportionment tools to pummel the opposition that they have today. Like so much else in American life, redistricting in this sense has become weaponized.

What was once the province of a few political insiders has become an all-consuming enterprise, often run by hyper-partisans hellbent on “winning” at all costs. California Governor Jerry Brown’s insistence that his state’s redistricting be done by an independent commission is, currently, the exception, not the rule.

Politics will never be eliminated from redistricting—nor should it be. But surely, there’s a common ground that people of conscience can explore together.
America's Worker Training 'Disconnect' – Smart Companies are Filling the Gap

by Richard Levick
Now here's a problem we thought we'd never have a few years back during the Great Recession: a lot of U.S. companies – particularly those in the technology, health-care and manufacturing sectors – are struggling to find qualified workers.

Economists argue that the U.S. labor market is now as tight as it's been in a generation. The Bureau of Labor Statistics reports that more than six million American jobs are going unfilled because of the dearth of skilled workers.

A recent PricewaterhouseCoopers (PwC) survey suggests that three-fourths of corporate CEOs view the lack of qualified employees as a major impediment to their company's growth. Four out of five human resources executives, moreover, say that the labor crunch is likely to adversely affect their company's expansion plans within the next four quarters. It has become distressingly apparent that the gap between what corporations need now and will need tomorrow – and what America's educational system is actually producing – is getting wider by the month.

“This disconnect between the skills businesses need and what post-secondary institutions are teaching is unsustainable,” maintains Karl McDonnell, CEO of Strayer Education, a nationwide company aimed at helping working adults acquire the skills to strengthen their earning potential in the marketplace.

“We must bridge the divide between educational providers and employers so that students are armed with the skills they need to perform today's jobs,” McDonnell says. “Working together, educators and businesses can address the shortcomings in the current system.”

Corporations are paying dearly for those shortcomings. AT&T is investing more than a billion dollars to retrain 100,000 of its workers through both schoolroom-type classes and special tutoring programs. Novelis, an Atlanta-based aluminum manufacturer, has adopted a new training curriculum to teach its engineers and technicians lessons drawn from the factory floor. The Novelis “college” is overseen by nine “deans.” Before Novelis instituted its new system, it would take roughly five years before its engineers could get acclimated; now it’s taking just two, which means in the long run the company is saving substantial money and aggravation.

AT&T and Novelis are not alone. McDonnell points out that U.S. employers are spending nearly a half-trillion dollars a year for on-the-job workforce training. In some ways, our society is paying double, forced to train engineers and technicians twice – once in college and once on the job.

How do we begin closing this gap and getting corporations the qualified workers they need? Forward-thinking companies like Novelis are providing at least part of the solution. McDonnell argues that innovative partnerships need to be cultivated between companies and training organizations. Some of these partnerships have apprenticeship programs at their heart.

The goal of these apprentice-driven initiatives is to have students learn on the job as they study coursework that's directly relevant to a productive career path. Student-apprentices are paid entry-level wages and learn new skills through hands-on training, classroom instruction, one-on-one tutoring, and online “homework.” Ultimately, the aim is to help student-apprentices gain greater responsibility and – down the road – higher wages.

Aside from apprenticeships, degree-focused partnerships have also begun to pay dividends. A partnership between Fiat Chrysler Automobiles and Strayer University has enabled participating car dealers to cut their employee turnover rate some 40%.

These programs not only satisfy employer needs, they also meet employee needs in ways that conventional training does not. Company-backed training is designed to avoid saddling students with debt; ideally, it positions them for more adaptable and higher-earning careers.
Companies embracing these resourceful training programs ought not to hide their light under a bushel. They’ve got a compelling human and business story to tell – and they should tell it to all their stakeholders and the community at large, especially prospective employees. Workforce development programs not only illustrate a company’s commitment to bettering its workforce, but to mastering technology and tackling tomorrow’s thorniest challenges, which is a message that ought to resonate with investors and shareholders, not to mention local elected officials and opinion leaders.

Are corporate academic programs a sometimes costly commitment? Sure they are. But remember the admonition of President Kennedy: “Our progress as a nation can be no swifter than our progress in education... The human mind is our fundamental resource.”
While the big-is-better strategy may be ideal for some large companies, what could this mean for consumers, workers, and the economy at large? The AT&T-Time Warner merger presents a perfect opportunity for speculation.
competitive concerns and a ‘substantial’ lessening of competition from a transaction, and hypothetical or possible concerns due to ‘bigness’ are simply not enough,” the expert notes.

Still, Jodie M. Williams, an antitrust specialist at MoginRubin LLP in San Diego, wonders, “What’s next?”

“This [AT&T-Time Warner] merger will most likely set the stage for more vertical acquisitions in the immediate future, leading to a troubling level of consolidation among already big business and potentially eliminate what few independent players remain. And while size matters, equally important is a corporate culture that fosters new ideas. In the past, big companies getting bigger meant stagnation in formerly dynamic markets where innovative technologies can gain traction.”

“Hopefully companies, smaller independent actors, in particular, will continue to come up with the ‘next best thing,’ and the next time we see AT&T in hot antitrust waters it will be for an acquisition of a product we haven't even heard of,” says Williams.

Veteran telecom policy expert James M. Smith, an attorney and the former head of what is now INCOMPAS, the Internet and Competitive Networks Association, believes that the AT&T-Time Warner decision “certainly weakens the leverage of DOJ’s Antitrust Division, and even the president, to prevent vertical combinations, and it may even weaken their hand in contesting horizontal mergers. It’s bound to embolden merger activity and industry consolidation. In telecom, it certainly makes it more likely that the T-Mobile-Sprint deal will face little government opposition.”

If Smith and the others are correct, the AT&T-Time Warner merger approval means that the corporate urge-to-merge will be with us for the foreseeable future. Here’s hoping it means greater consumer choice, increased innovation and competitiveness, and more and better-paying jobs. If it means the opposite, here’s hoping the federal government has the courage and wherewithal to turn that trend around. ❖
Can Drones Escape the Coming Legal Minefields Unscathed?

by Richard Levick
With drones becoming increasingly popular, there has been an attendant patchwork of rules and regulations that have sprung up around their usage across the country. However, if entrepreneurs want to maximize the technology’s utility, they’ll have to carefully navigate a series of legal issues.

Drones could play a huge part in our daily lives—if they can overcome the present patchwork of federal, state, and local regulatory barriers.

According to Bill Gates, “Drones overall will be more impactful than ... people recognize in positive ways to help society.” Microsoft is among the many tech companies making a concerted push on “unmanned aircraft systems” or UAS. One estimate by Goldman Sachs echoed Mr. Gates’ view, suggesting a “$100 billion market opportunity for drones” by 2020. Some 300 companies—including such aviation and aerospace behemoths as General Electric, Lockheed Martin, and Northrop Grumman—are making substantial investments of time and resources in drones.

Growing Pains

The UAS market, like any developing market, is experiencing growing pains. Yes, investment is soaring, but the industry’s most visible application—so-called air taxis—is still in a very nascent form, hamstrung by safety fears, untested technology and infrastructure, and thorny regulatory hurdles at the local, state, and federal levels.

A complex patchwork of rules and regulations has sprung up around the use of drones across the country. For retailers such as Amazon, it could become cost-prohibitive to stay on top of every nuance of every drone regulation in every county, city, village, and borough in the U.S.

Soon, there will need to be a move toward uniformity and consolidation, at least within each state.

FAA Changing Mindset

Anne Swanson of Wilkinson Barker Knauer, the chair of the D.C. Capital Chapter of the Association for Unmanned Vehicle Systems International, maintained that these hurdles can be overcome. “The mindset of the Federal Aviation Administration (FAA) has come a long way in the last couple of years,” she said.

Since 2016, she noted, the FAA has taken steps to strengthen UAS research, grant waivers for expanded commercial operations and improve the safety of the national airspace system for both manned and unmanned users. “Much has been accomplished, but much more needs to be done—through both congressional action and UAS rule-making,” Ms. Swanson said.

Working Together

In the spring, federal Transportation Secretary Elaine Chao, whose Cabinet department oversees the FAA, announced the winners of an unprecedented fast-track UAS pilot program, which could be a major boost for rapid commercial testing and clearance of drones over the next few years. Ten different teams of entrepreneurs will now have an opportunity to expand drone operations under the supervision of state and local authorities, working in concert with the FAA and DOT. This drone pilot program will explore ways in which state, local and federal regulators can work together.

The federal government is also on the cusp of asking the UAV industry to comment on two sets of proposed new FAA rules for regulating drones. The Office of Management and Budget (OMB) is in the final stages of reviewing proposed rules for drone operations over people and rules for remote identification and authentication of drones, both of which the Department of Transportation and the FAA submitted to OMB earlier this spring.

Operations over People

“Operations over people” rules have long been under consideration at the FAA, and the UAS industry expected their release over a year ago. The process was delayed by concerns raised by federal security agencies about the ability to identify and track drones in flight. The second rule-making on “Safe and Secure Operations of Small Unmanned Aircraft Systems” is intended to address those security
concerns. Once the rules are adopted and released, Ms. Swanson predicts commercial drone operations will quickly accelerate.

In the interim, what can companies that have drone interests do to position themselves vis-à-vis policymakers and the marketplace?

- Don’t forget the mantra safety first. Recognize that safety concerns are likely to dominate the drone debate for the foreseeable future. Challenge every division in the company to develop the strongest policy safety agenda—and communicate it to your key external constituencies through community forums, social media, online outreach, and local op-eds.

- Consider appointing a drone safety ombudsman to become a company spokesperson and champion for the cause.

- Commit the CEO to a series of prominent earned media and speaking opportunities—all geared to spotlight the company’s overriding commitment to safety in all aspects of drone use.

- Retain expert counsel. Keeping compliant with ever-evolving federal, state, and local drone regulations demands round-the-clock attention and expertise.

Drone technology may not be readily or widely available for a few more years. But it’s coming—and if the regulatory hurdles can be overcome, it could transform society. The impetus is there. Now let’s see if there’s the wherewithal to remove the barriers.
E-Commerce Beware: Sales Taxes Could Be Coming to a State or Locality Near You

by Richard Levick
Almost lost amidst the din surrounding the retirement of U.S. Supreme Court (SCOTUS) Justice Anthony Kennedy and subsequent nomination of Judge Brett Kavanaugh, not to mention the Court’s rulings on the Muslim travel ban, union membership dues and legislative redistricting, was a decision that could have a profound – and disquieting – effect on online retail in the U.S. and around the world.

A divided SCOTUS in late June overturned a quarter-century-old precedent by holding that a state may impose sales taxes on retailers with no physical presence in the state, so long as those retailers have a clear connection to state consumers and generate a certain threshold of sales. The decision in South Dakota v. Wayfair is potentially good news for bricks-and-mortar businesses that could now be on a (somewhat) more competitive footing vis-à-vis online retailers.

Indeed, the Wayfair decision could help mom-and-pop operations and traditional retailers stay afloat. For the past decade or more, Main Street stores have been on the losing end of market trends: online sales have been growing at four times the rate of conventional transactions.

Wayfair could also be great news for hard-pressed state and municipal treasuries, which now have the capacity to raise significant amounts of revenue through taxes on online sales.

It’s not great news for entrepreneurial businesses that rely on e-commerce sales: Wayfair could end up having an adverse effect on the thousands of companies whose business plans revolve around the Internet. But don’t cry crocodile tears over the likes of Amazon or Apple. Most of the big guys have already figured out ways to absorb the state-and-local tax hit; they’ll be just fine.

It’s startups and smaller companies – the engines of economic growth and job creation – that will feel the pain of the SCOTUS ruling. Some 10% of all retail sales in 2017 were e-commerce, a figure expected to substantially grow. Smaller companies may have a tough time adjusting to the economic realities imposed by Wayfair.

Adam P. Beckerink, a tax, retail and e-commerce specialist in Morgan Lewis’ Chicago office, points out that “Wayfair could undermine the very thing on which companies rely when it comes to revenue projections – predictability. Smaller companies, especially, need to know precisely how much they’re likely to pay in taxes in a given year in a given state or locality. Wayfair adds an element of uncertainty to all that, which makes it all the tougher for start-ups to get untracked.”

Phil Bond, executive director of Web Enabled Retailers Helping Expand Retail Employment (WE R HERE), a coalition of more than 15,000 small online retailers, worries that “The Court’s ill-considered Wayfair decision essentially says borders no longer matter for e-commerce, which is bad news for small online retailers and others. State and local tax collectors (and auditors!) from some 10,000 jurisdictions could soon be roaming the Internet looking for money from small, out-of-state companies.

“Right behind them will be tax collectors from other nations, demanding remittance when their citizens shop from US companies. Unless Congress steps in, we will have to fight state-by-state and nation-by-nation to defend the small, innovative companies that drive our economy,” Bond says.

At this point, no one for sure knows what the implications of Wayfair will be – and we won’t for some time, Beckerink notes. SCOTUS sent the South Dakota statute back to the state supreme court to ensure that it complies with a past ruling that creates a formula for state taxing power, which is no easy task.

The earlier ruling says that a “clear nexus” must be established between the taxing retailer and the state. In South Dakota, the law upheld by SCOTUS stipulates that retailers would not be subject to an Internet sales tax unless they reached $100,000 in annual sales in the state – a threshold which satisfied the Court. A lower sales standard in
a bigger state might not pass muster with the Court, although certain states are likely to try, Beckerink believes.

Left unaddressed by SCOTUS, as Bond notes, is the whole issue of retroactivity: If a state or locality seeks to collect past revenues for Internet sales, will the Court approve such a retroactive move? Or will that be viewed as an unreasonable revenue grab? Only time will tell.

SCOTUS’s formula also makes it clear that a state may only collect revenue on purchases within its borders and cannot impose different rules on out-of-state retailers.

What should those companies worried about the potential fallout from Wayfair be doing?

First and foremost: Assume the worst scenario. Don’t wait for states and localities to begin imposing taxes before incorporating them – to the extent that you can, of course – into your business plan.

Second: Retain the right experts. Guesswork won’t be helpful as you try to assess a new regulatory and marketplace landscape. Hire legal and communications specialists who can help you anticipate what’s coming and how to stay compliant with – and one step ahead of – it all.

Third: Press Congress to clarify it all. The most effective way out of what could become a convoluted revenue thicket is for Congress to pass clarifying language – a point on which conservative and liberal members of SCOTUS agree. Your trade association should be advocating for such a legislative solution. If it’s not, you should retain your own lobbying counsel – and you might want to have your own legislative and communications help, anyway.

Finally: Communicate to your key stakeholders. For a lot of companies that rely (or hope to rely) on e-commerce, Wayfair could become a fighting word. Let your executives, employees, shareholders, investors and – above all – your board members know that you’ve got a plan in place to deal with it.

