



DIRECTORS
ROUNDTABLE

WORLD RECOGNITION of DISTINGUISHED GENERAL COUNSEL

GUEST OF HONOR:

Lori Schechter

Executive Vice President, General Counsel &
Chief Compliance Officer, McKesson Corporation



THE SPEAKERS



Lori Schechter

*Executive Vice President,
General Counsel & Chief Compliance
Officer, McKesson Corporation*



Ethan Posner

Partner, Covington & Burling LLP



Linda Thomsen

*Partner, Davis Polk
Wardwell LLP*



Peter Erbacher

Partner, Linklaters LLP



Tiffany Cheung

Partner, Morrison & Foerster LLP



Kirsten Jensen

*Partner, Simpson Thacher
& Bartlett LLP*

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

TO THE READER

General Counsel are more important than ever in history. Boards of Directors look increasingly to them to enhance financial and business strategy, compliance and integrity of corporate operations. In recognition of our distinguished Guest of Honor's personal accomplishments in her career and her leadership in the profession, we are honoring Lori Schechter, General Counsel of McKesson, with the leading global honor for General Counsel. McKesson is a leading global healthcare services and information technology company. Her address focused on key issues facing the General Counsel of an international healthcare services corporation. The panelists' additional topics included crisis management; securities and other regulation; recent European trends impacting foreign investors; dealmaking; and class action issues.

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

Jack Friedman
Directors Roundtable Chairman & Moderator



Lori Schechter
*Executive Vice President,
General Counsel &
Chief Compliance Officer*

Lori A. Schechter is Executive Vice President, General Counsel and Chief Compliance Officer for McKesson Corporation. She is responsible for overseeing McKesson's general counsel organization, which consists of the law, public affairs, compliance and corporate secretarial functions for McKesson and its subsidiaries.

Schechter served as associate General Counsel of McKesson from January 2012–June 2014. Previously, she was a litigation partner at Morrison & Foerster, where she represented

clients in complex litigation and investigations, and served for four years as chair of the 500-lawyer global litigation department.

Schechter was named by the *National Law Journal* as one of the "Top 50 Female Litigators in the Country." She received her B.A. from Cornell University, and her J.D. from Yale Law School.

MCKESSON

McKesson Corporation

McKesson Corporation, currently ranked 5th on the Fortune 500, is a healthcare services and information technology company dedicated to making the business of healthcare run better. We partner with payers, hospitals, physician offices, pharmacies, pharmaceutical companies, and others across the spectrum of care to build healthier organizations that deliver better care to patients in every setting. McKesson helps our customers improve their financial, operational, and clinical performance with solutions that include pharmaceutical and medical-surgical supply management, healthcare information technology, and business and clinical services.

Across the U.S., retail pharmacies, hospitals and health systems depend on our nationwide distribution centers for needed pharmaceuticals. We also support physician offices, surgery centers, long-term care facilities, and home

care businesses by delivering critical products, technology, equipment, and services. Our consumer channel provides direct access to medical supplies and health care products.

For more than 100 years, McKesson Canada has helped pharmacies, manufacturers, hospitals, and other health care institutions improve the quality and safety of care they provide to millions of patients every single day. We partner with the Canadian health care industry to provide better care by delivering vital medicines, supplies, and information technologies.

As a leading international provider of logistics and services, our proactive and preventive approach ensures 15 million patients in 14 European countries receive the products and support they need for greater care. Every day, our wholesale branches supply 65,000 pharmacies and hospitals with up to 130,000 pharmaceutical products, while our 2,200 pharmacies and partnerships serve more than 2 million customers directly.

We also provide software, services, and consulting to hospitals, physician offices, imaging centers, home health care agencies, and

health plans. Working with organizations across the spectrum of care, our solutions promote patient safety, reduce costs and variability, improve health care efficiencies, and strengthen revenue streams and resources.

McKesson took roots in the earliest days of the United States – when organized health care in America was just taking shape. Over the past 180+ years we have played a fundamental role in helping to shape the design and direction of health care: helping to set standards for the health care supply chain and playing a large role in our industry's technology revolution.

Today, we are experiencing an era of unprecedented change in health care. New services and new ideas will be needed to deliver improved outcomes for businesses and patients. McKesson is at the forefront of that transformation.

We feel strongly that the way we do business is as important as the business itself. Guided by our strong core values, we are creating maximum value for our customers and investors while making McKesson a great place to work for all employees.

JACK FRIEDMAN: Good morning. I'm Jack Friedman, Chairman of the Directors Roundtable. We are a civic group which has organized 800 programs globally over the last 25 years and never charged the audience to attend. Some of you already know us, but to orient those who are coming for the first time, our mission is to do the finest programming we can for Boards of Directors and their advisors, including bankers, CEOs, General Counsel, and outside counsel. I want to thank the people here at Morrison & Foerster for the assistance they have given us on this program and thank all of you for coming this morning.

Today, we have the privilege of presenting the leading world honor for General Counsel to Lori Schechter, who is Executive Vice President, General Counsel and Chief Compliance Officer of McKesson. Lori will make her opening remarks in a moment, but first I would like to introduce our Distinguished Panelists.

They are Tiffany Cheung of Morrison & Foerster; Ethan Posner of Covington & Burling; Linda Thomsen, of Davis Polk & Wardwell; Peter Erbacher, of Linklaters, who joins us from Germany; and Kirsten Jensen of Simpson Thacher & Bartlett.

After the program today, we will create a full-color transcript of the event and make it available globally to over 100,000 leaders.

Lori went to Yale Law School, and we received a letter from them for this occasion. Here is what it says:

Dear Lori:

I am writing on behalf of Dean Robert C. Post, Dean of Yale Law School, to congratulate you on receiving the leading global honor for General Counsel from the Directors Roundtable, worldwide programmers and their advisors, on Thursday, October 6, 2016. Your work as general counsel, executive vice president, and chief compliance officer, overseeing law, public affairs, compliance and corporate secretarial functions for



McKesson and its subsidiaries, has earned you the highest recognition from the Directors Roundtable, worldwide programmers and their advisors. We are enormously proud of your extraordinary work at McKesson.

Previously named by the *National Law Journal* as one of the "Top 50 Female Litigators in the Country," and representing clients in complex litigation and investigations at Morrison & Foerster, where you also served as chair of their global litigation department, you have had a truly remarkable career.

We send you all our very best on this terrific award.

Sincerely,
Toni Hahn Davis
Associate Dean
Yale Law School

Without further ado, I would like to invite Lori to make her presentation.

LORI SCHECHTER: Good morning, and thank you all for being here. I would like to particularly thank Morrison & Foerster for hosting this event here today. I would also like to thank the Directors Roundtable, the panel of truly impressive colleagues and speakers, and the audience, which includes many of my colleagues at McKesson. I'm really honored that you have come here today to honor me as a

distinguished General Counsel. I feel very privileged to be acknowledged by this illustrious group, and to have the opportunity to share some of my thoughts and reflections about the important role that General Counsels can play in helping to shape and lead our organization.

Let me start first by telling you a little bit about how I came to my position as General Counsel, which I have held just over two years. I joined McKesson in 2012 after 23 years in private practice. I'm often asked why I made that transition. My honest answer is I don't think I would have done it for any other company. I was a litigation partner at Morrison & Foerster, and chaired its nearly 500-lawyer Global Litigation Department for four years. I felt like I had achieved a level of success and influence that many lawyers strive for. I loved what I did, and I enjoyed the challenges and intriguing issues that my practice offered.

But I gave that up to go in-house for the first time in my career, to replace the retiring head of McKesson's Litigation Group, someone I had admired and had worked very closely with over the previous seven years.

Not many people know much about McKesson, and I'm not sure there's another Fortune 500 company that has flown so below the radar. McKesson is almost



200 years old, it has nearly 70,000 employees, and it's the largest healthcare company in the United States. We serve more than 50% of U.S. hospitals, 20% of the physicians in this country, and 96% of the top 25 health plans. We deliver one-third of all medications used daily in North America. We are a global organization with a large presence in Canada, and now in 13 countries in Europe.

Those stats, by themselves, are remarkably impressive. But what drew me to McKesson is its values and the quality of its leadership. As everyone here can appreciate, when you're outside counsel for a company, you see a company from a very intimate perspective, at some of its most vulnerable moments. As I dealt with the challenges the company faced from the outside, I felt truly aligned with McKesson's team of leaders and the values that they reflected.

Our original work together began in 2005, when I was retained as counsel for what turned out to be the very definition of a complex matter. It was a class action suit on issues and legal theories not previously addressed by any court. Soon after that suit commenced the company learned of an intertwining *qui tam* action and a Department of Justice investigation, which was followed by further investigations and suits by dozens of states'

Attorneys General. Some of those pieces were still pending seven years later when I joined the company in 2012.

