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5Rules
for General Counsel in the Digital Age
RISKS ABOUND, BUT SO DO OPPORTUNITIES

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5Rules

for General Counsel in the Digital Age

RISKS ABOUND, BUT SO DO OPPORTUNITIES

Richard S. Levick

Originally Published on Forbes.com

When most corporate general counsels look at that the world of digital and social media, they see a landscape rife with risk. The potential for an ill-advised employee tweet or Facebook post is always lurking. Online venues have provided plaintiffs' attorneys and activists with megaphones that amplify their messages. When crisis strikes, the speed with which the public narrative develops and is disseminated is nearly impossible for all but the most prescient companies to match.

But while the Digital Age has certainly introduced an intensified era of legal and reputational liability, it has also provided GCs with tools that, if effectively leveraged, take crisis preparedness and risk management to new and unprecedented levels. When they know where to look, who to watch, and – most important – how to partner with others in the organization who understand the digital space best, GCs can provide themselves with a wealth of intelligence that enables them to prepare for every anticipated contingency.

Even better, they help to demolish the organizational silos that are so problematic when lawsuits and other crisis situations arise.

At times when teamwork and trust are needed to seamlessly navigate the consumer, shareholder, litigation, and public affairs issues that inevitably accompany crisis, disparate departments are asked to come together – often for the first time – to quickly craft one consistent, comprehensive solution to the problem. This leaves little time for trust-building between the GC, investor relations, enterprise risk management, public affairs, brand, and communications teams. Before long, it's clear that crisis is not the first time that each of these critical functions should be exposed to the diverse perspectives that exist in other corners of the organization.

In the Digital Age, the best crisis management strategies are formulated – and, importantly, implemented – long before the crisis ever strikes. And it takes everyone working together to get the job done.

As the one C-Suiter everyone else looks to for leadership in crisis, the general counsel is uniquely positioned to reach across cubicles, offices, departments, and floors to break down the siloes that hinder optimal levels of digital readiness. As such, here are five ways that GCs can begin to think differently about crisis management in the Digital Age and infuse its strictures into the DNA of the entire organization.

1

ENTERPRISE RISK MANAGEMENT

Collaboration between the GC and ERM departments is critical. It's the only way to ensure that all the bases are covered and that the organization is appropriately focused on all of the anticipated issues that could create problems moving forward.

GCs need to sit down with risk managers, map out all anticipated threats to the organization, and then ensure that ERM is monitoring the digital space to gauge how those issues are evolving on a 24/7 basis.

Who owns the terms associated with our risks ("recall," "explosion," "spill," "corruption," etc.) on the search engines? What messages are those players highlighting with prominent search engine placement? What conversations are taking place on blogs and social media? Who is driving those conversations? Are those influential voices friendly or potential adversaries in the activist ranks, regulatory community, or plaintiffs' bar? What is trending not only via Search Engine Optimization (SEO) and Search Engine Marketing (SEM), but via Twitter hashtags?

What are the hot issues on Reddit? When the GC helps ERM look at these trends and apply them to risk in the same way that the brand team es digital intelligence to sales, it ensures that the organization is always looking around corners to identify where – and from whom – its next crisis might arise.

2
BRAND MARKETING

Armed with a clear and up-to-date picture of the threats that exist, GCs need to then sit down with the brand marketing team to accomplish two key objectives. First, the GC needs understand how these threats could impact the consumer experience. Doing so ensures that risks are properly prioritized and that the organization is prepared to communicate in ways that strike a careful balance between limiting liability and maintaining brand loyalty.

Second, and even more important, the GC also needs understand all the ways in which digital and social media can quell a crisis or send it spinning out of control. No one in the organization gets the digital space better than the brand team. As such, leveraging its knowledge is essential to managing the online venues that impact organizational reputations more than any other.

3
COMMUNICATIONS

With the threats clearly outlined, their potential sources identified, and the possible impacts fully understood, it's time for the GC to meet with the communications team to begin fortifying the organization. This is where all that digital insight from the brand folks comes into play.

First, the GC needs to collaborate with the communications team as it develops optimized prophylactic Web and social media content that can 1) influence conversations and perceptions about their top-line risk issues, and 2) ensure that the organization's messages receive top-billing in search engine rankings. In some cases, key exposure terms may need to be controlled via SEO and SEM strategies that guarantee prominent placement.

The GC needs to take an active role in this exercise as well to ensure that the budget is appropriately allocated. Traditionally, companies may do this once, but it is critical that they update these terms with periodic commitment. Realities change and so should your terms.