Will Wayfair become an inflection point – a SCOTUS decision that we look back on with a wince? Not necessarily. The ruling is narrow enough so that it should provide sufficient wiggle room for smaller companies. Plus, Congress could shock everyone and actually do its job. But no one should hold their breath.

Retailers will likely feel the fallout from Wayfair – good and bad – for some time to come.
Redefining Education: Preparing Children For a Radically Different World

by Richard Levick
Almost everything about our lives has changed in the past couple of generations, much of it with breathtaking speed. The economy has gone global and is now thoroughly dependent on digital technologies, rendering obsolete much of our parents’ world. Trains and planes now travel at three or four times the pace of their predecessors – and they’re much safer than they used to be.

We can all remember a time when certain African or Asian villages were so remote that it took weeks to reach them. Now virtually everywhere in the world is just a day’s trip away.

A few short years ago, Amazon, Alibaba, Facebook, and Google didn’t exist. Now they’re the dominant drivers of a transformed world. The mobility spawned by this tech-dominated global economy has literally changed the face of countries, including America’s. The U.S. Asian population grew more than 70% between 2000 and 2015; the U.S. Hispanic population increased some 60% during the same period, a demographic revolution that shows no sign of abating.

Almost everything has changed, except perhaps the most important thing: the education of our children. A large percentage of schools worldwide seem to be caught in a time warp, trapped in the postwar years of Western economic and cultural hegemony.

“It is as if more than a century ago someone invented ‘school’ and the formula was universally adopted, and since then it has remained largely unchallenged,” writes education pioneer Chris Whittle.

Whittle isn’t alone in believing that the world faces an urgent “learning crisis.” Experts recently gathered by the Center for Universal Education at Brookings (CUE) and the Inter-American Development Bank (IDB) predict that, in little more than a decade, some 800 million children in low- and middle-income countries will “reach adulthood without the skills they need to thrive in work and life.”

Given such inequities, the CUE-IDB specialists argue that, “We must make room for bold new approaches that have the potential to deliver quality learning for all children and youth, not in a century, but today.”

America’s education system is in better shape than many countries yet still demands a big injection of “bold” and “new.” For example, too many U.S. schools remain ill-equipped to teach multiple languages or immerse students in foreign cultures.

Whittle School & Studios, Chris Whittle’s vision, embodies a modern approach to the Innovation Age, the first global Pre-K-through-12 school with campuses interspersed throughout the world. It’s a school that cultivates passion and a lifelong approach to learning. Every Whittle School student backpack will carry a laptop and an iPad. The “studios” in its name connotes the global talent available to its students.

If a young person wants to be the next Yo-Yo Ma, world-class cello lessons will be available. If a student wants to learn Mandarin, immersion in Chinese language and culture is available.

At a time when too many of our “leaders” seem skittish about the outside world and our radical new future, Whittle embraces globalism and everything it entails.

Over the next decade he plans to establish campuses in more than 30 cities. His mission is to prepare young people to become truly “global” citizens: well-rounded, multilingual, and intellectually ready to take on whatever challenges get thrown at them in a diverse and hypercompetitive world.

“The Whittle School & Studios approach is for children to learn by doing and by ‘going places’ in-person to ‘see and feel’ for themselves – not by sitting in a classroom taking a static test,” says Jill Watson, the mother of a 14-year-old Montgomery County (Maryland) boy planning to enroll at Whittle’s Van Ness campus next year in Washington, D.C.
“Too many traditional classes – even Advanced Placement courses – teach to a test, not to instill learning or to provoke thinking. The Whittle approach puts the emphasis where it belongs: on teaching kids to savor and appreciate our ever-evolving world,” Watson says.

The aim is for Whittle School & Studios campuses to work cooperatively through cross-cultural exchanges, and what they’re calling “Expedition Days,” those wondrous things known back in the day as “field trips.” Whittle’s goal is to create a new collective intelligence unlike any single-site institution in the world.

Can Whittle and his fellow pioneers revolutionize education – and make it stick? Here’s wishing them “good luck” in a dozen different languages.
When States Tax E-Commerce, Who Wins and Who Loses?

by Richard Levick
In late June, a divided U.S. Supreme Court overturned a quarter-century-old precedent by holding that states may collect sales taxes on retailers that have no brick-and-mortar presence in the state, so long as those retailers have a clear connection to state consumers and generate a certain threshold of sales.

The decision in South Dakota v. Wayfair is potentially good news for traditional businesses that could now be on a (somewhat) more competitive footing vis-à-vis online retailers. Indeed, Wayfair could help some conventional retailers stay afloat.

For more than a decade, Main Street stores have been on the losing end of market trends, with online sales growing at four times the rate of traditional transactions. The Wayfair ruling could also be great news for hard-pressed state and municipal treasuries, which now have the capacity to raise significant amounts of revenue.

Unpredictability for Small Online Businesses

However, the Supreme Court’s (SCOTUS) ruling may create a disquieting degree of risk for smaller businesses that depend on e-commerce to push sales. Most of the big guys like Amazon and Apple have already figured out ways to absorb the state and local tax hit—they’ll be just fine. It’s the startups and smaller companies—the engines of economic growth and job creation—that might feel pain from the decision. Some 10 percent of all retail sales in 2017 were e-commerce, a figure expected to grow substantially.

Adam P. Beckerink, a tax, retail and e-commerce specialist in Morgan Lewis’ Chicago office, thinks smaller companies may have a tough time adjusting to the new economic realities. “Wayfair could undermine the very thing on which companies rely when it comes to revenue projections—predictability. Smaller companies, especially, need to know precisely how much they’re likely to pay in taxes in a given year and in a given state or locality. Wayfair adds an element of uncertainty to all that, which makes it all the tougher for startups to get untracked.”

Could It Apply to Any Country?

Phil Bond, executive director of Web Enabled Retailers Helping Expand Retail Employment (WE R HERE), a coalition of more than 15,000 small online retailers, worries that “the Court’s ill-considered Wayfair decision essentially says borders no longer matter for e-commerce, which is bad news for small online retailers and others. State and local tax collectors (and auditors!) from some 10,000 jurisdictions could soon be roaming the Internet looking for money from small, out-of-state companies.

“Right behind them will be tax collectors from other nations, demanding remittance when their citizens shop from U.S. companies. Unless Congress steps in, we will have to fight state-by-state and nation-by-nation to defend the small, innovative companies that drive our economy,” Mr. Bond says.

No Certainty for a While

At this point, no one knows what the implications of Wayfair will be—and we won’t for some time, Mr. Beckerink notes. SCOTUS sent the South Dakota statute back to the state Supreme Court to ensure than it complies with a past ruling that creates a formula for state taxing power, which is no easy task.

The earlier ruling says that a “clear nexus” must be established between the taxpaying retailer and the state. In South Dakota, the law upheld by SCOTUS stipulates that retailers would not be subject to an Internet sales tax unless they reached $100,000 in annual sales in the state—a threshold that satisfied the Court. A lower sales standard in a bigger state might not pass muster, although certain states are likely to try, Mr. Beckerink believes.

Left unaddressed by SCOTUS, as Mr. Bond notes, is the whole issue of retroactivity: If a state or locality seeks to collect past revenues for Internet sales, will the Court approve such a retroactive move? Or will that be viewed as an unreasonable revenue grab? Only time will tell.
SCOTUS’s formula also makes it clear that a state may only collect revenue on purchases within its borders and cannot impose different rules on out-of-state retailers.

What should those companies worried about the potential fallout from Wayfair be doing? First and foremost: Assume the worst scenario. Don’t wait for states and localities to begin imposing taxes before incorporating them—to the extent that you can, of course—into your business plan.

Second: Retain the right experts. Guesswork won’t be helpful as you try to assess a new regulatory and marketplace landscape. Hire legal and communications specialists who can help you anticipate what’s coming and how to stay compliant and one step ahead.

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Will Wayfair become an inflection point, a SCOTUS decision that we look back on and wince? Not necessarily. The ruling is narrow enough that it should provide sufficient wiggle room for smaller companies. Plus, Congress could amaze everyone and actually step into the void.

But don’t hold your breath. Retailers are likely to feel the fallout from Wayfair—good and bad—for some time to come.
Does Seeking Alpha Enable Anonymous Authors to Spread Fake News?

by Richard Levick
“Fake news” and the conspiracies that motivate it come in all kinds of packages, as do the consequences that befall its victims and the penalties (if any) imposed on its perpetrators. Facebook, Twitter, and Google are all facing increased scrutiny for enabling fake news and struggling to figure out the best way to address it.

Seeking Alpha should be added to that list. Our firm has had multiple clients – as have many other communications firms – who believe their companies have been harmed by anonymous content on Seeking Alpha, and with no opportunity for recourse or rebuttal. Those who run companies in the micro- or small-cap tier are particularly vulnerable to “opinions” from so-called experts. Millions of dollars can be lost instantly in this volatile market on the strength of a negative comment published in the financial press.

According to some observers, Seeking Alpha is a readily available outlet for those who engage in such activities.

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As Robinson is a former director of public affairs and chief spokesman at the SEC, the question gets begged, why isn’t the Commission showing a rather more aggressive interest in this topic? Indeed, one of Washington, D.C.’s most respected securities lawyers (who cannot comment for attribution because of a conflict) calls the SEC’s failure to vigorously monitor the crowdsourcing site “startling.”

“I concur that the SEC hasn’t been nearly aggressive enough in cracking down on those who use Seeking Alpha to line their own pockets,” says Robinson. “The only reason I can think of is a misplaced concern about media freedom.”

Questions about Seeking Alpha are not new. In 2014, Barron’s rather politely called on Seeking Alpha “to address some serious shortcomings,” the most serious being the anonymity of its contributors. Only Seeking Alpha itself claims to know the identities of the market influencers they publish. In this crowdsourcing dynamic, investors are regaled with tips from strangers with names like “Fuzzy Panda Shorts.”

Seeking Alpha has in any event gained some broad acceptance and mainstream respectability. To be sure, Seeking Alpha has played its hand shrewdly. When questions arose four years ago, Eli Hoffmann, Seeking Alpha’s editor-in-chief, quickly seized on a report in the Wall Street Journal quoting academic studies that found his site outperformed analysts and financial reporters on both earnings projections and stock returns. When specific abuses were uncovered, Seeking Alpha addressed the problem by simply removing specific articles.

To further assuage market concern about paid stock promotions, Hoffmann unveiled a number of new controls. Seeking Alpha now monitors websites that run persistent tabs on stocks actively recommended by its contributors. IP tracking now cross-checks article submissions to uncover contributors submitting under false identities. A system was installed to validate contributors’ identities by matching Seeking Alpha’s information against publicly available databases. Seeking Alpha claims it has a zero-tolerance policy against contributors who cooperate with stock promoters, permanently barring them from posting. A confidential email hotline for anyone who suspects potential manipulation was even set up at integrity@seekingalpha.com.

While I’m not qualified to challenge Seeking Alpha’s defense of its methods and policies, it does not seem that the biggest concern – the anonymity of contributors – has been addressed. Posts remain anonymous, with no requirement that contributors disclose if, for
example, they’ve taken a short position on a company they happen to be publicly savaging. Shouldn’t we also know when the short began and its size?

In lieu of publishing real author names, Seeking Alpha claims to thoroughly vet contributor identities. “None of our contributors are anonymous,” says founder and CEO David Jackson. “We ascertain the real name of every contributor, even if they choose to use a pseudonym on their articles.”

Assuming Seeking Alpha’s good faith, it’s hard to understand how 250 posts per day can be adequately vetted. Shouldn’t government regulators force the issue of full disclosure of authors’ names and any interest they have—financial or otherwise—in the subject of their post?

It is true that the Commission has as recently as 2017 investigated companies alleged to have used Seeking Alpha to manipulate their own values. But it was the writers who mainly came under fire; not the outlet. It was even suggested that Seeking Alpha’s own disclosure initiatives helped start the SEC actions, and that the instigators would not have tried to exploit Seeking Alpha if it weren’t such a reputable outlet.

“If the SEC forces us to hand over the name of a contributor in a fraud investigation, we’ll do it,” promises David Jackson. So, it seems the ball is in the SEC’s court. At the very least, the SEC should at least confirm that it has closely scrutinized and is monitoring the due diligence process purportedly in force at Seeking Alpha.

Seeking Alpha’s success and its apparent immunity to more stringent oversight relates to a breakdown in confidence in traditional institutions. “Investment banks are getting paid by the companies they sell research on, and that leads to conflicts of interest,” Jackson argues. “…the investment banks and financial media have an abysmal track record. They failed to uncover the truth about fraudulent companies like Enron and WorldCom or provide warnings about the tech and real estate bubbles.”

That is certainly true. But I see no justification for adding the abuses of a mob to the tyrannies of the elite if media outlets are indeed too easily used as a direct conduit for such abuses.
August 23, 2018

Don't Bet Against Elon Musk

by Richard Levick
Space and automotive pioneer Elon Musk, a former LEVICK client, has attracted much attention of late – much of it negative. Should we begin to doubt his leadership?

"No great mind has ever existed without a touch of madness." - Aristotle

Aristotle lived, thank heavens, before the Age of Twitter and 280-character musings issued in the middle of the night by exhausted or exasperated people – sometimes both. The ancient Greek philosopher understood that true genius was rare – and such rarity was accompanied by behavior that the rest of society would view as, umm, peculiar.

Deliberately depriving yourself of sleep falls into the peculiar category. Which brings us to the case of Elon Musk: futurist, technology visionary, Tesla Motors founder, space exploration pioneer – and a guy who's apparently in desperate need of a night's rest. He also happens to be someone I've admired for a long time.

My old acquaintance, appearing emotionally distraught, admitted to The New York Times on August 16 that he's had to work around-the-clock for the past year to keep Tesla from being capsized by short sellers – shareholders hellbent on cashing in. The "shorts" would rather see Tesla drown than give its founder a chance to demonstrate that his long-range vision will pay dividends once his high-performance, environmentally-sensitive automobiles start gaining a greater toehold in the marketplace.

Tesla's detractors would do well to remember two things (besides the fact that they sound a lot like Amazon's detractors for the first three quarters of a decade when Jeff Bezos kept investing profits into growth): the cynicism that greeted Musk when he announced his SpaceX initiative; and the spectacular video earlier this year of the Falcon Heavy's two side boosters returning to their launching sites for future use. The boosters landed with nary a glitch, floating back to their pads as if pulled by a string. To see such technological brilliance in action took my breath away.

Here's the bottom line: Don't bet against Elon Musk. He's an unabashed genius. And geniuses need time and (forgive the pun) space to carry out their vision.