My respect for the company started at the top, with the CEO, John Hammergren. His story is also not as well-known as it should be.

John became CEO in 2001, under very trying circumstances. The organization was in crisis, and to right the ship, John instituted a set of principles he called "ICARE" [pronounced "I Care"].

The acronym stands for "Integrity, Customer-First, Accountability, Respect, and Excellence." John used these principles to help guide McKesson's actions at work, with our customers and our communities, all towards delivering better health. From that foundation, the company began a turnaround that led to a long and dynamic period of sustained growth and market success, despite the challenges and complexity of the healthcare industry.

In my interactions with John, he impressed me in two ways that really struck me. For those of you that are litigators, you know that process you go through when you're getting ready for an oral argument. You spend a ton of time trying to figure out in advance what's the toughest question the judge could ask based upon the facts or circumstances or the legal issues that you're dealing with. That's the joy and the challenge of oral argument. I repeatedly found, whether I was counsel outside or inside the company, that John, a non-lawyer, had an uncanny ability to distill legal issues and zero in very quickly on those tough questions and on the things that matter most. Needless to say, I did not give up the challenge of oral argument when I moved in-house.

Second, John always gave me an overwhelming feeling that he always wanted to do *the right thing*, not just the thing the lawyers said he could do. I saw that play out many times, and it's been reflected by McKesson's

Board and across the leadership team, two of whom have joined us here, today — our CFO, James Beer, and our Executive Vice President of Human Resources, Jorge Figueredo. I was very moved by that, and by the organization's sense of mission.

For a venerable company more comfortable working in the trenches of healthcare than drawing attention to itself, the people from top to bottom really shared a common belief that we're in business for better health — for our customers, for the healthcare system, and most certainly, for patients.

I joined McKesson in 2012 essentially because its values were a strong fit with my own. To be sure, it didn't hurt that McKesson's offices were just three blocks away from the office that I was leaving, which is the very office that we're in today.

Two years after joining McKesson, in 2014, I became General Counsel when my predecessor left to join American Express. As General Counsel, I inherited a strong organization, and assumed the helm of four functions: Law, Compliance, Public Affairs, and the Corporate Secretary's Office. Taking on the distinct responsibilities really gave me a new perspective on the company at the very moment it was entering another period of significant transformation. Only a few months earlier, McKesson had ventured into Europe with the acquisition of Celesio, and became a truly global organization. We acquired a public company with an equal number of employees, and with operations in multiple countries we had not ventured in before.

As a company, we needed to maintain and enhance our own culture and core values as we commenced our integration with Celesio. And for the organization I now headed, we needed to ensure an effective integration with the global cultural difference we faced, with distinct regulatory landscapes, and with the risk of overlapping or inconsistent approaches for the law, compliance, and public affairs functions that I led.

Our transformative time was marked *not solely* by our challenges of global expansion. Changes in the healthcare world that we already inhabited were also proceeding at an accelerated pace. Our customers and suppliers in our traditional markets were undergoing massive consolidation and disruption. The government’s regulatory framework was evolving rapidly and its enforcement efforts were intensifying — and the plaintiff bar was not far behind.

From my new General Counsel vantage point, it was clear that all of these developments represented significant new risks for the company, and frankly, new opportunities — opportunities for my team to shape the contributions that we could deliver to the company, not only in mitigating risks, but also actually in adding value. From my new vantage point, I took a deep breath and got ready to launch.

Now, in this effort, I got a boost from a new initiative at the company to define its leadership principles. I mentioned ICARE at the outset. That was the culture of the company I had joined. McKesson’s renewed focus on leadership, called “ILEAD” [pronounced “I Lead”] builds upon our understanding of *who* we are as an organization, to define more clearly *how* we should lead.

The “ILEAD” acronym stands for “Inspire, Leverage, Execute, Advance, and Develop.” It was not intended as another corporate slogan, but rather an invitation to the senior leadership of the company to use ILEAD attributes to focus on how we lead the company, its employees, and all of the stakeholders we addressed as we strive for success.

I’ve always been a bit overwhelmed by all the acronyms that companies use, but “ILEAD” really spoke to me. The General Counsel organization had previously defined its mission in terms of mitigating and managing risk. That traditional focus for a law and compliance organization emphasizes and, indeed, it requires looking backward. The ILEAD framework got me thinking about leadership in a way that looks forward.

McKesson’s Shared Value System



The month after I became General Counsel, each of the senior leaders of the company was asked to define what great leadership or leaders meant to us. The desire to look forward really drove me to my answer: “Great leaders are visionary. Visionary leaders inspire others to anticipate and influence what lies ahead.”

I used ILEAD as the rubric for the changes my team led for the company in the last two years, changes that helped us address new and expanding risks, as well as new and emerging challenges and opportunities in the healthcare industry and globally.

Let me draw out how we did that, and then I’ll give you a couple of examples to illustrate it. The first thing that I did was redefine my organization’s mission statement as a vision statement. Our vision is to be trusted advisors, that help mitigate and manage legal, reputational, and competitive risk arising from existing and proposed laws and regulations. It is also to be active and strategic partners in driving and delivering value for the company. To me, that vision was forward looking.

The second thing I did was use our new vision to take a deep-dive look at the changing environment we were in, and

acknowledge that it would be the rare occasion when we would be addressing legal or reputational issues that were either black or white. Instead, the issues we would invariably be addressing 90% of the time would fall under shades of gray. That is neither clearly in the black: likely to be illegal or cause irreparable reputational harm or to significantly interfere with other business objectives; nor clearly in the white, which would be issues that pose no legal risk, are neutral or reputation-enhancing, or that clearly advance the goals of the enterprise and impact stakeholders.

I realized that to effectively address the shades of gray that we were facing, to mitigate risk, and to truly add value, our approach needed to change. To accomplish all that we wanted to achieve, we needed to enhance the partnerships my teams forged with our various business teams. In that way, we could combine our legal, compliance, and public affairs knowledge and expertise with the knowledge and experience in the business in order to fully assess the risks and options that we were facing.

The partnerships could better ensure that all impacted stakeholders and necessary decision-makers were identified and consulted. And then we could, as a company,

more holistically assess a range of risks and rewards, and the impacted constituents with the challenge or the opportunity we faced.

For my team, it would allow us to become more trusted and sought-after advisors, as well as active strategic partners in the businesses of the company.

So how do you inspire other groups outside of your own organization to join you on that journey, and strategize and execute in a new way? For me, it began with a reevaluation of our touchpoints with the government.

McKesson interacts with federal, state, and local government entities and agencies in at least three different ways. First, the government is our customer, and our government contracting span was far deeper than I had at first realized. I knew we had several high-profile government contracts with various federal agencies, such as our prime vendor relationship with the Veterans Administration, where our pharmaceutical distribution business delivers drugs and related products to every VA healthcare facility in the United States. But I did *not* realize that we had as many as 34,000 government customer relationships across federal, state, and municipal levels, spanning many of our businesses. As I will explain in a moment, no one person at the company realized that volume, either.

Second, the government interacts with us as a regulator — the entity with the power to examine our conduct and initiate enforcement actions, to test our compliance with the legal requirements that impacted our businesses. Like other companies in the vastly changing healthcare industry, we have had our share of encounters with the government in this space.

Third — and, frankly, most newsworthy as we approach election day — the government clearly affects us as a legislator — the entity that shapes and alters the laws that impact the company, and the entity that historically may not have understood all that we, as a company, do to drive better health as a business.



As McKesson expanded, entered new markets, and acquired other companies, our interactions with the government through *all* of these touchpoints increased and became more complex. Yet, in many instances, those interactions were driven by different business units and functions, often in a vacuum or sometimes through responsible individuals who had a vision and goal of only the businesses they were supporting.

This audience, no doubt, understands the risk incumbent in that. A misstep on one government contract, even if it implicates the products or services of just one business, could jeopardize the entire company's ability to participate in any government contract or program in the future. The outcome of regulatory enforcement actions, even if affecting only one business, also has the power to limit government relationships — not to mention our relationships with our customers, and our investors and our shareholders. The reputational harm could also impair our ability to educate policymakers and influence future legislation.

So what could we do to address this? We needed a more holistic approach to how we interacted with the government. Government entities were different than commercial customers, and we needed to address that difference. And rather than

having government regulators seek to blame us for problems that were not always of our making, we needed to work with government entities to help define solutions. As I said before, to me, that meant that we really needed to enhance our partnership with McKesson's business units. With that partnership, we needed to more effectively minimize risk and more proactively participate in value creation, using our areas of expertise as lawyers and as effective policymakers and advocates.

I'm going to briefly describe two examples of what my teams did in the last two years, both of which I'm extremely proud of.

The first is our formation of a government contract task force — a partnership that combined the expertise from the law and compliance teams with the business champions that were selected by each of the business unit presidents, in those businesses that had any type of government contracting relationship. We set three goals for our first year. One was to combine in one place an inventory of all government contracts in the company — federal, state, and local — to get a comprehensive enterprise overview. Two was to formalize a process for assessing high-risk contracts with a requirements matrix before decisions to bid were even made. And three was to drive a monitoring function tied to our requirements matrix to ensure that we delivered on each of the terms of the contracts we were awarded.

It was *this* task force that coordinated an inventory of what we now know is more than 34,000 government customer relationships. It was *this* task force that rolled out a training program covering the unique issues government contracts present. And it was *this* task force that, at least in some measure, facilitated the successful awarding of a significant contract with the Department of Defense earlier this year.

The other area where we have redefined what we hope to do is in the area of controlled substances and the growing epidemic this country is facing with regard to

opioid abuse. The regulatory challenges that we and others in the healthcare industry have faced concerning opioids is no secret. More than a year ago, we announced a settlement in principle that we reached with the Department of Justice and the DEA concerning the regulations that require the submission of suspicious order reports to the DEA. There's a lot of complicating factors to this situation that I don't need to get into here, but no one disputes that opioid addiction is a serious societal problem, with many bad actors along the way contributing to this epidemic.

Layered on top of that are the needs of our customers and of their patients who genuinely need these medications.

Here, again, my teams stepped up and developed and led an internal strike team, this time for medication abuse and opioid diversion. They tapped into the expertise from the compliance, legal, and public affairs teams, and from multiple business units and other stakeholders to work together and ensure that we are analyzing these issues from multiple perspectives.

We recognize there's no easy fix to this problem. We'll do our part to ensure a secure supply chain along the way, but this public health scourge will also require action from many corners.

The Opioid Abuse Task Force asked the questions, "Are there products, services or programs that would meaningfully address this growing health epidemic? Are there legislative outcomes that would move the dial and not simply lay the blame? And what can we, as a company, do to join forces with government entities seeking to stave off the epidemic?"

I don't have those answers yet, but the effort that has been launched with this task force really does exemplify our CEO and our leaders' drive to do what is right. It reflects our call to leadership by inspiring our teams to go beyond what is expected. And

“Our vision is to be trusted advisors, that help mitigate and manage legal, reputational, and competitive risk arising from existing and proposed laws and regulations. It is also to be active and strategic partners in driving and delivering value for the company.”

– Lori Schechter

it furthers the desire to look forward and to deliver value in this very complex healthcare environment we call “home.”

The challenges and risks that global companies face today are more complex than ever. At the same time, the demands that companies deliver *exceptional* value to their customers have never been more unrelenting.

This visionary panel assembled here today can add much to the discussion about what global companies should think about and do to address these challenges. I look forward to hearing their insights which, under other circumstances, I would probably have to pay a king's ransom for! [LAUGHTER] Thank you very much. [APPLAUSE]

JACK FRIEDMAN: It is important to create the right relationship between the legal department and the business side, at all levels. How do you work to get your department and the business side to work together in a positive manner?

LORI SCHECHTER: It's a great question, and it really does drive the point about building a better partnership.

How do you get a seat at the table early so that you can actively engage in advising the business before they launch something new? To me, it's a combination of not just being the naysayer or the person looking at the risk issues, but also being the person that's helping to create the value. They need to understand that you can actually serve both if you have a seat at the table early. If you get invited in to talk about the issues and actually contribute to how they want to set up the product or service before they launch, the business teams realize that you are helping

on value creation; you're not just there to say “no.” It's a process of really teaming up with the businesses and making them feel like you are their ally, not their enemy.

JACK FRIEDMAN: Thank you. What are some of the ways that running your department and the business as a whole have changed in recent years? I would imagine that there have been significant technology changes, as well as laws regarding employees.

LORI SCHECHTER: Yes, and millennials are a big change, too.

I would say that dealing with a new generation that really does see their role differently and their participation differently has caused us to really think about ways to use technology to better support our employees. We are now making telecommuting an option available to all our employees, and we can do that using technology to help us stay connected. In order to facilitate more interactive meetings where we can see each other, we are using video-conferencing instead of less personal phone conferences or more costly flying people from meetings to meetings. Getting used to that and not having people in the room next door has been a new change, but one that we have worked very hard to get the value out of, and really engage our team.

JACK FRIEDMAN: Does the technology you mentioned include the basic idea that everybody has the ability to hear and see people at a meeting?

LORI SCHECHTER: Yes, it's very important to be able to see the people that you're meeting with, if only because you can see if someone is rolling their eyes at what you're saying! [LAUGHTER]

Having the ability to see people at a meeting makes people feel more engaged, and you accomplish more when people feel more invested in the outcome; it matters a lot.

JACK FRIEDMAN: Thank you. Our next speaker is Linda Thomsen with Davis Polk.

LINDA THOMSEN: First, congratulations, Lori. Based on everything you said, it is clear that you both care and lead, and you've been an inspiration for all of us here. Thank you. Congratulations, too, to McKesson for those programs and that leadership, because it dovetails with what I'm going to talk about, which really takes a page from Lori's remarks and is a topic of interest.

I'm Linda Thomsen, a partner at Davis Polk. My life has been about dealing with crisis, either when I was in the government – about half of my career has been in the government, the other half in the private sector – and there's lots to be said about what to do when you're in a crisis. What is more interesting, more elusive, is how to avoid crises in the first place. I recognize that to a certain extent, everybody in this room would realize that it's a fool's errand, because for entities, under our system, you are responsible for the actions of everybody in the organization. Even if those actions are against policy or against direction, so that to realistically think you can avoid that is somewhat silly.

It is similarly a fool's errand because crisis avoidance is expensive. It doesn't contribute to the bottom line – at least not initially; and thirdly – and perhaps most importantly and somewhat sadly – we live in a world where prosecutorial discretion has fundamentally left the building. You get very little benefit or credit for those efforts. Occasionally the government will tell you that you're getting a better deal than you would have, but in a world where there are ever-escalating penalties, that doesn't feel that way. If you are ever worried about the state of prosecutorial discretion, and it's

important, I urge you to take a look at the *Yates* case. I'm not talking about *Sally Yates*, which I think Ethan's going to talk about, but rather *Fisherman Yates*. *Fisherman Yates* was apparently a commercial fisherman boarded by some sort of regulatory authority. His boat and its catch was examined, and it was determined that he had under-sized fish. He was directed by that authority to keep the fish so that when he came into port, they would have the evidence of his violation. Then these authorities left the boat. I do not fully understand why they didn't take the fish, but in all events, they left the boat and he tossed the fish. He was then prosecuted for a Sarbanes-Oxley violation of the provision that says you can be prosecuted if you destroy any record, document or tangible object. The government was of the view that the fish amounted to tangible objects, and therefore he should be prosecuted for tossing them.

That case went all the way to the Supreme Court. Much of the discussion from the justices was about who made the decision to prosecute this guy for this violation. The answer from the government was, "We charge the most we can; we push the envelope as far as we can." There was great concern on the part of the justices.

Now, it actually makes for great, quite amusing reading, and Justice Alito has a concurring opinion where he talks about statutory construction. One of the great lines is that in this context, "tangible object" should refer to something similar to records or documents, looking at the phrase. A *fish* does not spring to mind, nor does an antelope, a colonial farmhouse, a hydrofoil, or an oil derrick. [LAUGHTER]

In all of that, the conviction was overturned, but it does suggest that we live in a world where prosecutorial discretion is really somewhat out the window.

Nevertheless, I submit that it is important – and it's clear from Lori's remarks that McKesson has adopted an approach of



trying to avoid crisis. I say that not because we should try to avoid government investigations or civil litigation or terrible press, but rather because our core missions, our constituencies, deserve our best efforts.

Put another way, even if everybody in the government was sitting around eating bon bons (and they're not), and even if we had massive regulation, litigation reform and we no longer had class actions, and if all the press and media cared about was Brangelina, we should still be focused on avoiding crisis and focusing on our mission.

How do we avoid crises, or try to avoid them in the first place? It starts with something Lori pointed out, which is mission first. Having every person in the organization understand not just their job – most people can tell you what their job is – but the best organizations, the organizations that do a very good job at avoiding crises, everybody in the organization knows what their job is, what the mission is. They know what we're trying to do here.

McKesson has ICARE, ILEAD. Those expressions really do bring to every person in the organization a familiarity with the mission of the place.