Can I guarantee that Tesla will be the big marketplace disruptor that Musk has envisioned? No, but I keep thinking about those SpaceX boosters fluttering to the ground without so much as a shimmy – and I'm inclined to give Musk the benefit of the doubt.

I'm not alone. Business consultant Simon Newman, a former university president and an expert in entrepreneurship, volunteers that, "It is not always possible for a visionary to effectively describe his view of the future in such a way that his team immediately 'gets it'. Inevitably, there will be unforeseen problems in implementing a vision, so there is a 'test and correct' period. Musk is experiencing the 'test and correct' period with Tesla. He will get through it, and the company will be stronger because of it."

I agree with Arianna Huffington, a fellow Musk admirer, who has urged him to slow down, cut back his 120-hour work weeks, get some rest, and take care of himself. Musk acknowledges that his exhaustion has contributed to some dubious decision-making and unfortunate rhetoric – which have hurt his brand and gotten him into hot water with federal regulators – but argues that he's the only one who can keep Tesla's adversaries at bay.

Surely, that's not the case. There are executives and advisors inside and outside Musk's orbit who can help him keep Tesla afloat – and free his time to concentrate on big strategic matters.

What should Tesla executives and Musk brand-keepers be doing to rehabilitate his image?

First, build off Musk's own acknowledgment of the problem. He's been candid and forthright about his shortcomings – so turn that into a strength. He's admitted that he needs to delegate more – so bring in some well-respected managers with experience in turning around financially troubled institutions. Have Musk embrace them in a public setting and keep them in the public eye. Act more like Ronald Reagan and less like Jimmy Carter. Get out of the way of the really smart people you have hired.
Second, let the world know that these changes are being made to allow Musk to be Musk – in other words, the boss is going to focus on strategic vision and the next big thing, not be caught up in day to day administrative and financial details.

Third, the world has room for only one notorious nocturnal tweeter. Musk should stop tweeting nasty or inflammatory things. It’s beneath him. If Musk is going to use Twitter, he should do it during normal business hours. But like any visionary, he needs to ask himself: “Can I really articulate a vision worth articulating in just 280 characters?” If the answer is “no,” he needs to put down the phone.

When it comes to Musk, we would all do well to remember writer John Updike’s explanation of why slugger Ted Williams (talk about genius!) refused to come out of the dugout for a curtain call after hitting a homerun in the last at-bat of his career: Gods don’t answer their mail.

Oscar Levant, the popular musician who made a career out of poking fun at his own obsessiveness, once observed that, “There is a fine line between genius and insanity. I have erased this line.” Aristotle would have understood.
Caught in the Tariff Crossfire? An Rx For How to Communicate

by Richard Levick
The current occupant of the White House does so much posturing on economic policy that it’s hard to know what companies should take seriously – and what they should take with a grain of salt. But after months of machinations on trade, it’s now clear that President Trump is truly committed to an “economic nationalism” that could have profound repercussions for U.S. companies and our traditional trading partners.

As Adam S. Posen, the president of the Peterson Institute for International Economics (PIIE), warned in a recent issue of Foreign Affairs, the administration’s trade belligerence could trigger the “abandonment of the rules-based international economic order.” Dr. Posen describes a “post-American economic world, one where all investment is more uncertain and politicized – because the U.S. government acts toward businesses as any self-enriching autocracy would – is increasingly on its way.”

Sobering words, especially from someone who proudly calls himself a traditional free-market economist. What can U.S. industries and companies caught in the crossfire of harsh rhetoric, tariffs, counter-tariffs, and counter-counter-tariffs do about it, particularly if they’re satisfied with the trade dynamic that existed until recently?

It’s easier said than done. Many companies are forced to walk a fine line. They don’t want to upset the president by speaking out too forcefully. But they look at the precipitous drop in net foreign direct investment in the U.S. in the past 18 months and worry, as Dr. Posen does, that the global economy may be moving toward a “post-American era” far faster than anyone reckoned.

“The falloff (in direct investment in the U.S.) is a result of a general decline in the United States’ attractiveness as a place to make long-term business commitments,” Dr. Posen maintains.

Given those exigencies, what should companies do? A PIIE policy brief argues that if our trade partners stick to their threatened retaliation against the 25% automotive tariffs that President Trump is imposing – and all indications are that they will – there could be a five percent drop in auto sector employment. That’s not “just” Detroit and the traditional American automobile industry. It’s all the German and Japanese auto-related facilities that have taken root in the Sun Belt over the past generation, too – not to mention all the downriver supply chain firms in Ohio. Thousands of jobs – many of them at small businesses – are at stake.

How can those companies raise the alarm without unduly raising the president’s hackles?

Judith Alison Lee, co-chair of the International Trade Group at Gibson Dunn & Crutcher, suggests: “First, participate in all the existing administrative proceedings to limit or reduce the scope of the new tariffs. It’s hard to be taken seriously in the political arena if you are not taking full advantage of the existing remedies. And second, mobilize all the possible stakeholders – including upstream and downstream partners – so that your company is not a convenient target for any public castigation by the Administration.”

Allow me to add these recommendations.

Don’t get caught up in the recriminations. Even if you believe your industry has been treated badly in past trade deliberations, don’t fuel the debate. Look for ways to ease tensions, not exacerbate them. Harley may be an exception, but they are also uniquely situated, first because of their brand loyalty, and second, because their audience is the president’s audience. They have unique standing. But this advice is only as strong as the president’s standing. The more isolated he becomes, the easier it is for companies to communicate their messages, if they are historically consistent with their brand. Expect more Nike-like Colin Kaepernick communications from companies, not less.

Work with union leadership. To the extent possible, you want to be seen as in sync with any members of your work force that are
unionized. If there are areas of agreement on tariff issues, spotlight them. Deemphasize those areas where you’re not in sync.

Cite third-party metrics — not your own. Say you want to point out potential job losses if the tariff wars continue. Far better to have that information coming from an independent (but still credible) source that could document the adverse impact cancelled contracts would have on local communities and related businesses.

Prepare easy-to-follow materials for key constituencies, including your workforce, vendors, and suppliers. Before-and-after charts and graphs that document the impact of tariffs, at-a-glance tables that show the importance of international markets, and other materials can be invaluable in helping reduce arcane economic policy to simple terms. While you’re at it, the president loves charts and graphs more than any other form of communications. If you can get one on “Fox & Friends,” you will reach the president through his favorite form of communications. He also records CNN.

Tap social media. If you want reach key constituents, use the digital channels they use. Convert those charts, tables, and graphs into easily absorbed social media attachments.

Sit down with local business leaders and the newspaper editorial board. Local leaders can be invaluable allies at crunch time, especially if they happen to belong to a certain political party that, until recently, advocated free trade and international cooperation. They are easier to reach and carry more impact with this president.

Give the administration something. If you want them to budge on tariffs, see if you can’t work with them on another high-profile issue.

If Dr. Posen and other tariff detractors are correct, the current application of “economic nationalism” could lead to diminished growth and job losses sooner than many economists reckoned. If that’s the case, companies need to get their Sharpies ready.
#MeToo After Moonves: What Should Companies Be Doing?

by Richard Levick
In light of Leslie Moonves’ sexual abuse allegations and resignation, institutions in similar situations need to reexamine solutions that more thoroughly address the larger narrative.

In the wake (well, CBS hopes it’s the wake) of the Les Moonves scandal, institutions grappling with sexual misconduct allegations against senior executives need to reexamine the assumptions surrounding their internal and external response strategies.

After slowly forcing Moonves’s resignation, CBS did what other publicly-traded companies have done in similarly disquieting circumstances: it expanded its board of directors. CBS’s old board, in my judgment, remained far too detached and passive as the accusations against Moonves escalated, especially given what should have been its canary-in-the-coal-mine moment with former CBS morning anchor Charlie Rose, a serial harasser. The rumors of a culture of harassment and worse were very public. That was the time to begin an independent internal investigation and draw a “that was then, this is now,” line in the sand. Three of the six new CBS board appointees added in recent days are women.

It’s worth asking the uncomfortable question: Is putting women on the board truly going to change a company’s culture? In my experience counseling companies, diversity is critical, but diversity of opinion and the courage to share those opinions is critical, too. Does adding women to the board run the risk of being viewed as window dressing, a gambit that could backfire if it isn’t followed by meaningful and thoughtful action?

America’s changing demography also poses challenges. If organizations are hoping to cultivate brand loyalty and attract first-rate talent, they should be aware that, right now, more than half the students in higher education are women. Moreover, institutions should keep in mind that some 77 million millennials have far different expectations about gender equity than their parents.

Companies confronting #MeToo accusations must do more than administer band-aid solutions. They need to thoroughly address the wound – and do their best to ensure that the infection doesn’t recur. “Women have been victims of eons of harassment, but many men now are wary about interacting with female colleagues, fearing that some misconstrued action or comment could lead to accusations of harassment, with no due process to determine the facts,” says Andrew Yarrow, author of the new book, Man Out: Men on the Sidelines of American Life. “The current climate not only hinders teamwork, brainstorming, and productivity, but it also has the perverse and sad effect of leading many men to resent and be angry toward women.”

In today’s acrimonious climate, how can companies demonstrate that they “get it” – that they not only appreciate the intrinsic value of having women in senior executive capacities and in their boardrooms, but want to create a culture of gender equity and genuine inclusiveness?

Women on the board is only one small but important step. Anyone who spends time outside America sees a diverse world with very different cultures. American companies fall prey to their own biases – just as Asian and European companies do. We notice it when these great foreign conglomerates follow their biases. Do we have enough distance and diversity to recognize it in ourselves?

I asked three seasoned corporate change agents to assess these questions. They all happen to be accomplished – and hard-charging – women.

Catherine A. Allen, a long-time champion of business innovation and now Chairman and CEO of The Santa Fe Group, a strategic consulting concern, agrees that CBS’s board mishandled the initial charges against Moonves.

“The CBS board either condoned a culture that enabled sexual harassment or was too slow to be transparent and research the allegations,” she says. “This happens when boards sometimes view their CEO or senior team as ‘irreplaceable.’”

“‘The Me-Too’ movement highlights the long-known ‘secret acceptance’ of sexual harassment in the workplace,” Allen asserts. “Every organization has the potential to experience sexual harassment, but some have a culture that not only allows it, but ‘wink-winks’ the condoning, and sometimes, celebration, of it.”
“The discerning issue is power – the use of it by people who have power on those who don’t or have less. It becomes less about sex and more about control and ego. So, rules that ban office romances are not necessarily addressing the problem.”

Allen believes that boards and senior management should focus on the “tone at the top.” If senior executives and board members “condone or allow or even exhibit inappropriate workplace behavior, it sets the tone for others to follow,” she says. “That is why it is so important to be transparent and address complaints with seriousness, especially when leveled at senior people. But it is also important for those accused to have a chance to explain or tell their side of the story.”

Kimberly Fine, the principal of Shippan Partners, a business development consultancy, has after three decades at the top of the corporate world developed a provocative perspective: “Simply put, one major factor that has led us to this point is that most women do not help other women. Women do not understand power. They may earn it – but most don’t share it.”

While still in her mid-30s, Fine was widowed. It wasn’t easy trying to balance a demanding professional life with caring for her infant son. She learned quickly to set boundaries with aggressive male colleagues and bosses.

“I was, and still am, often the only woman at the table,” Fine says. In her experience, “most women do not help other women. Women do not lift each other up. Women do not take the risks of championing other women. Of course, there are the exceptions; when you find one, grab them and hold on to them.”

“If women supported women to a greater extent, many young women would not be at the mercy of ‘men in power.’ We have all had ‘Me Too’ experiences. It is inner strength and a sense of self-worth that empowers a woman not to succumb.”

“There is no easy route to power: you have to do the work, earn it, and pay it forward. The tide can be changed – but ladies, it is up to us!” Fine says.

Suzanne Rich Folsom, a former general counsel of U.S. Steel and a director of Women’s Corporate Directors, argues that, “Yes, having women on boards can make a difference. But simply adding a woman or women to the board for the sake of ‘appearances’ is not the right move for a corporation.”

“When I talk about strength in numbers, it’s about both women and men having the courage to speak truth to power on these issues. Boards also need to diversify and make sure that they have members who have been responsible for different functions within the corporation, especially compliance. The board needs to be devoted to a corporate culture that not only fosters diversity but encourages everyone – including women and minorities – to strive for success and aspire to leadership.”

Lessons can be learned from the CBS debacle, Folsom believes. “We don’t know what questions the female and/or male board members asked about culture at CBS. Perhaps if there had been more women on the CBS board, they would have been able to influence attitudes about the value of diversity and inclusion – and demand better behavior from executives,” she says.

She also points out that board members need to be intimately familiar with their corporation’s harassment policies and to insist that allegations involving senior leaders be immediately brought to their attention. “We don’t know what, if anything, was shared with the CBS board about any such allegations, but we now know that the board should have taken the lead on any investigation and ensured that it was independent,” she says.

Board members also have to ask managers tough questions about their efforts on diversity and inclusion, even when the corporation’s financial performance is strong. Finally, to better understand all sides, boards should make a commitment to interview female and minority executives who exit the company, particularly when they’ve been top performers, she notes.

Still, it cannot be the responsibility of women and minorities alone to champion changing attitudes in C-suites and on boards – we need men who understand the true value of a diverse workforce and leadership, asserts Folsom.

Folsom, Allen, and Fine aren’t a law firm. But in the #MeToo world after Moonves, organizations would do well to heed their counsel.
When Lack of Context Leads to Catastrophe

by Paris Kissel
Despite good intentions, an inclusivity initiative that was intended to serve as a comment on cyber-bullying sparked online outrage. Much of the misunderstanding arose from a lack of context and background. What could the companies involved have done differently to ensure that their message had been properly received?

An inclusivity initiative that was intended to serve as a comment on the cyber-bullying phenomenon ended up sparking online outrage when viewers discovered images of a thin model wearing a sweatshirt bearing what appeared to be a fat-shaming message.

The article of clothing in question, which was designed by Los Angeles-based label LPA and sold by high-end online retailer Revolve, was made in collaboration with prominent women, such as Lena Dunham, Cara Delevingne, Emily Ratajkowski, Suki Waterhouse and Paloma Elsesser, who’ve each been the victim of online verbal abuse.

The sweatshirts featured quotes from actual messages these women have received from Internet trolls, and were meant as a reclamation of hurtful words often used against women and to create a community for those affected by cyber-bullying, with proceeds benefiting a women’s charity.

According to LPA, the brand had planned to launch the sweaters on its own website, with each of the five prominent women modeling them in a selfie, but due to a lack of communication and oversight, the collection’s first impression ended up embodying everything but body positivity.

Released a day early, the collection featured a sweatshirt adorned with the quote, “Being fat is not beautiful, it’s an excuse,” modeled on a slender Caucasian woman, without considering the subconscious message that may have sent.