I recently had the opportunity to go to the Churchill War Rooms in London. If you ever have a chance, it's really well worth it. You have a walking tour and they hand you a device that lets you listen to the voices of women, because they worked in the War Rooms during World War II. We have the women's voices because they were the youngest people in the War Rooms and they had the most menial jobs — some of them mind-numbingly boring. Nevertheless, every one of those women, who now are hitting 90, spoke about the mission. Now, of course it was World War II; the mission was critically important and it was hard to miss. It's stunning to listen to them talk as they were teletype operators or they were typing contracts or putting up maps, that they knew profoundly what the mission of the place was.

Another thing that you see in the best organizations is tone at the top. People talk about tone at the top with some frequency. "Tone at the top" means more than just the CEO going out around the world, preaching the gospel of the organization. It means "the top" is all relative. "The top" is the person who's going to be making the decision about whether or not you get a raise; whether or not you get a bonus; whether or not you get a promotion. "The top," for you, is one step up. Organizations that require, through their culture, that people behave as examples, tend to avoid a crisis. If you think about it, all of us — somebody's always watching. I don't mean that in a creepy, "reading my email" kind of way. Someone is modeling your behavior all the time. I think about babies in a nursery at a hospital, and I'm sure there's a neonatologist who can tell me this is completely not true. I imagine an infant coming in and looking at the isolette next door, where there's a kid that's three hours earlier, with his or her fist in his or her mouth, and the new kid saying, "Oh, *that's* what I do with this thing!" I'm sure their focal length is really not that long, and they can't figure it out, but still, if we behave as if we're being watched, we behave better. That is taking leadership from the top.



Another thing — and this is very hard, these days — is to learn from your mistakes. In an era where whistleblowers are glorified and paid all kinds of money, it is difficult to embrace this. It's difficult to acknowledge mistakes, and yet it's the only way that you can really move forward. It's also very difficult in an environment, as I said, where there's very little prosecutorial discretion. If you acknowledge and deal with your mistakes, you may end up paying for them in a very public and unhappy way.

One of the most important things is to acknowledge and recognize that process equals substance. For all the lawyers in the room, we talk about due process all the time, and all the rules and regulations that go with it — the timing, who says what to whom, limitations — and all of that is designed to get to the substance of fairness and justice. In organizations that use thoughtful processes and procedures, you see them getting to the end result much more often.

I adore checklists. I don't love "check the box," but the notion that you would set out, in checklist form, what you need to do under certain circumstances is very important. There was a study some time ago. A national group of anesthesiologists were

getting very irritated at their malpractice premiums — they were going up all the time — decided rather than launch a massive lobbying effort to change the liability laws or the insurance laws, they decided to become better anesthesiologists. In the process, they developed lots of checklists for their work and various procedures. Lo and behold, they did become better anesthesiologists, and their malpractice premiums went down while patient health went up. I have to hope that they like that better than the fact that their malpractice premiums went down!

In substance, it's all macro, but nevertheless, important. One of the things that Lori talked about that I think is key to all of this is the concept of accountability. It is certainly the case that when you make individuals accountable for their piece of the process, you end up with better results. Now, I understand "there's no 'I' in teamwork," but there is an "I" in accountability. We witnessed cultural changes — Sarbanes-Oxley certifications that people make, may dispute them — they are one of the most transformative things in corporate governance over the past several years. When, under Sarbanes-Oxley, someone has to sign off individually on the financial statements, we saw across the board a cascading of responsibility where the senior officer to sign off asked for junior officers to sign off, and that takes personal responsibility.

If you ever get the chance to listen to Charles Bolden, I encourage you to. He's the head of NASA. He talks about the countdown sequence in a moon launch, where everyone in the ship has to sign off on launch in a certain order; it's really well thought-out.

At the end of the day, these are some of the things that can work to avoid crisis. It may put me out of business, and it's not going to work 100%, but in the long run, organizations are better and truer to their mission.

JACK FRIEDMAN: Thank you very much. Next, we have Ethan Posner of Covington & Burling.



ETHAN POSNER: Good morning, everyone. Following Lori and Linda is indeed a challenge.

I want to pick up on some themes that both Lori and Linda raised, and highlight two issues that are somewhat in tension with what Lori and McKesson are trying to do. Or at least have the potential to be in tension, in terms of ensuring a shared mission and a partnership between legal and the business. This is assuming that your crisis avoidance that Linda talked about didn't work. As Linda points out, no company is perfect. The government's enforcement in healthcare – and this can also be true in financial institutions, the defense industry – is extraordinary. A lot of it is driven by something that's really unique to the United States, and that is incentivizing people to come forward to the government and file these *qui tam* relator False Claims Act lawsuits. The SEC has a whistleblower provision now, as well. I cannot over-emphasize how unusual that is, globally, and how that drives enforcement and will continue to drive enforcement.

The enforcement of the Foreign Corrupt Practices Act – the FCPA – is now internationalizing enforcement by the United States. There's almost no jurisdiction or conduct by a U.S. organization that's out of reach globally. They're really enforcing

the anti-kickback statute and other statutes around the world, as long as there is some jurisdictional nexus to the United States. DOJ has become very clever in figuring that out. That's another trend we see.

Another trend we see is the number of enforcers that relate to one another. The FBI and the Department of Justice, which we are all familiar with, whistleblowers beget congressional hearings, from which we get FDA enforcement, for those who are regulated by the FDA; they could get FTC matters; they get the SEC interested. They all tend to work together.

I'd like to point out one issue that is something that we've seen change in the last ten years is the states. National corporations, like McKesson, have so many rules and regulations they need to follow, but what you want is predictability. What you want is a national uniform system of regulation. What the states are doing now, in healthcare and in banking and in other industries, are imposing new and different requirements. The Deputy A/G in Texas once said to me, when I was saying, "Look, the national rule is 'X,' and you're trying to make it 'X+Y,' and you're adding something." His response was, "You're in Texas now, son!" [LAUGHTER]

You're seeing states – California, Texas – even smaller states, like Oregon, imposing new and different requirements in the healthcare industry, and starting to become healthcare regulators. They are healthcare regulators in the way that CMS can be, in the way that the FDA can be, in the way the DOD can be in the defense industry. That's another change we've really seen in the last ten years.

This program of incentivizing whistleblowers, whether it's under the SEC program or the federal False Claims Act in which the complaints are brought to the Justice Department – which drives criminal outcomes, as well as civil outcomes – obviously has the potential to be in tension with a company's mission of solving problems

collectively and communally, and creating partnerships between the business and legal.

On the FCPA, one thing that we're seeing is an extraordinary amount of extraterritorial enforcement by DOJ and the SEC. One change in large law firm white collar groups, whether it's Covington or any major firm, is our lawyers are traveling all over the place now. It's because the Justice Department and the SEC and other regulators are enforcing the FCPA and the Anti-Kickback Act. There are relationships that companies like McKesson have with hospitals and physicians outside the United States. Of course, in many national jurisdictions, the healthcare system is really run by the government, which means that you're interacting and paying money to a government organization. It has quadrupled the enforcement outside the United States. There are really almost no jurisdictional limitations to what DOJ and the FBI and other enforcers are doing. That's why we see there are so many more enforcement actions in Eastern Europe, China, and Latin America. DOJ has brought in a compliance consultant, which I thought was a good idea. They brought in to the criminal division someone who'd worked at Pfizer and some other big corporate compliance organizations. I thought that there are now some really heightened expectations for corporate compliance organizations as a result. That's another development that's worth taking a look at.

Linda talked about the *Yates* fish case, and she mentioned the other *Yates* development. The Memorandum of Policy Directive by the Deputy Attorney General Sally Yates in 2015, which talks about prosecuting individuals and instructing corporations that if they want to get what are called "cooperation credit" – whatever that may be – they need to provide all relevant facts for individuals in corporate investigations. Both of those things can be in tension with what McKesson and other organizations are trying to do in terms of a shared mission and collectively cooperating and finding the facts in their own organizations. The *qui tam*

provisions and the Yates Memo directive are in tension with one another, because you're incentivizing employees to bring attention and facts to the government who will get paid as a result if there is a settlement. While at the same time, corporations are being told to provide facts about corporate officers and other employees. Those two things can act in tension with one another, and certainly have the potential to act in tension that is contrary to a corporation's goal of collectively understanding what happened and working with their employees to both fix it on a prospective basis and also understand what happened on a retrospective basis.

The Yates Memorandum from the Deputy Attorney General went out a little over a year ago, so we're now a year in. What have we seen? One thing is more prosecution of corporate officers. We've seen more holding corporate officers accountable under the federal civil enforcement False Claims Act provisions. There have been a number of settlements in which officers have been named and have settled False Claims Act and criminal dispositions and faced the potential for debarment and suspension by HHS [Health and Human Services]. The jury, so to speak, is out on how much cooperation credit corporations are really getting.

The challenges for Lori and other corporate counsel are stark in these cases, because one thing that we see are certainly savvy employees and officers are reading about, "Wait a minute; are you telling me that my employer is incentivized to talk about me and maybe to blame me for something that went wrong? Are you telling me that corporations are now being incentivized to do that? I might be a little less willing to cooperate with the corporation's investigation." This is harmful for everybody. It makes it harder for the company to get the facts; it makes it harder for the government to get the facts. It injects lawyers for employees into the process earlier, which often can prevent a company from understanding what went on. It makes it a challenge to interface with the Justice Department,

and it's creating a number of very difficult incentives. That and the False Claims Act incentives for whistleblowers, often are in tension with one another. One is saying, "Go tell the Justice Department about what your company is doing," and the other policy is saying, "Company, go tell the Justice Department about what an employee is doing," and it potentially may create a regrettable race to DOJ about this. It's certainly setting up challenges in the execution of what Lori and other General Counsel are trying to do, which is to create partnerships with the business and to collaboratively understand what may have happened to fix it going forward, and to think a little bit about how to handle things retrospectively.

That's certainly a notable development that is really creating complications in the way that companies handle internal investigations and the way in which they interact with federal regulators here in the United States.

Briefly, on ex-U.S. enforcement, it's really amazing how much of this is still directed by the U.S. government and by the government departments. You are seeing some greater cooperation between global regulatory and enforcement authorities in the U.K., which is called the Serious Fraud Office.

Some of them are more active than it used to be; there are some Chinese enforcers that you see some more activity from. A lot of the ex-U.S. enforcers tend to follow on from what the U.S. is doing. The extraterritorial application of federal statutes by the Justice Department for conduct outside the United States is really what is driving a lot of the ex-U.S. enforcement and interest. For example, when Romania sees that the U.S. is enforcing and investigating relationships with state-owned hospitals, you tend to see the Romanians in particular, and other Eastern European enforcers follow on. But it's really driven by the U.S., and a lot of that continues to be driven by the False Claims Act's whistleblowers provision, which allows the filing of these False Claims Act cases which, as Lori and many



others know, can lead to civil enforcement actions, and many of them also lead to criminal referrals, as well.

Companies like McKesson and others are obviously doing the best they can do to set up the systems and processes A) to ensure that it doesn't happen in the first place, and B) also to ensure the shared mission between the business and legal so that when an investigation hits, there's a greater trust and familiarity with those two organizations. That should make it easier to handle the complexities that you are beginning to see when companies are incentivized, allegedly, to see how much credit companies get. Companies are incentivized to provide facts about alleged individual culpability. That's why it's so important to set up this ongoing trust and collaboration partnership between business and legal, because when that investigation hits, and you have that trust and you have that familiarity in place, it may very well be easier for companies that have done that in the first place to manage the investigations and manage these complexities.

Thank you, and congratulations, again, to Lori. [APPLAUSE]

JACK FRIEDMAN: Thank you. I would like to have Kirsten Jensen from Simpson Thacher speak next.

KIRSTEN JENSEN: Congratulations to Lori for a very well-deserved honor. It's really a pleasure and a privilege for me to work with you and your team. Thank you.

One of the things that Lori talked about was enhancing the partnership of the McKesson legal team with the businesses to mitigate risk. I'm going to speak to you briefly about something that I think is a key element of being a successful acquirer, which is M&A integration. I see M&A integration as being a great example of an area where the legal and business teams of *any* company can effectively partner together to manage risk.

To me, successful M&A means being seen as meeting expectations for a transaction. We all know that acquisitions often fail to meet expectations, whether it's expectations of the market, stockholders, board members, or management. Successful M&A doesn't stop at closing. It means not only successfully getting to closing, but also successfully achieving the synergies and other goals of the acquisition. A truly successful acquisition is successful strategically, financially, and operationally, and achieving that result is going to depend on success in integration.

That's why I view integration strategy as being a key element of acquisition strategy. Once an acquirer determines what it wants to achieve with its M&A activities overall, then integration strategy becomes a part of the assessment of specific targets and value opportunities, and in the evaluation of potential risks and roadblocks to achieving this desired value.

When clients ask me about integration, I talk to them about three components: an investigation/diligence component; a plan development component; and a plan implementation component. I usually look at them as components rather than phases, because they're not necessarily going to be linear in order.



Let's start out with the investigation component, or what I like to call "integration diligence," because some of integration planning really is just another flavor of diligence. It's important to start in integration diligence by identifying the value drivers in the business model for the acquisition. Certain of the business data that's being relied on in the model will need to be validated in integration diligence. For example, the team will be looking to stress-test identified synergies for scope and achievability, and identify unexpected costs and time adds. For example, scoping time, cost, and obstacles to moving a target's manufacturing to an existing buyer facility. Integration diligence is also looking to find and assess additional upside, like incremental potential synergies not included in the original model.

Integration diligence also needs to identify redundancies — such as in IT and other systems, people, contracts, and facilities — and identify inconsistencies — such as inconsistencies in policies, procedures, practices — whether on the operating side, finance, accounting, HR, legal, or anywhere else in the respective businesses. The integration plan then needs to address and provide for appropriate elimination or reconciliation of those redundancies and inconsistencies.

Moving on to my second component, plan development: an overarching decision that needs to be made in developing the plan is the type of integration that will be used for a particular deal: full integration, partial (for example back office only), or low (left largely stand-alone). Examples of factors to be considered in choosing integration type include the particular synergies that are trying to be achieved; the similarities and any overlap between the businesses; the expectations regarding the target's team and management; and the degree of control that the acquirer expects to exercise, post-closing, over the target.

Another important factor is deal terms impacting integration. For example, an earn out or a particular employment or retention arrangement may require a lesser degree of integration for a specified period.

Ultimately, the integration plan is going to be strategy-driven. The team needs to determine appropriate prioritization for the particular target and the particular deal, looking at the desired outcome in the context of the integration diligence information, and evaluating risk to value and risk to contribution potential.

It's important for the plan to be both realistic and achievable in its timeline and its expectations, because — going back to where I started — successful M&A means being seen as meeting expectations for a transaction.

My third component of integration is plan implementation. If plan development is about strategy, plan implementation is about process. The best implementation plan in the world isn't of much use if it doesn't get fully implemented.

Tracking of implementation is critical to making sure that it's progressing as planned and that items ultimately get fully closed out and aren't left hanging partway done. Implementation always needs to be paired with change communication plans, for both internal and external audiences. Change communication is a critical part of

change management, especially with respect to employees. Information is an important tool, and disseminating it properly internally can minimize friction and allow the focus to stay on running the business. Again, going back to where I began, perception of success – both internally and externally – will be shaped by the messaging provided as to what the goals are and what the results are for the particular transaction.

I'd like to finish up by talking briefly about integration teams, because for all of the three components of integration, it's extremely important to get the right cross-disciplinary and cross-functional team in place. Legal is an important part of those teams. When people think about the role of lawyers in M&A, due diligence always gets a lot of attention. Everyone always appreciates how important due diligence is – how important it is to get it right and the importance of the legal team in doing that. But appreciation for the role of legal in integration planning and implementation, sometimes gets short shrift. I see lawyers as having the potential to be very high value-add in both, and many integration activities play to the lawyers' core competencies and skill sets. The processes of issues being flagged and drilled down on, and tied back to a plan for future resolution or change, of identifying and resolving discrepancies or otherwise finding solutions, and driving to closure – all of those mesh with lawyers' process management and risk management strengths.

Internal legal M&A personnel can often help create desired outcomes in terms of efficiency and consistency for integration processes across deals. They can also help bridge for those business people on the integration team who have relevant business expertise but don't necessarily have prior M&A experience, and help capture lessons learned from the integration process in a way that lets those lessons be leverage for future deals.

Issues that come up in integration may tie into or have ramifications for the legal agreement with respect to the deal. An



obvious example is indemnification claims. Involvement of legal as part of the integration team can help with early identification and escalation of those when appropriate.

All of the integration components can be impacted by antitrust considerations, as well. Legal is best positioned to work with the business team to reduce risk of problems in this area. A clean team may be needed in order to isolate competitively sensitive information, or other restrictions on the integration planning, timeline, and process may need to be established until the parties have antitrust clearance.

Lastly, legal privilege is always an important consideration in integration that should be managed by the legal members of the team.