Many were quick to point out that physical differences are what gets you punished on the Internet, and a lack of diversity in representation is a huge contributing factor. Moving further away from their intended message, the item was offered only in sizes XXS-XL, excluding the very people this garment was meant to empower.

What the image further failed to highlight was that below that harsh quote, in a barely legible font size, was the name of the body-positive influencer, Paloma Elsesser, reclaiming its toxic words.

A picture is worth 1,000 words, but on its own, without any context or backstory, the image seemed to overtly promote fat-phobia and eating disorders. The collection has since been removed from Revolve’s website and many celebrities that contributed to it have renounced their support. Revolve then donated $20,000 to Girls Write Now, a program that promotes mentorship through writing for underserved women.

It’s important to remember that when launching a campaign, you should always be careful about what you say and who says it. No matter how good your intent, without a properly developed message you’re susceptible to misinterpretation. Ultimately, if your words require a long-winded explanation so as to avoid appearing offensive, perhaps they would be better rephrased.
How to Stay Ahead of Cyber Breaches, the Boardroom’s Biggest Fear

by Richard Levick
How to Stay Ahead of Cyber Breaches, the Boardroom’s Biggest Fear | September 20, 2018

Our world is digital, which means cybersecurity is that much more of a threat – especially in business. Usually considered a matter for the IT department, what can the Boardroom do?

Few events pose more sudden and systemic risks to corporate leadership than a significant cyber event. And the threat is only growing.

If reputations are gained by the teaspoon and lost by the gallon, cyber is exponentially more threatening. The onus of managing risk in every corporation ultimately falls on the CEO and the board of directors. Effective CEOs, therefore, are thoroughly plugged into cybersecurity operations, those systems and procedures that, in today’s lexicon, are aimed at mitigating the risk of company communications being disrupted.

I know from conversations with CEOs and general counsels across the country that their biggest fear—besides being impugned on social media—is having their cyber systems hacked, their “state secrets” exposed and exploited, or worse yet, their external and internal communications operations dismantled or gutted. When you can’t tell the world you’ve been hacked because your email system is completely down, you’re in trouble.

Corporate Compliance Complicates Cybersecurity

Many board members don’t live in the world of disrupted communications, cyber ambushes, NGO assaults, blowups on Twitter, and the like. So, what’s the appropriate role for board members when it comes to these issues? The board’s responsibility revolves around recognizing risk—and ensuring that the company is taking appropriate action and installing sufficient backup systems to minimize that risk.

GDPR is a classic example: Hundreds, if not thousands of American corporations are operating under the mistaken impression that they don’t have to comply with the EU’s new privacy regulations. Yet if companies depend on the creation or processing of data (and these days, what company doesn’t?), there’s a strong chance that they’ll be subject to GDPR and the ongoing efforts of the EU and other government entities around the world to crack down on hacking and privacy violations.

Under GDPR, every data-driven company must appoint a designated data protection officer. Data protection best practices, moreover, now point to the creation of a board-level cyber risk committee, as well as toward the assurance of personal employee-level cybersecurity discipline among board officers themselves, since they’re often the target of phishing. Finally, board members in the U.S. should keep in mind that the U.S. Cybersecurity Disclosure Act of 2017 requires board-level cybersecurity expertise.

The “European model” for anti-hacking and privacy protection is the way the world is going. Smart companies and board members need to stay a step ahead.

How Can Companies Stay Ahead?

Former Department of Homeland Security Secretary Tom Ridge, now chair of Ridge Global Cybersecurity Institute, argues that protecting against cyber incidents is everyone’s responsibility, from the people in the boardroom to entry-level employees. “Board members who are not as experienced with cybersecurity need to see it at the forefront of financial risks that could impact their bottom line,” says Mr. Ridge. “We need to have more information-sharing and more conversations about cyber risk at the board level, and not just within companies’ IT departments.”

How can companies keep their board members attuned to the risks inherent in disruptive communications without intimidating or depressing them?

The answers aren’t easy, but there are constructive steps that perceptive companies can take to keep board members plugged in.

First and foremost is to provide board members with a steady diet of articles and expert commentaries on the changing cyber climate.
Don’t saddle them every other day with a 100-page treatise on the latest cyber-hack nightmare. That will turn them off. Instead, email or text them quick and easily digestible news summaries and samples of how a nasty hack was averted—or, on the flip side, how company X was hurt by a sluggish response to a cybercrime.

When a respected business outlet runs a story about the dangers inherent in disrupted communications, make sure your board members see it—with key passages highlighted. That way they’ll be less shocked if and when the hazards hit you. And perhaps they’ll be more inclined to help you undertake preventive measures now, during peacetime, and not wait until it’s too late.

Second, consider adding board members to internal task forces on your areas of greatest vulnerability. They’ll see firsthand how seriously risk management is being handled by the company. And they’ll develop a greater appreciation for how rugged the real world of disrupted communications can be these days.

Third, show your board members the efforts you’re making to strike down the silos. When a disrupted communications crisis hits, you’re going to need everyone on board right away: from the general counsel’s office and public affairs to the folks in information technology and human resources. If they haven’t worked together in a crisis environment—even a simulated one—it could lead to a lack of trust and backbiting.

Managing risk these days is managing disrupted communications—and the way-too-easily-disrupted world that comes with it.
Will Naked Short Sellers Torpedo the Trump Bull Market?

by Richard Levick
Nevermind the succession of new tariffs that beclouds the prospect of sustained economic growth. Some observers believe even greater threats to the “Trump Rally” are rooted deep within our financial markets — specifically, in the sort of systematized and pandemic short-selling that can roil market innovators like Tesla, not to mention small and midcap companies that are much more vulnerable to manipulation. One might wonder which burgeoning new industries are on the current hit list. Publicly traded marijuana companies are mentioned often.

Short selling is a fact of life and I see no point in belaboring the familiar pro-and-con arguments as to its systemic impacts. However, there is an unresolved issue that’s very much worth revisiting. I refer to naked short selling. The SEC must act quickly to strengthen current regulations and it must act decisively to more effectively enforce those regulations.

During the 2008 crash, Lehman Brothers Chairman and CEO Dick Fuld told Congress that naked short selling played a major role in undermining his firm and precipitating the meltdown. The SEC also heard similar complaints from Goldman Sachs and Morgan Stanley. These investment banks (unlike other public companies) had access to trading records and could see the mechanisms by which the naked shorts were being done despite then-existing regulation.

Naked shorting takes place when investors sell tradeable assets that they do not possess or can even confirm their ability to possess. The trade may therefore fail to complete within the required clearing time. Unimpeded naked shorts hidden by a panoply of sophisticated concealments threaten a deluge of phantom stocks. Indeed, with naked short selling, actual share supply is sometimes less than traded volume.

You probably remember Mel Brooks’ The Producers in which the unscrupulous Max Bialystock came close to making a fortune by selling multiple 100% shares of his new Broadway play. Such a scheme works like a charm provided the venture is guaranteed to flop so no one expects any return on their investment. Alas for Mr. Bialystock, his play did not flop. Of course, Lehman Brothers did.

As part of its response to the crisis, the SEC codified Rule 204T, which requires broker-dealers to promptly purchase or borrow securities to deliver on a short sale. Rule 204T likewise requires that the broker-dealer (not the seller) “locate” an entity that the broker reasonably believes can deliver the shares.

If an investor or its broker-dealer does not deliver shares by the third day after the trade, a “failure to deliver” (FTD) occurs. Rule 204T imposes penalties if a clearing firm does not then purchase or borrow shares to close out FTDs no later than the beginning of the next trading day after the occurrence. The SEC also began working with the exchanges to make data on short sale transactions and volumes publicly available online.

Prior to 2008, a few lonely voices were raised against what seemed the patented abuses inherent in naked short selling. Patrick Byrne, chairman and CEO of Overstock.com, was the poster boy. He aggressively litigated against hedge funds and market makers he believed were sabotaging the capital markets; Overstock.com’s own share value had dramatically decreased even as its revenue and productivity grew dramatically. The 2008 crash made Byrne look like a prophet; a 2012 Bloomberg Television segment effectively chronicles his story.

At that point in time, SEC prophylaxis still did not satisfy critics like Kristina Copeland whose documentary film, Wall Street Conspiracy, is a compelling portrait of a system mired in manipulation and
self-dealing. Others dismissed such characterizations as red herrings; for example, Jim Chanos, president of the hedge fund Kynikos Associates, who famously shorted Enron, suggested that blaming naked short selling is a way for executives to avoid responsibility for simple bad management. (Of course, that’s also the mantra for activist investors, with whom short sellers often make common cause.)

More disinterestedly, a 2014 study by researchers at the University at Buffalo, published in the Journal of Financial Economics, found no evidence that failure to deliver stock “caused price distortions or the failure of financial firms during the 2008 financial crisis.” Today, University of Buffalo faculty member Veljko Fotak sees no reason to back off from that position. “We have always recognized the potential for abuse, but we just didn’t find evidence of it, even for firms such as Lehman that were vocal about the negative impact on their own stock.”

“I do believe that the current ban is unnecessary,” adds Fotak. “We are not advocating for total deregulation, [but] the restrictions in place prior to 2008 were already sufficient. Blaming short sellers is always easier than admitting that betting the farm on subprime mortgages was a mistake.”

According to Fotak, “the SEC was dragged kicking and screaming by Congress into imposing this ban.” Those favoring more aggressive regulation would no doubt agree with that. Thomas Ronk, for one, further points out that, with a full day under existing law to cover after an FTD occurs, market makers are still effectively exempt from the ban.

Ronk is CEO of BUYINS.COM, Inc.; with cofounder Matthew Pirvul, they’ve set up a database “to level the playing field between institutional shorts and shareholders...” Since January 2005, their team has tracked the aggregate daily short volume data from thirteen U.S. exchanges and found a dramatic decrease in FTDs in recent years. However, according to Pirvul, “While FTDs have decreased...there has been a noticeable increase in the aggregate daily short volume and total shares shorted as a percentage of total trading volume.”

“We hope that the decrease in FTDs is due to the proper delivery of stocks between back offices of broker-dealers/clearing firms,” adds Ronk. But he offers another explanation: Using complex computer applications, “market participants are netting out delivery obligations amongst themselves without actually delivering the shares.

“The SEC and FINRA have both taken actions to monitor compliance with failures to deliver,” Ronk says. “What remains to be seen is how broker dealers are reporting their FTDs and how their corresponding clearing firms monitor that reporting.”

The SEC has ordered construction of the CAT database (Consolidated Audit Trail) at a cost of approximately $1 billion. However, the Securities Industry and Financial Markets Association (SIFMA) successfully lobbied for a one-year delay. “We believe that the CAT database combined with the SEC’s MIDAS [Market Information Data Analytics System] could be an automated surveillance system capable of more thoroughly regulating the more than 300 market makers and 4,000 broker dealers,” says Ronk.

One can always hope but, in the current limbo, three larger questions persist. First, will the powers that be (like SIFMA) find ways to indefinitely neutralize adequate regulatory resources? Second, why has the SEC been historically hesitant to implement aggressive regulation of naked short selling? Third, most importantly, what justification is there for naked short selling under any circumstances other than honest clerical errors?

I see none whatsoever.
It’s been around 15 years since my firm was retained by an order of the Catholic Church embroiled in a crisis involving charges of pedophilia and cover-up. Periodically, when new developments occur, such as the massive Pennsylvania abuse scandal that surfaced in August, my thoughts naturally revert to that experience. Each time, I ask myself what if anything has been learned. Each time, I wonder too about the larger socio-cultural impact of this seemingly endless ordeal.

To be sure, Scott Sobel and Larry Smith, the two senior colleagues who worked with me on this matter, are likewise haunted by such persistent reflections. I say “haunted” because, obviously, there’s been no closure or resolution for any of us. Yet, while we’d be loath to offer up bromides or glib pronouncements under any circumstances, perhaps some insight can be gleaned from a collective reflection. I’ve therefore asked Scott, now with kglobal, and Larry to provide a few brief comments of whatever sort they choose. I’ve appended my own to theirs.

Scott’s experience is particularly trenchant as he is a convert to the Church who over the years has retained some contact with the order we represented. Yet Scott has no illusions about the institutional fallibilities that continue to protract the crisis at the diocesan level as well as at orders like our client, a rather isolate and strongly ideological order. Even while their crisis grew deeper and Scott became ever more closely entangled with these people, he strongly suspected that he wasn’t being told everything; that fresh revelations awaited. Tragically, subsequent events confirmed his suspicions.

At the same time, Scott’s own spiritual journey was undeterred for a host of personal reasons; his faith in the moral agency of the Church abided despite its compromised hierarchy. For Scott, that translates directly into a practical strategy for collective rejuvenation and rebirth. If his faith held fast in part because of his own awareness of the extraordinary benefits, spiritual and practical, that the Church provides, should not the Church therefore “maintain a constant drumbeat” in the face of its ongoing crisis – constantly reminding the world of those extraordinary benefits, not to excuse or mitigate transgressions but as a wholly separate narrative?

The drum must be beat at the diocesan and parish level, Scott emphasizes, completely separate from the internecine politics and bureaucracy that have exacerbated the ongoing crisis. “It has to be more than an occasional news release,” he says. “It has to be a groundswell, a grassroots outreach in which the everyday work of individuals and dedicated congregations can once again define what the Catholic Church is all about.”

While Scott was embedded at the client’s headquarters in Rome and dealt with international media, Larry faced local skirmishes in two U.S. communities where priests were being accused. His approach was to defuse local coverage by questioning the extent to which the accusations were full-proof. “This was highly sensitive and called for a very delicate balancing act,” says Larry. “Nothing was more abhorrent to me than attacking the alleged victims, and I just would not do that.”

What Larry did do was focus in a general way on the nature of the relationships between priests and parishioners; to emphasize how vulnerable both parties are in these intimate relationships, and how the trust of innocent priests can also be betrayed. Take all accusations seriously but be very sure of the ground you stand on. Be very sure that you, as a journalist, or simply as a concerned citizen, are being fair to both sides before you go ahead and ruin someone’s life with unvetted allegations.

Like Scott, Larry perceived deep vulnerabilities in the order. “I suggested to a senior priest that he talk to rabbis and reverends he knew who might be able to speak on behalf of the order,” recalls Larry. “He told me he didn’t know any rabbis or reverends.

“I found that disturbing, very disturbing. Such isolation bodes no good.”
My own reflections over the past 15 years have tended to be more generalized, inspired, really, by a number of larger socio-cultural trends. I knew before I met this client that there were fundamental differences between me and the Church itself regarding social issues. That never bothered me as I don’t expect or even hope that large institutions will change fundamental philosophies overnight. Besides, the Catholic Church has been historically open to change and growth from within since the 13th century at least.