The law is currently evolving in this area in connection with M&A, with a recent New York Court of Appeals decision ruling in *Ambac v. Countrywide/Bank of America* that there was no privilege prior to closing between a buyer and a target, including in the important post-signing, pre-closing period in the absence of actual litigation.

JACK FRIEDMAN: Could you elaborate on that point between the different periods and the duties?

KIRSTEN JENSEN: There are forms of legal privilege that can potentially apply between parties to an M&A transaction, particularly once the deal has been signed and before it's closed. Parties often enter into joint defense agreements and take other actions based on common interest privilege in order to try to retain legal privilege over certain interactions between buyer, target, and their respective counsel before closing.

The New York Court of Appeals, which is New York's highest state court, ruled earlier this year in the *Ambac v. Countrywide/Bank of America* case that there was no privilege during the post-signing pre-closing period based on the common interest doctrine because the communications at issue didn't relate to litigation that was actually pending during that time. If a target has important potential litigation or government investigations or clearances that are being worked through, the legal teams for both parties will want to keep up to date on the latest case law developments in this area as they determine how best to handle any integration planning for those matters.

JACK FRIEDMAN: Thank you.

KIRSTEN JENSEN: I've also included as a handout, a 2015 report from Deloitte LLP on integration (available at www.directorsroundtable.com/id=1100) that you may find of interest if you'd like more on this topic. Thank you. [APPLAUSE]

JACK FRIEDMAN: Thank you very much! Our next speaker is Tiffany Cheung of Morrison & Foerster.

TIFFANY CHEUNG: Good morning. I also would like to congratulate Lori on this well-deserved award. I'm very honored to be here as part of this panel.



My practice focuses on class action litigation, and in particular, class actions involving alleged marketing or privacy violations. The plaintiffs' class action bar has been quite active, and very likely will continue to be.

I started working with McKesson when I was a mid-level associate at Morrison & Foerster, and the class action du jour at that time involved a benchmark price for pharmaceuticals. This is the matter Lori referred to as the very definition of complex litigation — and it was, and I learned a lot on that matter.

Through working on this class action, I experienced first-hand the value that McKesson places on strong teams from the very most senior executive to the most junior member of the litigation team, and I dove into helping to develop a litigation strategy that defends against the claims being asserted while also being true to the company's values and achieving the company's objective.

Over time, the claims brought by the plaintiffs' bar have certainly evolved. Currently, I handle a number of Telephone Consumer Protection Act (or TCPA) class actions. These cases are often based on allegations that defendants placed calls or sent text messages or faxes without the consent of the recipients of those communications.

When I describe these cases and what I do, the common response I get is, "Who sends faxes?" [LAUGHTER] Once, I was asked by someone much younger than me, "What are faxes?" [LAUGHTER] There does seem to be, even today, pockets of the healthcare industry that prefer communications by fax, and in fact rely on fax machines to facilitate the delivery of healthcare.

The Plaintiffs' Bar has taken a keen interest in those companies that are sending significant numbers of faxes, because of the high potential for statutory penalties that can add up when they're calculated on a per-fax basis.

Even for businesses that have given up communications through paper and toner, the TCPA creates an opportunity to review compliance processes. Businesses are often looking for ways to legitimately communicate with consumers through phone calls or text messages, to provide information consumers want and that, in fact, benefits them. In the healthcare field, such text messages may include prescription refill reminders or appointment reminders, and those messages are most efficiently sent through automated means.

Even a business developing a program with good intentions, to do good by consumers and to help patients, should be aware of the rules under the TCPA. A failure to follow the technical requirements of the statute could lead to staggering exposure very quickly.

As a litigator, the focus of my job is often backward-looking. Stuff happens and decisions were made in the past, and the investigation has got to focus on what happened then, and why. In working with strong in-house counsel teams, like those at McKesson, we have found ways to add value, not just by successfully defeating the class action claim, but also counseling business clients on compliance and mitigating risk.

The litigation experience allows the litigator to identify the fact patterns and procedures that are most likely to attract the complaints,

and enables litigators to work closely with the business team to identify areas of high risk and to address those areas before a complaint can be filed.

We also try to spot trends before they arise, rather than simply reacting to and dealing with a complaint once it is filed. We try to identify what might be coming down the path; what's a mile or two away that we should be dealing with now, before it becomes a bigger issue.

Claims based on statutes like the TCPA have been referred to as "gotcha statutes," and they're becoming, and continuing to be, more and more popular. Similar statutes impose strict penalties that can add up quickly on a per-violation basis. Such statutes have technical requirements that are not intuitive, so that even a company trying to do what is right, and acting in good faith, can have no knowledge that it might not be compliant with the law, and still be subject to enormous penalties.

In this environment, privacy and cybersecurity claims are also on the rise. As more companies hold personal information of consumers for legitimate reasons, cyber criminals are developing more and more sophisticated ways to access that data. Proprietary information and trade secrets of companies have also become targets that pose a cybersecurity risk. Given the prevalence of data breach class actions and class actions based on statutory violations, the question often posed in these cases is, "Where is the claim where information has been accessed or there has been a technical violation of the law, but no one's actually been injured and no money has been lost?"

In the wake of those questions, the United States Supreme Court issued its decision earlier this year in *Spokeo v. Robins*. In that case, the Supreme Court held that a bare statutory violation, without a showing of concrete harm, is not enough to establish Article III standing in federal court.

We are just beginning to see how the lower courts are interpreting the rationale set forth in *Spokeo*. The results in the lower courts thus far have included dismissals of claims, to settlements of actions in the wake of the uncertainty, and remands to state court, when there is no Article III jurisdiction.

Cases involving alleged violations without harm are certainly going to continue to be hotly contested, and it's an area and an opportunity where outside counsel can work with in-house teams to plan ahead so that we can address these issues before the litigation gets to a contentious stage. I look forward to that.

Thank you! [APPLAUSE]

JACK FRIEDMAN: We have one more speaker. Peter Erbacher of Linklaters has come here from Germany, and will be giving us an international perspective.

PETER ERBACHER: Thank you. Lori, congratulations to you on receiving this honor. It is well-deserved, as I know from my work with you and your team.

My name is Peter Erbacher. I'm an M&A partner in Linklaters' Frankfurt office.

Well, I thought, being the last of the roll, I need an interesting subject to keep your attention levels up, so maybe something to do with taxes? [LAUGHTER]

Actually, my subject is going to be illegal tax arrangements in the European Union in the form of favorable tax rulings and the changing tides that we are seeing in the European Commission's enforcement policy of the ban of such arrangements.

Why am I talking about this as an M&A lawyer? It has become a major risk in M&A that needs to be addressed. Think about it: if the European Commission ordered a state to demand payment of taxes that have not been paid because of what are considered to be illegal tax arrangements that that state has made



with a company, they can go back ten years from the start of the investigation. By the time you have a decision, it is often 13 years back. They can go back well *beyond* the period when tax assessments will have become legally binding and unable to be appealed. This presents a real risk, and it is no surprise that we're seeing requests for indemnities or other mechanisms to address the risk.

State aid within the European Union is, in principle, illegal. There are certain exceptions, but that's the fundamental principle. Within the European Union, in the single market, we have the complete freedom of movement of goods, services, capital, and people. If you are within that market, you can trade and do your business as if it was just a single country – in most respects, not in all respects – but certainly as far as competition and anticompetitive behavior is concerned, and therefore state aid distorts that competition, and that's why it's, in principle, considered wrong and illegal.

The law does not differentiate between the different ways in which state aid is provided, but evaluates each by its competition-distorting effects. Nonetheless, for a very long time, such aid in the form of tax breaks has not been the focus of the Commission's enforcement efforts. When

the new Commission entered office a bit more than two years ago, the new president of the Commission, Jean-Claude Juncker, wrote a letter to the new Competition Commissioner, asking her to make this a priority and to use, in particular, the illegal state aid toolbox to go after these aggressive tax arrangements.

State aid is always an issue where there are differentiations in the treatment of different companies that are otherwise legally and commercially in a similar or identical position. A tax arrangement extended to one company that is not available to all other similarly situated companies falls into that category.

By contrast, you will find that within the European Union, the tax systems and rates in all countries are enormously different, and that is perfectly legal and fine. It's just within one country's tax system that everybody has to be treated equally. If you provide more beneficial treatment to one company or a group of companies, then that is illegal.

The consequence of such an illegal state aid is that the Commission can order the state to reclaim any payment made by the state, or in my example, to claim payments that have not been demanded by the state in the past to be made now.

There is also, of course, the right of competitors to initiate court proceedings in order to force the Commission to go after competitors who have received illegal state aid. Likewise, if the Commission decides that an arrangement has been illegal state aid, everybody affected – that includes the member state which is the direct addressee of that order, as well as the ultimate beneficiaries – can appeal the Commission's decision to the European Courts.

In those tax cases that are making the headlines these days, typically the tool that has been used by the tax authorities of the relevant states is tax rulings. Now, tax rulings are perfectly fine as long as they're just interpretations and definitions as to how a

certain tax law shall be applied to a particular set of circumstances, as long as they are not granting illegal benefits to a company. However, according to the Commission, such benefits are now being increasingly identified in many cases.

As an illustration, let me pick one of them, the *Amazon* case. Amazon has subsidiaries in Luxembourg, through which it is transacting its business in Europe. In other words, practically all of the Amazon sales in all of the European countries are made through a Luxembourg entity. The U.S. Amazon entity charges that Luxembourg entity license fees for intellectual property rights and other things it can license – which is perfectly fine. The problem that the Commission found with those license fees was how they were calculated. What the Commission said is, first of all, they were not based on any generally accepted, OECD [Organisation for Economic Co-operation and Development] calculation rules. They were not based on a risk and transfer pricing study or other analysis, but rather they were designed to leave the licensee with a certain residual profit which was calculated as a percentage of the operating cost, and every excess profit would be transferred to the U.S. as a license fee.

That was found by the Commission to be not at arm's-length, not in line with accepted transfer pricing rules, and therefore illegal state aid.

Now the case is, of course, still pending. It's very likely, like all these cases, to go to the courts. We won't have the result for some years to come yet, but this is a typical case. As I've said before, the Commission doesn't look at the techniques; it looks at the effects that these illegal state aid matters have.

What is prevalent in almost all of these cases is that over the years, they have become more drastic. Take the *Amazon* case, again, as an example. When Amazon started this structure, the ratio of the operating costs to the profit of Amazon was X. The operating

costs increased, but the revenues, the size of their business, increased much, much faster. Now the proportion of the profits that are actually attributed to the local business in Europe and are taxed there have shrunk. The portion that is paid as a license fee into a tax haven country where it's typically not taxed either has grown in size. In other words, the problematic effects of these arrangements have grown, and yet the tax rulings that implemented the arrangement that the companies have found with the tax authorities have not been changed. Some of them have very long application periods – sometimes ten years – that's also something that the Commission considers very problematic.

You will have read about a number of other cases which made the headlines. Altogether, the Commission is currently investigating around 40 of these cases, but they are said to be preparing to examine over a thousand other cases. This is a major issue, and it is part of a plan of the Commission to clamp down on overly aggressive tax planning and tax structuring. The Commission has responded to a lot of public criticism that these schemes have received, and the cases are now making headlines in all of the European countries. This is going to be with us for a few years to come. None of these cases have been decided by any of the courts, so we don't yet know the outcome. In the interim, if you have to look at a particular situation that you're dealing with and wonder whether this could be illegal state aid or whether it's within the range of a normal legal arrangement between taxpayer and authorities, then the criteria should be: Is there a good commercial rationale for a structure applied by a company, or is there no other purpose but saving taxes? Does the allocation of profits follow the entrepreneurial risk and rewards, as it should? If you find countries like Luxembourg, Holland, or Ireland being the country of residence of their companies where they conduct the business, then these are all criteria to alert you that there might be an issue. Thank you. [APPLAUSE]



JACK FRIEDMAN: Today, many European lawyers have a second job, which is fortune teller. [LAUGHTER] Tell us about your perspective on the Brexit referendum.

PETER ERBACHER: If I only provided accurate predictions, I would probably get a call from Theresa May tomorrow! [LAUGHTER]

You may have read that at the Conservative Party Conference last weekend, she said that the U.K. government intends to notify the other member states of their leaving the EU formally before the end of March next year. She combines that by saying that they have no intention of compromising the political instance of this referendum, which was having their sovereignty back in deciding who to let into the country and who not.

In other words, they want to, at least not in the form as it exists amongst member states, do away with the free movement of people, one of the four freedoms I mentioned before. Hearing the reactions from Brussels and other member states, the consequence of that seems to be that they will not be able to remain in the single market as they are now as a member state.



Whether it's going to be a completely hard Brexit, in other words they will just leave, which would mean dealing with the European Union member states on the basis of World Trade Organization rules. In other words, Most Favored Nation rules apply in terms of tariff and customs duties, etc., remains to be seen. They will try to negotiate a deal with the European Union where they can have as much access to the single market as possible. But if they indeed remain firm and refuse any compromises on the free movement of people, then I'm afraid that the other member states will take them by their word – "Brexit means Brexit."

There are two countries in Europe that are in a situation that some people have thought might be an alternative for the U.K. One is Norway, which is a European Economic Area member state. Even though they're not a member, they adopt a substantial part of the EU laws and regulations. They allow free movement of people from the European Union and in return for that, they have equal access to the single market. The situation is similar in Switzerland, which is one step further away from the EU as an EFTA member. Both of them, by the way, pay contributions to the European Union which, compared to the gross domestic product, are about the same as the U.K. However, Ms. May has clearly stated that these are not models for the U.K.

JACK FRIEDMAN: Do you have to pay taxes on your fortune telling? [LAUGHTER]

PETER ERBACHER: I don't receive any income for coming here, so that's unlikely. [LAUGHTER]

JACK FRIEDMAN: Thank you. What are some of the biggest issues that the healthcare industry is currently facing?

LORI SCHECHTER: I don't know if that's an easy question to answer. I have been struck by how, at the Presidential debates we've been seeing, healthcare hasn't come up, because it's such an important issue facing the country now. There's so much going on in the healthcare industry, but it hasn't been a focus of the debates. I do think you're right – much will come out when we know who's leading the country, in terms of where we're going on healthcare.

Value-based healthcare is a real focus right now. Looking at ways to improve access, quality, and price, and ensure that we are doing it in the best possible way, has certainly been McKesson's focus.

I'd say those are the three big issues. What are we doing about access, quality, and value? Where we end up probably will be very dependent upon who's leading the country and whether or not they can get anything through our Congress. The

federal agencies have a real microscope on healthcare now; they have for some time. Certainly in the M&A world, there's a real microscope. As Ethan talked about, there's a real healthcare enforcement microscope going on, and those are all areas that may evolve as the political winds move.

JACK FRIEDMAN: I was told that of all the major antitrust cases right now with the government agencies, more than half of them are in the healthcare industry. Why do you think that is?

LORI SCHECHTER: What's *their* reason for looking at us? You might want to ask *them*. [LAUGHTER]

JACK FRIEDMAN: Is it just that people feel that healthcare affects everybody?

LORI SCHECHTER: Yes, healthcare has certainly been at the forefront of what President Obama has focused on, and it has spurred the way the country has responded – people *are* concerned about what is the state of healthcare today.

People are worried about what the future looks like in healthcare, and that has really encouraged the changes that we have been seeing. It's why we, at McKesson, continue to try and focus on ways to deliver better healthcare for everybody, across the board.



JACK FRIEDMAN: How do you size up in healthcare what may be the attitude for a particular regulator?

LINDA THOMSEN: It is fair to say that there are huge differences among agencies at one level. But another theme – and it’s one you raised – is that there is a consistency among regulators these days that is more enforcement oriented than regulation oriented. In part it’s because regulation is harder to do than law enforcement. Law enforcement is micro; it’s one company, one set of activities. You can usually get agreement around the activity and the behavior. Regulation, because we have a somewhat more fractured political system right now, tends to be forward-looking; it tends to be broad brushing. It’s harder for agencies to get regulations done, so they “regulate by enforcement.” They would rather bring

enforcement actions and then have people modify their conduct based on those enforcement actions, than do the hard work of getting regulations.

Now, that means that there are enormous differences between the agencies, in part based on their resources. For example, I would rather a matter be at the CFTC than the SEC, because the CFTC is so resource-constrained. They *do* reward cooperation very meaningfully, because it’s important to them. It gives them credibility. You’re absolutely right; I can pick who I want to, if I’m going to self-report – which is a whole other conversation. I make choices about who I call, based on my knowledge of how they’ve behaved in the past.

Law enforcement is very bottoms-up in this country, which is a distinction from Europeans and others. Our foreign clients are horrified when they come in under investigation; there is virtually no check on investigations. There are plenty of checks once you get sued, but up until that point, there are very few checks. It’s a little random.