I also believed, and still believe, the Catholic Church is the kind of anchor that civilization needs in a world that offers little peace and no certitude; a world of increasingly diminished community and moral values relativized or simply destroyed with each raucous Twitter blast. “If God does not exist, everything is permitted,” Dostoevsky famously wrote. We’ve seen enough post-Christian technology and politics to know just how awful it is when everything is permitted, especially to those viral throngs whose worst natures are encouraged by Internet anonymity and non-accountability.

So, I entered our engagement with this order of the Church instinctively aware of the stakes; instinctively aware that, when a great institution is mortally wounded, we are all harmed. We all lose some vital comfort, some sense of shared mission. The longer any institution ignores the causes of its crises, the greater the peril it must ultimately face. But, I told myself, the Church survived a Reformation that its own avarice had brought on. It will survive this as well.

These days I’m not so sure. Fifteen years ago, I had probably forgotten that the Counter-Reformation succeeded because the world was still a religious place in the 17th century. Today, watching the evolution of the Internet, I see something more challenging to the Church than science or free thinking or capitalism. I see the trivialization of the very idea of reality, a boundless technologically driven solipsism in which everything is possible and therefore nothing matters.

It’s precisely the kind of spiritual wasteland from which the Church once offered refuge but in which it may now be hopelessly mired – not just because its transgressions are horrific, but because the will to redeem has been enfeebled in the vast reality TV show that our world has become.
The End of the Penny Stock Market Could Be Imminent

by Richard Levick
An event that rather significantly affects the financial markets has just occurred without much if any fanfare in the financial press. Bank of America’s Merrill Lynch announced that, as of September 30, it will not allow clients to sell microcap stocks, known as penny stocks, without a regulatory review and will outright ban sales of the riskiest ones. The bank had already discontinued purchases in July. If enough other financial institutions follow suit, the penny stock market could disappear altogether. As of this writing, Morgan Stanley and UBS have not followed Merrill’s lead, according to sources cited by CNBC reports, but investors sense a chill wind has begun to blow.

Shares from companies valued under $300 million and traded for under $5 on an over-the-counter market are the ones affected — in other words, virtually the entire microcap market. Since total aggregate volume of OTCQX, OTCQB, and Pink securities was $246.7 billion in 2017, we’re talking about major economic impact. Thousands of start-up companies may go unfunded, overall growth in key industry sectors derailed, and jobs lost.

It’s all the more disheartening in light of data showing that 98% of that $246.7 billion in traded securities involve companies which provide current information to investors, “demonstrating continued progress in using data-driven standards to encourage OTC issuer disclosure for investors and brokers,” at least according to a report from OTC Market Groups Inc. The same report tells us that 61 companies graduated from OTC markets to a major exchange, which says something about how the microcap market feeds and enriches our economy’s mainstream. IBM was once a penny stock, after all.

The question is why Merrill, for all intents and purposes, is abandoning this market at this juncture. The official line, in Merrill’s communications to its brokers, is that microcap stocks can be too easily manipulated for fraudulent purposes. But that’s hardly news, of course, so why get out now rather than a decade ago? The answer may be that the risk of fraud becomes all the less worth running when coupled with a prophylactic regulatory regime with which it is simply too expensive and time-consuming to comply.

Because of restrictions imposed by FINRA and the SEC, microcap funders cannot, for all intents and purposes, deposit paper certificates with major clearing firms. Stringent requirements escalate the costs associated with the deposit and liquidation of these securities since broker-dealers are required to file Suspicious Activity Reports (SARs) with the Treasury Department for transactions suspected to involve fraud or with no apparent lawful purpose. Compliance is by no means perfunctory as a quick glance at the filing instructions will confirm. In fact, the overall cost of compliance has grown into the billions of dollars annually as banks filed nearly one million reports in 2016.

For Jason Adams at Key West Investments, LLC, it’s an instance of the regulatory right hand not knowing what the left is doing. On the one hand, says Adams, the government is stimulating more investment on the front end via crowdfunding, looser restrictions on Internet advertising, etc. But once that money enters the market, it’s a Herculean task to get it out.

“It’s a bait-and-switch,” he says. “I’d compare the current system to a casino that lets people play with chips all night and then closes the cash-out window.”

Recent SEC actions typify the regulatory hazards that banks, broker/dealers, and clearing houses now face. If the compliance burdens are heavy for Bank of America, smaller firms, including both broker/dealers and clearing houses, are really up against it. In September, for example, the SEC settled with clearing firm COR Clearing LLC for not reporting millions of dollars in purportedly suspicious penny stock sales. COR did not admit guilt, but agreed to effectively exit the business by drastically limiting sale of microcap stocks deposited at COR. According to the SEC, COR ranked second in 2016 among all broker-dealers in the total dollar value of sub-$1 penny stocks that it cleared.

In another significant matter earlier this year, the Commission settled with broker-dealers Chardan Capital Markets LLC and the U.S. unit of Industrial and Commercial Bank of China Limited, for failing to
file SARs for billions in microcap stock sales. Chardan agreed to pay a $1 million penalty. Last year, the SEC charged Alpine Securities Corporation with routinely and systematically failing to file SARs for stock transactions flagged as suspicious. According to the complaint, when Alpine did file SARs in some cases, it allegedly omitted the very information that led to Alpine’s belief that a transaction was suspicious.

Adams sees a fundamental regulatory disconnect here as well. “They’re not penalizing or preventing money laundering because they have no idea where the initial investments came from,” he says. In effect, all the regulators achieve with SARs is to tell money launderers to find another way to clean their lucre. Smart fraudsters will always find a way to game the system.

With their deregulatory energies unleashed in so many other directions, it seems time for the Trump administration to particularly focus here, on behalf of investors who ask for nothing more than the right to cash in their holdings without the burden of having to navigate unnavigable hurdles. We’ll see if the administration is quick enough, or willing enough, to recognize and correct the looming demise of this entire market segment.

Efforts toward reform have already been undertaken within the industry, with the explicit purpose of more directly engaging government, not simply to deregulate, but to manage the situation in a way that would lighten the burden while still providing the microcap market with the oversight needed to ensure its integrity. The Clearing House, now restructured as the Bank Policy Institute (BPI), issued a report last year that called for the reformation of the “outdated SAR regime” and for the government itself to assume the costs of oversight.

The report points out that, when the SAR regime was founded in the 1990s, agencies had little insight into the financial system and no technical ability to mine data. “Today, government agencies could develop resources to mine financial data, and rely less on financial institutions to provide robust, individual reports on suspicious activities or transactions.” It would be in the regulators’ interest as well. Even as financial institutions have been compelled to file ever-increasing numbers of reports, “a declining percentage provide value to law enforcement,” said BPI. Yet regulators “continue to emphasize the importance of financial institutions developing carefully crafted, highly detailed SARs, with little to no feedback provided on such submissions…”

In other words, the microcap markets are broken. SARs relief may not be the only way to fix it, but it’s a pretty sensible start.
University of Maryland: An Institute For Lower Learning?

by Richard Levick
There is an old saying in crisis communications: “Pay me now or pay me later.” The cost is never more of a bargain than at the beginning when the band aid gets ripped off. It is painful, of course, and it means saying goodbye to the comfortable way of doing business; sometimes, it means the end of careers, products, or more.

But still, this sacrifice in the face of a near-death institutional experience is a bargain, or, as the Marines would say, “Always better to sacrifice an arm than your life in a knife fight.”

The University of Maryland, my alma mater, showed it learned nothing from Martha Stewart, Penn State, Michigan State, or even Richard Nixon.

It’s not just the crime or the cover up. It is the failure to summon the courage to act. And a failure of courage is almost always the result of a faulty analysis of the problem. This was not about football. It was all about Jordan McNair, the 19-year-old football player, who died of complications from heat exhaustion. As Ellis McKennie, a Terrapin teammate and lifelong friend of Jordan McNair, wrote, “It’s never the wrong time to do the right thing.”

A crisis cannot be wished away by even the smartest people. The best the Board of Regents could do after “studying” the crisis for three months, was to walk slowly into the propeller blade rather than run into it.

Maryland students, faculty and alumni, coupled with members of the football program, the governor, other elected officials and a justifiably outraged media, deserve credit for forcing a reversal of the Board of Regents’ execrable decision to reinstate football coach DJ Durkin and athletic director Damon Evans, despite all the damning behavior the Regents unearthed in their “wait for us, we will get it right when we study the problem carefully over the course of a semester” investigation.

It took far too long, inflicted incalculable damage to the university’s brand, and betrayed Jordan McNair’s family and memory. The university finally came out in the “right” place by firing Durkin, but Evans is still on the job; far worse, the Regents blackmailed University President Wallace Loh into retiring at the end of this academic year, a great loss to the institution. President Loh has been a huge boon to the university, buttressing its academic reputation and transforming its commitment to technology.

Not only are the Regents bad at mourning, history and reputation, they are bad at math. No matter who is at fault, part of the reason institutions make sacrifices – even if the person(s) fired is not fully responsible – is to deliver a message: “That was then, this is now. We recognize the need to change and we are doing it, institutionally and symbolically.”

Clearly, courage does not wear black, gold and red.

The school had to be shamed into doing the right thing by a series of searing student protests and condemnations from the media, not to mention a highly unusual deeply critical public letter from Governor Lawrence Hogan.

Irony of ironies, Maryland’s Regents lost the very constituency they were hellbent on winning: the sports community, their false god. Stupid is as stupid does.

You needn’t look far for sports criticism.

It was everywhere. Particularly on point, is an October 30 commentary by ESPN’s Scott Van Pelt, an ardent Maryland alum. In it, he skewed the Regents’ decision-making and warped values. With visions of Big Ten money swirling in their heads, the Regents asked all the wrong questions and managed to lose every constituency.

The most tragic quote in the decision-making process came from the now resigning James T. Brady, the outgoing chair of the Board of Regents (There is another classic lesson here. The longer a crisis
festers the higher the price goes in any organization. What was once all about two athletic trainers is now taking out a head coach, university president and board chair. Brady extolled Durkin’s “passion for the university, the football team and the players. [Durkin] was absolutely impressive and very believable.”

Forgive me, but why does Durkin’s “passion” have anything to do with these issues? “Yes, his belligerence poisoned a culture that may have contributed to a young man’s death,” the Regents seemed to be saying. “But look, he loves the game.” Loving the sport or your victim does not exonerate you.

This tragically reveals a classic error – the false equivalence test – in this case pitting football passion with the death of Jordan McNair. It also tells you everything you need to know about why Maryland did virtually everything wrong. The first question you have to ask in a crisis is, what does a ‘win’ look like? Saving lives and honoring the dead are always at the top of the list.

Inexplicably, the Regents made this mistake in slow motion (Do we now call this “The Big Ten Mistake” with three schools now having done exactly the same thing?) and focused on the wrong goal – not unlike the Catholic Church, which chose to protect wrongdoers, not victims; Takata, which thought it had a lock on automobile air bag sales and forgot about driver safety; or Volkswagen, which settled into a comfortable institutional lie about its compliance with environmental laws rather than install uncomplicated technology.

In an incredulous but largely under-reported move, the Regents also recommended retaining both the assistant athletic director of athletic training and the head trainer for the football program. An earlier independent report — one the University had accepted — had outlined numerous missteps that were made by the school’s athletic trainers, which contributed to Jordan McNair’s death.

The choices before Maryland’s Regents were not difficult: justly compensate the McNair family, pay homage to this brave young man’s memory, re-examine their football and athletic culture, abide by the NCAA sports medicine recommendations, and dismiss the coach and athletic director to begin anew. By failing to exercise that judgment, the Regents have lost their authority. They chose to side with the football coach over the parents and over the university president. This will take the Regents and the university years to recover.

And for the rest of us, just heartbreak and the recognition of another great institution letting us down.
When We All Vote: A Chance to Do Something Truly American

by Richard Levick
What makes my family’s immigrant history so remarkable is how unremarkable it is – at least compared to other American families that have overcome even greater hardship and persecution.

Both the Levicks and the Rosenblatts, my mother’s ancestors, came to America to escape the vicious anti-Jewish pogroms that terrorized Russia and Poland in the late 19th century. My grandfather Levick was still in swaddling clothes when his parents left behind their shtetl. I can only imagine how frightened they were as they took themselves and their toddler from horse-wagon, to train, to boat, to another boat, and after enduring many days of rough seas, stood on a crowded deck to admire the Statue of Liberty on their way to Ellis Island.

My forebears weren’t alone. Jews fled the Tsar and his marauding Cossacks by the hundreds of thousands. The ethnicity, the geography, and the persecutors may be different, but that same story can be told about tens of millions of Americans, from the very beginning of the New World until today. It is probably why today I so embrace and relate to immigrants, from Mexico, Latin America, Africa, and beyond. “Give me your tired, your poor, your huddled masses yearning to breathe free” is as sacred to me as the First Amendment.

Regardless of where their journey originates, immigrants come here to seek a better life for themselves and their children. Many of them hail from autocratic societies where any possibility of achieving freedom of religion or the consent of the governed is a cruel joke.

Repressed peoples continue to come here because America, for all our flaws, has been and – our citizenry willing – will remain an open and democratic society. How can we pay homage to our ancestors, who sacrificed so much so we can enjoy the fruits of freedom?

The answer is by practicing what was known in my formative years as “civilized democracy” – the values that those who came before imbued in us. Those values begin and end with one word: VOTING.

Let me put it another way: our ancestors didn’t subject themselves to the hell of escaping Tsarist Russia, or famine-wrecked Ireland, or corruption-plagued Central America, so that their descendants wouldn’t bother to vote or participate in America’s great experiment in democracy – the very thing that drew them to our shores in the first place.

Many Americans say they feel hopeless these days – that the system is rigged against them. I understand that feeling and would be lying if I didn’t say I felt despair at times and needed to take the pulse of democracy to see if it was still breathing. Among our voter discouragements are unbridled candidate funding for the few, new obstacles at the polls, and gerrymandering that gives the U.S. Congress less turnover than the Politburo. It seems not all votes – or voters – are equal.

Great laws and great progress – freedom of the press, freedom of religion, the civil rights and voting rights acts – are made not when one ideology governs, but when the learned disagree and discuss, rationally and heatedly, the intended and unintended consequences of actions in state legislatures, in Congress, and at the Supreme Court. Ideology is a filter designed to help us first understand how we will view an issue. After that, consideration, judgment, and discussion need to take place.

Only through a well-balanced democracy can this second step be engaged. Voting is the first step in this thousand-mile journey.

In the presidential campaign year of 2016, voting turnout declined to its lowest level in two decades. A CNN study points out that only about 55 percent of voting-age citizens went to the polls two years ago.