ETHAN POSNER: Yes, regulation by enforcement is exactly the right phrase. I don’t think there’s any question about that. What the Justice Department units, particularly the DC offices, Boston and some other places, achieved in the promotion, marketing, and pricing in pharmaceuticals since 2001, their attitude was, “We’re going to change behavior through prosecution,” which is obviously not the way it’s supposed to work. The other thing they did was push aside the Food & Drug Administration,

which Congress has entrusted with regulating the promotion and marketing of pharmaceuticals. DOJ and others, including the state, displaced the principal regulator in this area through its enforcement. That has been a remarkable development since 2001, and you see that in other industries. People who’ve been in Washington know, it’s hard for agencies to promulgate guidance. Governing and guidance is hard work. A lot of times, what’s happened is the enforcement agencies have regulated behavior through prosecutions, which is not the way it’s supposed to work.

JACK FRIEDMAN: Thank you. Is there anyone in the audience who would like to ask a question?

[AUDIENCE MEMBER:] How is the issue of cybersecurity brought to the CEO at McKesson?

LORI SCHECHTER: On McKesson’s executive leadership team we have our Chief Information Officer/Chief Technology Officer, Kathy McElligott, and she takes the lead on cybersecurity issues. We partner together on the legal issues that the cybersecurity presents to the company. She has a seat at the table and she reports directly to the CEO. It sets the right tone for how important an issue it is for the company, and the partnership is critical for that.

JACK FRIEDMAN: Thank you, everyone, for coming. I want to thank all the speakers for sharing their wisdom. I want to thank Lori for honoring us by accepting our invitation to speak today. **[APPLAUSE]**



Ethan Posner
Partner

COVINGTON

Ethan Posner, named by the *American Lawyer* as a “Rising Litigation Star,” is co-chair of Covington’s White Collar Defense and Investigations practice group. He represents numerous major companies and individuals in federal and state criminal and civil government investigations and False Claims Act cases. Mr. Posner also has handled several recent major congressional investigations and hearings on behalf of pharmaceutical and health care clients before House and Senate Committees.

Mr. Posner served as Deputy Associate Attorney General, Department of Justice. In that position, he advised the Attorney General on antitrust and civil litigation issues; he had oversight responsibility for certain major litigation matters handled by the Antitrust and Civil Divisions; he chaired Justice Department policy and enforcement groups; and he testified several times before House and Senate committees.

Practices

Litigation and Investigations

- White Collar Defense and Investigations
- Congressional Investigations
- Class Actions

Industries

- Life Sciences
- Life Sciences Litigation and Investigations
- Health Care

Education

- University of Michigan Law School, J.D., 1989
 - *magna cum laude*
 - *Michigan Law Review*, Note Editor
- Wesleyan University, 1984

Judicial Clerkship

- Hon. Harrison L. Winter, U.S. Court of Appeals, Fourth Circuit, 1989–1990

Government Service

- U.S. Department of Justice

Bar Admissions

- District of Columbia
- New York

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Linda Thomsen
Partner

Davis Polk

Davis Polk & Wardwell LLP

Ms. Thomsen, who was the first woman to serve as the Director of the Division of Enforcement at the Securities and Exchange Commission, is a partner in Davis Polk's Litigation Department and practices in the Washington, D.C. office. Her practice concentrates in matters related to the enforcement of the federal securities laws. She also chairs the firm's Women's Initiative Committee, which is dedicated to the recruitment, retention and promotion of women at the firm.

She has represented clients in SEC enforcement investigations and inquiries, in enforcement matters before other agencies, including the Department of Justice (various U.S. Attorneys Offices) and the Commodity Futures Trading Commission, in investigations and inquiries from self-regulatory agencies, including FINRA, and in internal investigations.

These matters, which are typically nonpublic, have covered a broad range of securities-related subject matters, including insider trading, foreign corrupt practices, financial reporting, manipulation and regulatory compliance. Her clients have included major financial institutions, regulated entities, public companies and senior executives.

Ms. Thomsen returned to Davis Polk in 2009 after 14 years of public service at the SEC. While there she held a variety of positions and ultimately served as the Director of Enforcement from 2005 through February 2009. During her tenure as the Director of Enforcement, she led the Enron investigation, the auction rate securities settlements, the stock options backdating cases and the expansion of the enforcement of the Foreign Corrupt Practices Act.

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For more information, please visit:
www.davispolk.com.



Peter Erbacher
Partner

Peter Erbacher is a partner in Linklaters' Frankfurt office, specialising in Mergers and Acquisitions. During almost thirty years, Peter has developed extensive experience advising corporations and financial institutions in all kind of acquisitions, disposals, takeovers, joint ventures, and similar transactions. Peter's particular focus is on multinational, cross-border transactions. He advises German and international clients

mainly from the healthcare, pharmaceutical, energy, financial services, and construction industries. Peter is a graduate of Frankfurt University. He has been ranked by JUVE, Germany's leading directory, as one of the leading German Senior M&A Lawyers for many years in a row.

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Tiffany Cheung
Partner

**MORRISON
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Tiffany Cheung is the chair of the firm’s Consumer Class Actions practice group. Her practice focuses on defending consumer class actions, and includes federal, state, and multidistrict complex litigation. She has successfully defended clients in disputes involving the Telephone Consumer Protection Act (TCPA) and various unfair competition, consumer fraud, and antitrust laws in federal and state courts throughout the United States. In addition, she has represented clients in investigations and actions brought by government officials, including the Federal Communications Commission and various state attorneys general. Her clients span a wide range of industries, including the pharmaceutical, retail, and technology industries.

Ms. Cheung has spoken on topics regarding key developments in class action privacy litigation and has authored numerous legal updates concerning consumer litigation. She is the editor of the TCPA Report section of the Morrison & Foerster Financial Services Quarterly Report. Ms. Cheung is also recommended by *Best Lawyers USA* 2016 and by *Legal 500 U.S.* 2016.

Ms. Cheung earned her B.A. from the University of California, Berkeley with high honors and was a member of Phi Beta Kappa. She received her J.D. from the University

of California, Boalt Hall School of Law in 2000, where she was editor-in-chief of the *Asian Law Journal*. From 2000 to 2001, she was a judicial clerk for the Honorable Marian Blank Horn of the United States Court of Federal Claims. She was also a judicial clerk for the Honorable Susan R. Bolton of the United States District Court for the District of Arizona from 2001 to 2002.

TCPA Class Action Against Health Care Provider.

Defended a putative class action alleging that defendant willfully violated the TCPA by placing auto-dialed or prerecorded debt collection calls to patients. Obtained voluntary dismissal. (S.D. Cal.)

In re Pharmaceutical Industry Average Wholesale Price Litigation.

Represented a pharmaceutical manufacturer in multi-district federal and state court litigation brought by states and counties against dozens of pharmaceutical companies involving the alleged overpayment by the Medicaid program for prescription drugs.

In re Verizon Wireless Data Charges Litigation.

Represented a wireless carrier in coordinated multi-district litigation of more than 30 putative class actions that challenged charges for data usage by the wireless carrier.

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teletype was used to send overseas cables, the firm purposely chose “mofo” as our teletype address. The nickname stuck, and we later decided to use it as our IP address.

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Kirsten Jensen
Partner

Simpson Thacher

A founding member of our Palo Alto office, Kirsten Jensen has specialized in mergers and acquisitions over her 20+ years of practice. Named one of the Women Leaders in Tech Law by *The Recorder* in multiple years for her extensive experience representing clients in the tech and biotech industries, Kirsten has also been recognized by *The Legal 500 United States* for her M&A work.

Kirsten regularly advises her corporate and private equity clients on public and private M&A, joint ventures, minority investments, corporate defense and general corporate matters. She enjoys using her knowledge and experience to provide practical advice and develop solutions to help her clients achieve their business goals. Kirsten works with clients in a broad range of industries in addition to tech and biotech, including pharmaceutical, health-care, renewable energy, finance, consumer products, media, real estate, aerospace, and light industrial.

Kirsten received her B.A. from Yale in 1988 and her J.D. from Harvard in 1991.

Kirsten's corporate representations include:

- Yahoo!, in its acquisition of Tumblr
- Google, in its purchase of YouTube

- Agilent Technologies, in the sale of its semiconductor products group to Silver Lake and KKR

Some examples of Kirsten's work with private equity firms are:

- Elevation, in its investments in MarketShare, Forbes Media and Palm, and in the sale of Palm to Hewlett-Packard Company
- Health Evolution Partners, in its investment in CenseoHealth and in various transactions involving its other portfolio companies, including Optimal IMX, Halcyon Health, and Freedom Innovations

Her joint venture experience includes:

- McKesson Corporation, in its generic pharmaceutical sourcing alliance with Wal-Mart Stores
- CB Richard Ellis, in its acquisition and joint venture Clarion Real Estate Securities
- Clorox, in its joint venture with Procter & Gamble

Kirsten authored the chapter on "Due Diligence in M&A and Securities Offerings" in the PLI publication *Advising High-Tech Companies*.

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