Eight years earlier, with President Obama on the ballot, some 64 percent of voting-age citizens – nearly 19 million more voters than in ‘16 – went to the polls. Many tens of millions adult Americans aren’t even registered to vote. When you think about the difference the American Republic has meant to the world – 75 years ago this fall, virtually all of Europe remained under the bootheel of Nazi oppression, awaiting liberation from Allied troops – Americans’ indifference to participating in our democratic processes makes your heart ache.
What can we do about it? As simple as it sounds, get more people to register, get more people to the polls, and get more people engaged in civilized democracy.

My company, LEVICK, is part of a voter registration and education initiative sponsored by the Arthur Page Society called When We All Vote. The impetus behind When We All Vote is to reach out across the spectrum – Michelle Obama and Tom Hanks are co-sponsors along with Faith Hill and Tim McGraw – encouraging grassroots organizations to make voter registration a priority for their members, especially groups that appeal to younger people. The goal is to inculcate voting habits in young people now – and hope they stick for a lifetime.

Voter participation always falls off for midterms, often quite dramatically. When We All Vote is also aimed at instilling better voter discipline across the board – getting voters to the polls every election, regardless of who or what is on the ballot.

This great-grandson of Russian immigrants had the honor of teaching university students the politics of U.S. constitutional law some years back. I would begin the first lecture by emphasizing that the American experiment in democracy is fueled by the world’s longest-living constitution, a living, breathing, flawed document guiding an imperfect union that cannot endure unless people of conscience work to improve it. That exercise begins with voting.
The Elon Musk Question: When Is 'Worth It' Really Worth It?

by Richard Levick
Elon Musk has always had a knack for grabbing headlines – some more positive than others – but the Tesla CEO’s latest incident has left many wondering what the entrepreneur is up to. Following a $20 million fine from the SEC after a tweet which mislead investors, Musk claimed it was all “worth it.” Does publicity justify controversy in this instance?

Elon Musk’s August tweets that led to a $20 million SEC fine were mystifying enough. But on October 29, Tesla’s redoubtable Chief Executive added to the head-scratching when he claimed it was all “worth it.” You’ll recall Musk was charged with misleading investors when he tweeted that he was considering taking Tesla private. He was also forced to step down as Chairman.

Worth it? Forbes deputy editor Helen A.S. Popkin raises at least the possibility that Musk is crazy like a fox. “For good or ill, no other automotive brand has the reach and impact of Musk’s tweets,” wrote Popkin. “And this sort of advertising isn’t replicable.” There’s purportedly something Houdini-like about his magic. “Musk can tank Tesla’s stock with a weed joke, only to collect the accolades from his followers when it rebounded…following a record $312 million profit,” wrote Popkin.

Of course, the questions get begged: who are those followers, of what bottom-line value is their enthusiastic support, and what is the longer-term impact on the company? Does such publicity justify controversy, especially if Tesla might equally thrive without it?

“Imagine if you are on the board of Tesla, how do you deal with the reckless tweets and behavior of Musk?” asks risk expert James Lam, president of James Lam & Associates and Chairman of the Risk Oversight Committee at E*TRADE Financial as well as an independent director at RiskLens. “How do you deal with the CEO who is the genius behind the brand and company, especially under intense public and regulatory scrutiny?”

Lam categorizes Musk as a “white elephant,” by which he means “big issues that are extant but difficult to acknowledge and manage.” Examples may include troublesome social media postings and behavior by the CEO, deeply rooted cultural issues, or workplace harassment incidents in the #MeToo era.

“White elephants are not acknowledged or dealt with on a timely and appropriate basis due to subjectivity,” adds Lam. “To address white elephants, boards should invest in good governance, objective data and input from independent advisors, and crisis management plans. They should also invest in succession planning to reduce ‘key person’ risks.”

In a situation like Tesla’s, the challenge for companies is to somehow retain the boisterous creativity that first-generation entrepreneurs like Musk bring to the table, while finding ways to channel that energy. Their goal is to exploit the iconoclastic brand without incurring undue risk or, for that matter, a $20 million fine.

In other situations, decisions may be demanded as to whether or not staking a controversial position is strategically creative and simply good business. “Boards do not typically recommend seeking controversy, and I would not advise that approach over social media,” says Susan C. Keating, CEO of WomenCorporateDirectors Foundation. Yet, there are exceptions. “Generally, a controversial position taken on social media would be a piece of an overall corporate campaign designed purposefully to be provocative,” adds Keating, and she cites Nike’s Colin Kaepernick ad as an example.

Corporate good citizenship may also demand taking a controversial position irrespective of the immediate business gains or risks incurred. “What is valued today in this world of fake news, corruption, and lack of moral values, is for honest and authentic leaders to step up where there is a moral vacuum,” says Catherine A. Allen, chairman and CEO of the Santa Fe Group and a director for Synovus Financial Corporation and El Paso Electric.

“I think of Walter Wriston, former chairman and CEO of Citibank, who was a global statesman,” adds Allen. “Today, Nike, Microsoft, Lyft, Land of Lakes Butter, and others are taking a more visible stand for the values the CEO and board espouse. It will turn off some people
and that is a risk, but I believe boards will be scrutinized more closely going forward for their culture and values.”

“To the extent an issue is relevant to your core business, you may not have a choice but to take a position,” says Denise Warren, CEO and founder of Netlyst, LLC, and a board director at Taylor Morrison Home Corporation, Monotype Imaging, and Electronic Arts. “We are living in extraordinarily partisan times and many customers, employees, and other critical stakeholders will simply not engage with companies whose values don’t align. They will demand to know where you stand on issues that are important to them.”

In other words, sometimes the risk isn’t just “worth it.” It’s necessary.

One CEO who seems to agree is Sheryl Palmer, chairman and CEO of Taylor Morrison, one of the largest home building companies in the U.S. “Oftentimes brands will see customers resorting to social media for solutions when they feel they aren’t being heard or taken care of,” says Palmer. “I understand that, the more accessible we are on social media, the more likely we are to receive an unfavorable comment here and there. But Taylor Morrison is a company that cares about people, and we don’t hide from negative comments on social media.

“Social media has simply become another vehicle for supporting our customers, hearing them, responding to them, and working toward a resolution,” adds Palmer. She believes that it can be strategically advisable for a CEO to take a controversial position, “but only with humility and an open mind to seeing the opposition’s point of view.”

If, as a recent study reveals, fewer than 10% of Fortune 500 CEOs engage in social media, Palmer personifies the enlightened minority. “Every social media channel has different audiences,” says Palmer. “I’m on LinkedIn daily and make it a point to interact with our company profile (like, comment, share posts), and to post more personal insights on my own account (key takeaways on state of the industry, events I’ve been invited to, company milestones, etc.). I have a few blog posts under my belt on topics near and dear to my heart...I have personal Facebook and Instagram pages too.”

Such engaged CEOs understand the obvious: that, in the last analysis, social media usage cannot be fully legislated; by nature, they present a riskier, less controllable environment than what most CEOs (Elon Musk notwithstanding) are comfortable with; “humility,” to use Palmer’s word, is called for.

“Social media can be a CEO’s Achilles heel, but typically this is indicative of a larger issue around the CEO’s leadership as a whole,” says Keating. After all, leadership demands adaptability, however strange – or controversial – the brave new world may be.
Opinion: Democrats Won the House, But What Happened to Their Passion?

by Alex Madison
What should have been an extended victory celebration for the Democrats after a successful election night lasted just until President Trump got in front of a camera the following morning. Intended to be a traditional, post-election press conference, the presser turned into a performance that dominated the news cycle for days. Trump had reminded the world that American politics still orbits around him.

Another oddity: there seemed to be more excitement coming from the left on Monday night than on Wednesday morning after victory had been secured. Why such short-lived enthusiasm? Where did the progressive passion go?

The answer is that it drained out with the candidates who didn’t win. Take Beto O’Rourke, a bona fide cultural phenomenon. Young liberals sported “Beto” shirts from Los Angeles to Brooklyn. Democrats fantasized over the prospect of a young, handsome Democrat with a Spanish nickname kicking conservative firebrand Ted Cruz out of the Senate in a safe red state.

Speaking in plain terms with powerful rhetoric and charisma, his campaign visited every county in Texas, striving to appeal with an unapologetically liberal message to moderate and conservative Texans who’ve never voted for a Democrat in their lives. Congressman O’Rourke drew massive crowds, regularly went viral on Twitter and Facebook, and received millions of dollars’ worth of earned media. Beto was the hottest Democrat since President Obama, and according to some, perhaps a potential successor. If the “blue wave” engulfed blood-red Texas, it could win anywhere.

Andrew Gillum and Stacey Abrams generated enthusiasm from the left as well. Both galvanized the progressive wings of their respective states, attracting the crowds and media attention required in campaign politics today, and most importantly both styled themselves as unapologetic progressives in the vein (and with the endorsement) of Sen. Bernie Sanders (I-Vt.).

Gillum and Abrams both faced extremely “Trumpian” opponents, so the outcomes of these races were thought to be something of a post-hoc proxy for an alternative-universe 2016: what might have happened had the Democrats put forward a charismatic progressive candidate against Trump instead of a damaged moderate?

In the end, just as Sanders lost his race, so have the other candidates that Democrats sorely needed for rebranding. With Trump still packing stadiums two years into his tumultuous presidency, why hasn’t the Democratic brand of enthusiasm been able to produce leaders that reflect its origin?

Progressive candidates in major elections who successfully built their own, positive brand — for whatever reason — haven’t been able to bring it home come election day. So, while the Democrats were able to keep pace with historical trends by flipping the House, they failed to elect a new generation of leaders the party is in desperate need of.

Furthermore, the Brett Kavanaugh saga turned out to be a colossal failure for Democrat branding as well. Young, progressive Sens. Kamala Harris (D-Calif.) and Cory Booker (D-N.J.) saw his hearings as the perfect opportunity to springboard into the national spotlight, theatrically appealing directly to the progressive wing of the country. While the reputational measuring here is more difficult than with an election, Sen. Joe Manchin (D-W.V.), the lone Democrat who voted in favor of Kavanaugh’s confirmation, coasted easily to reelection in arguably the reddest state in America, while Sens. Joe Donnelly (D-Ind.) and Bill Nelson (D-Fla.), both of whom opposed Kavanaugh, lost their reelection bids in swing states.

For perspective, Harris and Booker barely register as likely threats on most polls of likely 2020 Democratic primary voters.

Last Wednesday, Trump posted the following to Twitter: “In all fairness, Nancy Pelosi deserves to be chosen Speaker of the House by
the Democrats. If they give her a hard time, perhaps we will add some Republican votes. She has earned this great honor!"

This is Trump at his absolute best. The president has no intention of letting the progressive wing of the Democratic Party push a fresh-faced, compelling unknown into the Speaker's office. Trump wants (and intends on placing) Nancy Pelosi front-and-center where everyone can see her. And his point? Yesterday's Democratic Party is the same as today's. If there is one politician today not named Hillary Clinton that riles up the Republican base, while proving inversely uninspiring to her own, it would be a Democrat Speaker named Nancy Pelosi. If Pelosi does, as expected, regain the Speaker's gavel, Democrats will have inarguably fallen right into Trump's trap, and more importantly, failed to learn the lessons of 2016.

In many ways, Pelosi personifies exactly what has turned so much of Midwestern, middle-class America against the Democratic Party: A wealthy, coastal elite who can't or refuses to understand how Trump won. Has Pelosi even met a Trump voter? That characterization may not be entirely fair to her. It probably isn't, but optics in politics today are at least as important as truth.

So where does this leave the Democratic Party? Obama still seems to be the main show. And while he's done some great work campaigning for the Democrats, U.S. presidents have a long history of receding to the background after their term. It's hard to imagine Obama doing much more for the Democrats than he already has.

At least for now, the midterms have not bolstered their image from 2016. The Democrats have failed to heed their own diagnosis to rejuvenate their failed brand by embracing progressivism without sensible awareness of other facets of the party. Democrats' 2020 prospects in this respect are no better than they were a week ago, even after winning the House and several governorships. Repeated micro-failures across the board to pivot in a manner that is broadly attractive to a wider swath of Americans has left the Democrat machine lumbering along at the same speed it did in 2015 and 2016, ultimately reactive and beholden to whatever Donald Trump's next move is.

For the Democrats to truly rebrand from their disastrous 2016, they'll have to elect more than just critics of the Trump administration. The party needs candidates who can build their own, positive brand that appeals to the most politically active on the grassroots level. During the Trump era, the Democratic candidates able to do this have been the most progressive, but they've largely been unable to win on election day. The diagnosis for the Democrats following their unexpected loss in 2016 was that they needed to regain touch with the moderate members of the party and America at-large. In 2020, it's very likely they'll end up over-scratching their "progressive itch" by embracing too closely the progressive wing, in platform and candidate alike. If fresh faces and bold ideas can't win elections for the Democrats in 2018, where do they turn to restore their brand?
A Competitive 21st-Century America Begins With Reading

by Richard Levick
More than half of all U.S. students reach fourth grade lacking effective reading skills. Fortunately, programs such as Success for All prove that, when parents and teachers work together at formative moments in a student’s life, everyone wins – even a business’ bottom line.

“Give me your tired, your poor, your huddled masses...
until third grade.”

Much has been made of how America will compete in a disrupted age. How will we adapt? How will we remain competitive as a country and as individuals when so much is changing so quickly.

As unglamorous as it may seem, reading at level by third grade is one of the most important indicators of future success. Reading, perhaps more than any other childhood skill, provides the path to the next Steve Jobs or Oprah Winfrey. A case in point: Christine Fuentes is a 30-year-old civil engineer and project manager at Turner Construction Company in San Antonio, Texas, a thriving nationwide firm whose 120-person San Antonio operation has been a big part of the city’s renaissance.

Every day, Christine directs a team of four Turner employees and a host of subcontractors in meeting tight budgets and tough deadlines for a variety of commercial and residential projects.

Moreover, she’s a qualified “green builder.” She’s accredited in the Leadership in Energy and Environmental Design (LEED) program, a popular green building rating system that doubles as an integral part of Turner’s business offering, which prides itself on its environmental stewardship.

For the past few years, Christine has been a part-time graduate student in the business school at the University of Texas-San Antonio. Soon, she’ll have her Master’s in Business Administration, with a concentration in project management – a degree that Turner helped finance. Her MBA will nicely complement the undergraduate degree in civil engineering that she earned eight years ago at UT-Austin. Hook’em, Horns!

By any measure, Christine Fuentes is a highly accomplished millennial, the kind of focused and energetic professional that any business organization would be privileged to have.

It didn’t happen by accident. She’s quick to point out the things and people that enabled her to overcome a challenging childhood in a home without much money: her resilient single mother; an almost-all-Latino elementary school in southwestern San Antonio whose motto was, “You Must Believe to Achieve”; and a special program known as Success for All (SFA), which allowed Christine, a math whiz, to develop similar confidence in reading and writing English, essentially her second language, while still in elementary school.

SFA came into Christine’s life when she was in second grade and probably reading at below-grade level. Almost all the students were from poorer families where English was rarely spoken.

She recalls taking home the brightly-colored SFA materials to practice reading them at night to her mom, who in turn would sign her reading log. One of SFA’s core principles is to group students across grade levels so that every student is taught at the appropriate level to help accelerate their individual skills development.

Christine remembers working with the younger kids to sound out words phonetically and, if need be, use Spanish to translate certain words or concepts. This commitment to cooperative learning helps the entire class advance.

The more she worked with the SFA program, the more confidence she gained. The more confidence she gained, the more her language skills began to blossom.

She distinctly remembers that moment in fifth grade when her teacher, Mr. Hammer, volunteered that engineers would chart the future of America – and make good money while doing it. Christine vowed at that instant to become an engineer, a goal that led her to write an essay in eighth grade seeking admission to a special STEM (Science, Technology, Engineering, and Mathematics) high school.

Without her SFA training, Christine says, she would never have had the skills to craft that essay – or to take sophisticated science and engineering classes at the STEM school and, later, UT-Austin.
Christine’s example is illustrative of the success that SFA can have when parents and teachers work together at formative moments in a student’s life. SFA founder Dr. Robert E. Slavin observes that, “A child from a low-income household may have enormous potential and the capability to do great things. But if they struggle with reading early in life there’s a good chance they’ll never reach that potential.

“Sadly, more than half of all U.S. students reach fourth grade lacking in effective reading skills. SFA breaks this cycle of failure with hands-on literacy programs that have been proven to work,” Dr. Slavin says.

By partnering with pre-kindergarten-to-eighth-grade schools and programs across the country, SFA has over the past three decades helped millions of children – like Christine – gain new skills. Those attributes have been put to work by thousands of businesses across the country, Dr. Slavin points out.

“Success for All equals success for business,” says Stedman Graham, CEO of S. Graham & Associates, a Chicago-based corporate and educational marketing firm that has worked closely with SFA over the years.

“Investment in early literacy pays off in having an understanding of who you are. The ability to read and process information is pivotal in defining your identity and realizing self-worth, esteem, and the knowledge that you can contribute to any endeavor you choose,” Graham argues.

There are hundreds of thousands (if not millions) of young people like Christine Fuentes out there, ready to contribute to society – and a business’ bottom line. We have to find them early and get them into programs like Success for All. After all, some opportunities are too important to miss.
This Industry Has Pioneered 'Disruption'; Now It Must Alleviate It

by Richard Levick
This Industry Has Pioneered 'Disruption'; Now It Must Alleviate It | November 27, 2018

**Which industry accounts for 10.4% of global GDP, employs over 313 million workers and boasts some of the business world’s top CEOs?**

The answer is the travel and tourism industry. According to Gloria Guevara, CEO of the World Travel & Tourism Council (WTTC), despite its massive impact on the global economy and inevitable growth as travel becomes more accessible, the T&T industry is still taken for granted.

Name this red-hot industry.
It’s a global behemoth that has experienced spectacular growth in the past quarter-century. It now represents 10.4% of global GDP, with projections running even higher for the next two decades. Currently, more than 313 million workers the world over – one in 10 jobs! – depend on it for their livelihood.

Got to be software, right?
Nope – try again.

For a generation, it has been a driving force in the “disruption economy.” It has developed pioneering technology and spawned entrepreneurship that has shaken up the status quo and made life easier and more affordable for billions of people. Every day, it helps break down cultural barriers and brings disparate people together.

Okay, how about financial services?
Nope – try again.

It employs single mothers looking for good-paying part-time work and high school graduates just getting started in the workforce. It also boasts some of the business world’s top CEOs and attracts more than its share of the best and brightest business school graduates every year.

Alright, it’s got to be health care then, right?
Wrong again.

The economic, technological, and cultural juggernaut described above is the Travel & Tourism industry. “Despite Travel & Tourism’s phenomenal impact on the world’s economy, it is still taken for granted,” asserts Gloria Guevara, president and CEO of the World Travel & Tourism Council (WTTC).

In 2017, WTTC partnered with one of its members, McKinsey & Company, to analyse why certain tourism destinations are so crowded. The study observed: “Travel & Tourism is a cornerstone of our global economy. . . .With the world getting richer – one billion more people will be in the global middle class by 2030 – and travel becoming even more accessible, Travel & Tourism will continue to grow.”

The challenge, as Guevara relates, is for the industry “to grow in a smart, equitable, and sustainable way that allows us to be responsive to all our stakeholders, especially our end-users – the traveler.”

WTTC’s diverse and disparate membership – comprised of senior executives from the entire swath of hospitality and transportation companies, from hotels and airlines to tour operators and car rental agencies – enables it to speak with one voice to governments and international bodies. The Council’s 150-plus members account for two-thirds of a trillion U.S. dollars, equivalent to 30% of the entire sector. These companies have helped disrupt the global economy, which has been all to the good.

Consider how booking arrangements were made in the pre-digital era; now, literally at our fingertips, are a range of entrepreneurial sites that compete with one another on pricing. Flight-booking app Hopper, for example, tells you when to book – and when to wait – for flights and hotels, and tracks your travel patterns to predict your next vacation. Airbnb, Uber, and Lyft have revolutionized lodging and ground transportation. And the industry continues to strengthen technology to make travel safer and more secure.
There's a fascinating dichotomy here, Guevara is quick to point out. Having disrupted the global economy, industry leaders now want their customers’ experiences to be the least disruptive they can possibly be.

How? By making the travel experience safe, smooth, and reliable.

According to figures from the global airlines’ body, IATA, the number of people taking flights each year is due to double to 8.2 billion in the next 20 years. It is unrealistic to assume we can double the capacity at the world’s airports in the same time frame, so we must make better use of what we have.

The key to achieving this – and to making our borders more secure – is to incorporate cutting-edge technology such as biometrics into every element of a traveler’s journey. WTTC’s goal is for an international traveler to go door-to-door from Dublin to Dubai with just one identifier – their iris, fingerprint, or facial composition. Not only will this technology make the whole process of traveling more efficient, but it will also enhance security by ousting imposters with more precision and speeding human-controlled security systems.

Guevara explains: “Our vision is that the traveler won't need to provide the same information or passport multiple times. Instead, their experience will be seamless, faster, and more enjoyable throughout their entire journey. Biometrics will work at every touchpoint of the journey to make traveling easier for the passenger while providing border services with greater security.”

In a series of pilot schemes being facilitated by WTTC, representatives from several industries within the Travel & Tourism sector, such as airlines, airports, hospitality, cruise, car rental, and tour operators, will be able to jointly test different technologies that interconnect to improve the experience of the traveler. The first pilot program will see travelers on round-trips between Dallas/Fort Worth International Airport or London using biometric technology to conduct all airline security, airport, and border processes before accessing car rental and hotel check-in using the same biometric information.

Still, Guevara remains concerned about the issue of overcrowding, which continues to make headlines around the world. Guevara, who formerly served as Mexico’s Secretary of Tourism and has been an industry leader since 1995, argues that it all comes down to two imperatives: planning on the part of all parties, plus renewed and unprecedented cooperation between private and public entities.

“It is absolutely vital that communities and destinations take a long-term view of how they want Travel & Tourism to be developed and bring the public and private sectors together to achieve it. This is all about destinations protecting their tourism assets by managing the growth and maximizing the benefits of tourism,” explains Guevara. “Working together is crucial.”

Through the work of WTTC, airlines and local governments need to agree on expansion plans, car rental companies should align with transportation and environmental officials to ensure that growth is sustainable, and everyone in the industry needs to do a better job communicating the urgency of all this to policymakers and opinion leaders. That means an aggressive use of social and digital media, as well as traditional outlets. And it means systematically recruiting compelling third parties and community leaders to help tell Travel & Tourism’s story. It’s the consummate local-global dynamic. What happens in the neighborhood feeds global perceptions – and what happens globally feeds neighborhood perceptions.

Travel & Tourism has been overlooked for far too long. As the WTTC-McKinsey report concluded: “Leaders must be willing to identify and address barriers … And they must look for ways to compromise.”
Five Steps to Heal the Healthcare Workforce Shortage Crisis

by Richard Levick
While recent employment numbers have highlighted the nation's shortage of doctors, the shortage of nurses is even worse. The issue is not job growth, but rather the record high number in job openings, spurred by a combination of higher employment and demands created by the Affordable Care Act. What can be done to solve this crisis?

The newest employment numbers will be out in a few days, which brings to mind a much-discussed problem in recent years. The nation’s shortage of doctors in this country is estimated to potentially reach 121,300 by 2030. The projected nursing shortage is worse: up to 154,018 RNs by 2020 and a staggering 510,394 RNs by 2030. You think your wait is long now?

The problem has been much discussed. Solutions, less so.

Experts typically recite a myriad of reasons for the shortages, from the costs of medical education to the torments of med-mal litigation. Yet if we focus on nursing, we saw relative equilibrium between the number of job openings and candidates earlier in this century. After the 2008 financial crisis, supply and demand were further synchronized as, among other factors, more senior nurses chose to delay retirement.

Trends reversed with our economic recovery. High employment meant more people insured, which led to more people seeking services for a greater variety of reasons. At the same time, clinicians were retiring earlier; one survey found that 62% of nurses over age 54 considering retirement once the recession ended with nearly two-thirds of those planning to retire in the next three years. These numbers are all the more daunting as older nurses represent a disproportionately large segment of the nursing workforce.

Meanwhile, the Affordable Care Act added to the ranks of the insured, with far more preventative care than in the past, even as the baby boomer population continued to steadily increase. In light of such demographics, the core problem is not that too many professionals are fleeing the profession, nor that too few professionals are entering it.

According to the September BLS Healthcare JOLTS report, job openings are at record highs. There are over 1.2 million healthcare jobs open in the month, a 17.9% increase year over year. However, hiring is not keeping up with job openings. Only 633,000 jobs were filled in the month — basically only half of the open jobs in healthcare are getting filled.

Bottom line: “As large as job growth may be, the growth in job openings is much larger,” says Susan Salka, President and CEO of AMN Healthcare.

The fundamental solution is less about attracting people and more about efficiently deploying the people we have. To that end, a number of specific efficiencies present themselves, two of which we’ll mention here.

First, we obviously need a national system to replace the antediluvian state licensure processes that limits mobility. One community may have an immediate need of a nursing specialist; twenty minutes away, just such a specialist in a neighboring state cannot cross the border to meet that need unless he or she has undergone the exhaustive process of providing the 50 or so documents (along with TB and drug screening) needed to obtain a separate state license.

The call for national licensing has been loud and persistent, yet the inexplicable resistance continues — inexplicable because whose special interests does it protect? Not the medical profession’s and certainly not the patients’. The most common argument, that state licensing helps guard against malpractitioners slipping across borders, is hard to justify. A national system would directly preclude that. It’s really only bureaucratic lethargy propping up the current system as inefficiency breeds more inefficiency.

Interstate compacts have gained some traction but are growing slowly. Most notably, qualified nurses can practice anywhere in 31 states that are part of the Nurse Licensure Compact. So far, it’s the only true multistate healthcare license. Such compacts provide compound benefits as they stimulate expanded telemedicine, itself an additional efficiency to address the manpower shortage.
A second efficiency is already at hand, which is the use of “contingent staffing.” The attractions are obvious: if we can’t fully staff our facilities, why not mobilize clinicians on an ad hoc basis, fitting assignments to existing needs? The idea has gained traction as the healthcare industry continues to consolidate; bigger organizations are simply more apt to pursue this solution.

One objection is that it’s too expensive, but credible studies suggest otherwise. The KPMG 2017 U.S. Hospital Nursing Labor Costs Study found that “[w]hen all costs are considered, traveling nurses appear to cost less than permanent nurses on an hourly basis.” No mystery here, as contingent staffing companies cover the gamut of overhead costs – payroll taxes and benefits, as well as recruitment and onboarding. A more substantive objection concerns quality control. Do traveling clinicians have enough skin in the game? How do we assure they do? What are the best practices by which to assess contingent staff providers in a rapidly growing market?

The example of AMN Healthcare, a public healthcare staffing company – and a client of my firm – is helpful insofar as it’s been able to implement the kind of vetting and quality control processes that, I believe, represent the best practices. These, they advise, include, among others:

First, any temporary staffing company with which you do business must be a member of the National Association of Travel Healthcare Organizations (NATHO) and fully compliant with its ethical standards.

Second, look for ways in which the company exceeds NATHO standards. AMN, for one, has a clinical team of more than 50 professionals who screen each resume for nuances as to fit and skills. When someone proves unqualified for whatever reason, they should be added to a do-not-return list. A high rejection rate is a good sign.

Third, the same team that makes the assignment must be available afterward to help work out on-the-job problems that may arise.

That kind of ongoing partnership provides a safety net for both the healthcare facility and the practitioner.

Fourth, to what extent is the staffing company transparent as to compensation, hours, and the kind of facility being assigned? Do the practitioners themselves seem happy with the services of the staffing company? It’s in the interest of the facility to ensure that they are, as that too impacts the quality of care.

The general rule is “no surprises.” Not just transparency on hours and compensation, the company should even be willing to understand the backgrounds of all the neighborhoods where a hospital or clinic is located. That would not exclude facilities in tough or poor areas. In those situations, the company can assign practitioners with a personal interest in serving the under-served.

Fifth, what kind of technology does the company utilize to ensure maximum efficiency? There should be algorithms or similarly quantifying ways to identify the best assignments based on need, compensation, and experience. At the operational level, technology should be in place to notify pre-screened per diem nurses as soon as assignments are available. An ideal outcome of these and future efficiencies would be mandated nurse to patient ratios. Only California has legislated mandatory ratios. (They vary by specialty area; for medical/surgery, it’s one nurse to five patients.) Reluctance to do so elsewhere may be understandable under current conditions. After all, why bother passing mandates that hardly anyone will be able to meet?

But if we can significantly remediate healthcare workforce shortages – and the success of companies like AMN suggests we can – there will be no excuse for inaction. The alternative is the health care version of global warming – too few resources for an aging population.
Can Hester Peirce Refocus the SEC on Its Real Job?

by Richard Levick

December 10, 2018
Lately I’ve been weighing in on the excessive regulation that threatens the future of the microcap market. Among other concerns, I talked about the Suspicious Activity Reports (SARs) that firms are required to file as constituting a monumentally onerous imposition in terms of time and money. The overall cost has grown into the billions, unwieldy for major banks and simply impossible for microcap players.

Lo and behold, at least one SEC Commissioner agrees. In recent remarks at the Annual Securities Litigation and Regulatory Enforcement Seminar, Hester Peirce warned that SARs-related enforcement actions may well be driving honest firms to exit the microcap “space” and, in effect, force investors to rely on dishonest ones.

A closer look at Peirce’s public activities since she became commissioner in January suggests that her opinion on this specific issue isn’t just a one-off. To the contrary, it reflects a larger deregulatory sensibility that has gladdened financial institutions and investors alike. For example, in those same remarks, Peirce warned the Commission against focusing on penalty amounts; in other words, to stop acting like some sort of corporation with quarterly targets to hit. The SEC’s bounden duty is instead to take a multidimensional look at any matter that’s presented to them. Enforcement action in cases with smaller penalties may more usefully protect little-guy investors or set more important precedent than cases where awards grab headlines simply for their size.

To be sure, the SEC has felt the need since Bernie Madoff (if not before) to reassure an outraged public that it’s on the job—that it does indeed punish and deter abusers. Those big award numbers directly serve that political purpose. As a result, the commission has in some ways lost sight of its real mission, which traditionally was to ensure disclosure of material facts. It is not only, or even primarily, an enforcement entity.

It seems a fairly drastic repositioning, especially given the Sturm und Drang that SEC scrutiny has caused financial companies of diverse stripes in recent decades. Equally surprising to anyone who’s undergone SEC scrutiny in recent years, Peirce told a gathering of law students that assisting businesses in the “hunt for profits” ought to be a key component in the pursuit of “public interest.”

Peirce’s views on the “fiduciary” rule, which is intended to compel advisers to act in their clients’ interests, are equally welcome among those hoping for fresh voices at the SEC. She discounts the regulation as “wonderful for marketing purposes but potentially misleading for investors,” especially as it encourages “a false sense of reassurance.”

Nor does Peirce focus solely on correcting the purported past misdirections that the SEC has taken. She also seems to understand that, to function well in the future, regulators must be as attuned to marketplace innovation as the businesses they’re regulating. In a September speech at the Cato Institute, for example, she took issue with the SEC for denying a bid by an exchange to list a bitcoin trust. For her, that rejection hinged on the SEC’s assessment of the bitcoin market per se, which is outside SEC purview. “What authority do we have to require that assets underlying securities be regulated as if they were securities?” she asked. No more authority, really, than to order the recall of defective products manufactured by public companies.

The question, of course, is the extent to which the Commission as a whole can be swayed toward her vision of a less onerous enforcement role. “Commissioner Peirce will continue to bring a strong voice for deregulation to the table,” says Eugene Goldman, Senior Counsel at McDermott, Will and Emery. “However, the SEC Chair historically sets the agenda. Chair Clayton’s approach to deregulation will likely be less aggressive than hers, and he will continue to have the votes to approve most of the recommendations from the SEC enforcement staff.”

“Commissioner Peirce’s approach also has to be weighed in light of the new reality of increased oversight from the House,” adds Goldman.
Peirce has thus far maintained a relatively non-partisan tone, notwithstanding her clear views on deregulation. Originally nominated by President Obama to fill a Republican chair on the SEC (Congress did not act on her nomination at that time), she is not an ideological firebrand. Hopefully, a measured approach in a politically fractious environment will support persuasive consensus-building.

If the SEC resists call for self-reassessment and continues to see itself as primarily an enforcement entity, it may be time for the Commission to assume greater accountability for its decisions. It could even be time for a losers-pay provision by which it would incur the legal costs of companies that are exonerated after an enforcement action. I make this modest proposal mainly for the benefit of beleaguered microcap investors who simply cannot afford to wage war against powerful entities like the SEC. At the very least, such an approach could persuade regulators to rethink the kinds of cases it pursues with a more conscientious eye toward the larger marketplace consequences in each instance.
Employee Activism Is on the Rise. How Can Companies Respond?

by Richard Levick
For most of its (immensely successful) existence, the tech sector has been the darling of corporate America, with many tech companies ranked as the best places to work. But recently, a tide of employee unrest has swept over Silicon Valley—and other sectors as well. In the wake of numerous media investigations into sexual harassment and other misdemeanors, employees have been making their voices heard, staging walkouts and protests.

A New Kind of Activist

In addition to activist investors, activist bloggers, and, well, activist activists, corporations must now contend with activist employees—savy professional workers who know how to mobilize rallies and use social and traditional media to buttress their cause, both inside and outside the organization. The question of how to address employee activism has become a major issue throughout the corporate sector.

It’s a delicate balancing act, isn’t it? On the one hand, companies want employees to be devoted to causes and engaged in the community. On the other, companies want to foster a productive workplace, one focused on meeting quarterly goals and moving market share, not organizing walkouts and triggering undue tension among colleagues.

Pandora’s Box and Citizens United

Politics, like religion, used to be a radioactive topic in the office, one that managers tended to discourage at every turn. In today’s in-your-face world, it’s inevitable that combative politics would enter the workplace—especially in the wake of the Supreme Court’s Citizens United decision, which gave First Amendment rights to corporations.

The co-owner of Major League Baseball’s San Francisco Giants recently exercised his First Amendment rights by giving a financial contribution to an arguably segregationist U.S. Senate candidate in Mississippi. Wouldn’t his employees, including members of the team, be well within their First Amendment rights to organize a public protest of that contribution? Corporate executives that herald Citizens United should be careful what they wish for: Employees have—and will exercise—First Amendment rights, too.

Striking a Balance

So how can companies walk the tightrope between minimizing political organizing within their offices while supporting free speech and corporate social responsibility? Companies increasingly want to benefit from positioning their brands as socially responsible—but in a managed, controlled way that doesn’t interfere with the bottom line.

It’s a nettlesome issue, and it’s getting more convoluted by the day. In some cases, organizations have to balance their legal, ethical and business responsibilities in ways that may ultimately dissatisfy all parties involved.

Consider, for example, the case of employee protests triggered by allegations of workplace misconduct. These can sometimes be based on incomplete information; because of privacy and confidentiality concerns, the full details surrounding personnel situations may never be fully known by the broader workforce of a company. What happens when employee activism is based not on the full set of facts, but only on the information that happened to go public?

Culture Matters

Amy Conway-Hatcher, a partner and corporate compliance specialist at Baker Botts, said that, “the takeaway from Google and other #MeToo type cases is that culture and leadership matters. The fact is that employees are more productive and innovative when they work in a positive environment where everyone—especially leadership—lives by the same rules.”

“More than ever before, leadership must hold themselves and those around them accountable to live up to, and even above, the standards they set for everyone else,” Conway-Hatcher said. “That may lead to tough decisions if managers fail to live up to
the company’s values, but it also provides opportunities to correct risky behavior before it becomes a #MeToo problem. It also sets an important tone at the top that will resonate with all employees and go a long way to protecting a company’s most valued asset—its reputation.”

No one can predict with certainty where employee activism is headed and exactly what companies should be doing about it. Given Conway-Hatcher’s insights, what rules should govern a corporation’s internal policies toward the practice of politics in the workplace?

**Authenticity.** Whatever guidelines you develop should be thoughtfully developed with input from employee representatives at every level. Once adopted, they need to be clearly communicated to new employees as part of their orientation and incorporated into welcome-to-the-company materials and videos. Recognize that it’s almost guaranteed that your rules will be leaked to the media and community leaders. You might want to consider “leaking” them yourself to inoculate the company. Your key constituents should know how seriously you’re taking the issue and how much the company values a healthy work culture.

**Consistency.** Conservative viewpoints should be accorded the same respect as progressive ones, and vice versa. People espousing traditional values often say they feel like they’re under siege in today’s workplace. Encourage everyone to be respectful and non-confrontational and not give into peer pressure if they don’t want to. It’s not just political consistency; it is consistency applied at every level. Huge multimillion dollar payouts for senior executives when lesser employees receive a mere two weeks’ pay is not going to work in the age of transparency. If you’ll have trouble defending it in public, think long and hard before doing it.

**Discretion.** There’s no need for an office political discussion to be shared at a high-decibel level. It’s not a cable news studio; it’s a workplace. Your orientation video should demonstrate the proper way a disagreement should be handled if it must be handled in the office: behind a closed door and conducted in a civil way. It is also important for people to understand that disagreement is healthy. Civility is the key, not theological alignment.

**Selectivity.** Companies are increasingly expected to take positions on issues or are increasingly forced into them. Be very careful what you choose to support or oppose; it could lead to a slippery slope, turning your company into an exercise in student government. Materiality and consistency with the corporate mission and values should be at the core. Once you enter the political world, you are in it.

Finally, like it or not, employees will need to receive mandatory training in the proper expression of political activism in the workplace. Whatever rules are developed will need to be thoroughly communicated and understood, just as harassment policies must be thoroughly communicated and understood.

We live in an antagonistic age. The workplace is becoming an extension of a noisy public square, especially in Silicon Valley. Before unruly noise interferes with your company’s brand and work environment, you need to take proactive steps to respectfully channel it.
Dec 17, 2018

'Vinny' and the Proxy Advisors: A Five Trillion Dollar Debate

by Richard Levick
With proxy season just ahead, it seems a good time to revisit a persistent controversy that’s been haunting the marketplace in recent years. I’m talking about the extent to which fund managers are reliant on proxy advisory services like ISS and Glass Lewis for information and voting recommendations — so reliant that some observers (and companies) now believe that institutional investors have essentially delegated their votes to these firms.

The very fact that such perceptions exist, true or false, suggests that the topic isn’t getting the urgent public attention that’s warranted. Professional organizations like the American Council for Capital Formation (ACCF), the Society for Corporate Governance and the Business Roundtable have all expressed some dismay over the “significant influence” of proxy advisors in many instances where management and shareholder proposals are on the line.

Similar concern in Congress led to the Corporate Governance Reform and Transparency Act of 2017. Introduced by a Republican, Sean Duffy from Wisconsin, the bill passed the House by a vote of 238-182. It would have required proxy advisory firms to register with the SEC and allowed companies to fact-check research before distribution. The proposed law languished in the Senate and is now considered dead.

What is it exactly that troubles many public companies and financial service industry organizations? First, they believe proxy advisors rely on a one-size-fits all approach that cannot take into account the unique realities of individual businesses. Second, they say the advisors’ reports can be factually inaccurate and analytically flawed. Third, voting recommendations often support agendas that have no direct bearing on shareholder value. In fact, a 2009 study by Stanford economists found just the opposite — that, for example, when Boards changed or adopted policies to implement compensation practices advocated by proxy advisors, shareholder value was measurably reduced.

In response, some institutional investors aver that they make their own decisions, and that proxy advisors are indispensable if they are to fulfill their duty to vote on every issue at the multiple companies with which they’re involved. In turn, the proxy advisors cite what Lorraine Kelly calls a “fundamental misunderstanding” of their work.

“Nearly nine in 10 shares we vote are tied to a custom policy which solely reflect the views of the investor and not ISS,” says Kelly, Head of Governance Business at ISS. She says ISS clients “typically use our analysis and data as one of multiple inputs,” including multiple proxy advisory firms, in order to “arrive at an informed proxy voting decision. [T]he data are clear: while ISS recommended voting against say-on-pay proposals at 12.3% of Russell 3000 companies so far this year, only 2.4% of those proposals received less than majority support from shareowners. Similarly...although ISS recommended voting against or withholding votes from the election of 11.6% of uncontested director-nominees, just 0.2% failed to obtain majority support.”

Yet there’s equally compelling research that confirms an extraordinarily close correlation between the recommendations of the proxy advisors and actual voting records. Frank Placenti, a partner at Squire Patton Boggs, points to ACCF data showing that 175 asset managers handling over $5.0 trillion in assets voted consistently with ISS recommendations 95% of the time, while 82 asset managers with over $1.3 trillion of assets did so 99% of the time.

“[It]‘s important to look at who’s propagating these numbers,” counters Lorraine Kelly. ACCF was “roundly called out...by the very firm from which it sourced the data, Proxy Insight. [L]ook at Proxy Insight’s assessment, which arrives at a very different conclusion.”

Placenti also underscores a disturbing process-related issue, which is the large number of votes cast electronically with default mechanisms that have to be manually overridden in order for investors to vote differently from how the advisor advises. “This [robo-voting] allows no time for companies to digest the advisor’s report and effectively communicate to their investors any objections they may have to it,” says Placenti.
If those mechanics have rendered the system inexorable, shareholder activists gain a decisive advantage. Commentators have for years been advising companies on best practices in shareholder communications when an activist mounts a challenge. All such best practices are meaningless when the company only has hours to plan and execute a strategic communications plan. There's no point trying to persuade voters who've already voted.

In an October 2018 survey, four law firms asked companies in 11 industries to report the amount of time they were given by the proxy adviser to respond to recommendations adverse to management. Thirty-seven percent said that ISS did not provide any time. Glass Lewis was even worse, says Placenti, as 84% did not receive notice prior to an adverse recommendation.

“When a company did receive notice, it was often not enough time to generate a response,” reports Placenti. “Nearly 85% of companies that were given notice from ISS indicated they received less than 72 hours...with roughly 36% of these companies indicating they received less than 12 hours-notice from ISS.”

Factual or analytical errors by the proxy advisers purportedly exacerbates the problem; data from the 2016, 2017, and 2018 proxy seasons shows 139 proxy adviser errors reported by 94 companies. By law, these companies must be able to substantiate any claims of factual or analytical error that they make in supplemental proxies. In some instances, however, companies are reportedly loath to file supplemental proxies challenging the adviser’s recommendations because they know that they will be subject to future recommendations by the same adviser.

If that seems a mite coercive to you, it seemed a mite coercive to Congressman Duffy, who introduced the aforementioned legislation. Duffy characterized proxy advisors as sort of like “Vinny down the street.”

ISS insists that a more equitable and efficient system is in place. “When ISS learns of a material factual error, ISS promptly issues a ‘Proxy Alert’ to inform clients of any corrections,” says Kelly. “Even if a client has cast its vote before receiving an Alert, the client may cancel and change its vote at any time before the meeting date.”

If firms cannot fully discharge their voting responsibilities absent a proxy advisor, it’s likely because they cannot or will not invest in the kind of internal resources that would enable them to do so. By contrast, firms like Blackrock, State Street and Vanguard enjoy a marketing advantage when they remind the world that they’ve increased the size of their internal governance teams in order to maintain independence.

Yet the marketplace cannot rely on these examples to motivate similar investment by other firms. That hasn’t happened yet and there’s no reason to think it will. Renewed legislative effort is the best solution, if only to address the robo-voting issue and guarantee companies sufficient time to respond to third-party advisors. In any event, we need more clarity as to the accountability standards that do in fact exist, as well as standards that don’t exist but need to.