At the same time, the GC needs to ensure that he or she is constantly updated with the troves of intelligence that exist in the digital space. By providing the communications team with a list of potentially adversarial plaintiffs' firms, critical NGOs, important regulators, and an understanding of the import of tracking and analyzing their online activity (blogging, Search Engine Optimization, etc.), GCs can add yet another crystal ball to their arsenal. Now, corporate communications and ERM are informing the GC as to the patterns on the Web that often signal forthcoming activity – and doing so from their own unique, equally valuable perspectives.

And don't forget about Facebook monitoring, Twitter hash-tag tracking, and social media content strategies that provide insight into consumer sentiment. GCs or others are often reticent to allow employees to wade into the social media space; but when they are prohibited from engaging, companies lose their best brand evangelists – their people – and miss out on crucial conversations and ensuing opportunities to shape them.

4
PUBLIC AFFAIRS

With the initial framework in place, GCs can then begin to approach other arms of the organization to further solidify crisis preparedness. In the public affairs context, it's all about what's coming down the pike. Is there legislation on the horizon that will increase liability? Are regulators looking at new areas of enforcement that could create new compliance challenges? Who are the key players in the Administration, on Capitol Hill, or in state and local governments that could pose a threat? Do grassroots groups have us in the crosshairs? If so, what are their key concerns?

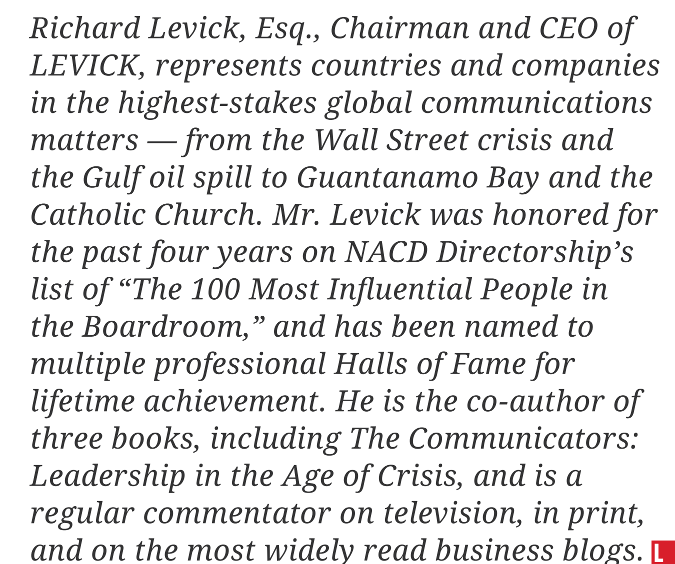
With those questions answered, GCs can then double back to the communications team to ensure that those issues on its radar screen as well, and that content is created – though not necessarily shared – to control the conversation should any of them present problems moving forward.

On the opportunistic side, few companies are engaging the digital grassroots to influence and forward their public affairs agendas. Relying on traditional lobbying may be as comfortable as it is historic, but it is less effective every day and needs to be integrated into a digital strategy. No one in Washington wants to be first, but everyone wants to be second. Showing grassroots support is the most powerful way to win support (and will be the subject of a forthcoming article).

5
INVESTOR RELATIONS

The same goes for IR. What are the hot topics in traditional media outlets such as The Street? What's being said about our company and industry on investment social media networks such as Seeking Alpha and wikinvest? What are the issues driving securities litigation in our industry? Have influential shareholders voiced concern over particular business practices or operations? In an age of intensified shareholder activism, these insights help companies stay a step ahead of the game and aligned with their investors in ways that build trust, credibility, and – above all – loyalty.

Follow Richard Levick on Twitter and circle him on Google+, where he comments daily on the issues impacting corporate brands.



Richard Levick, Esq., Chairman and CEO of LEVICK, represents countries and companies in the highest-stakes global communications matters — from the Wall Street crisis and the Gulf oil spill to Guantanamo Bay and the Catholic Church. Mr. Levick was honored for the past four years on NACD Directorship's list of "The 100 Most Influential People in the Boardroom," and has been named to multiple professional Halls of Fame for lifetime achievement. He is the co-author of three books, including The Communicators: Leadership in the Age of Crisis, and is a regular commentator on television, in print, and on the most widely read business blogs. L

Bangladesh and Beyond: Walt Disney's Leadership

Richard S. Levick

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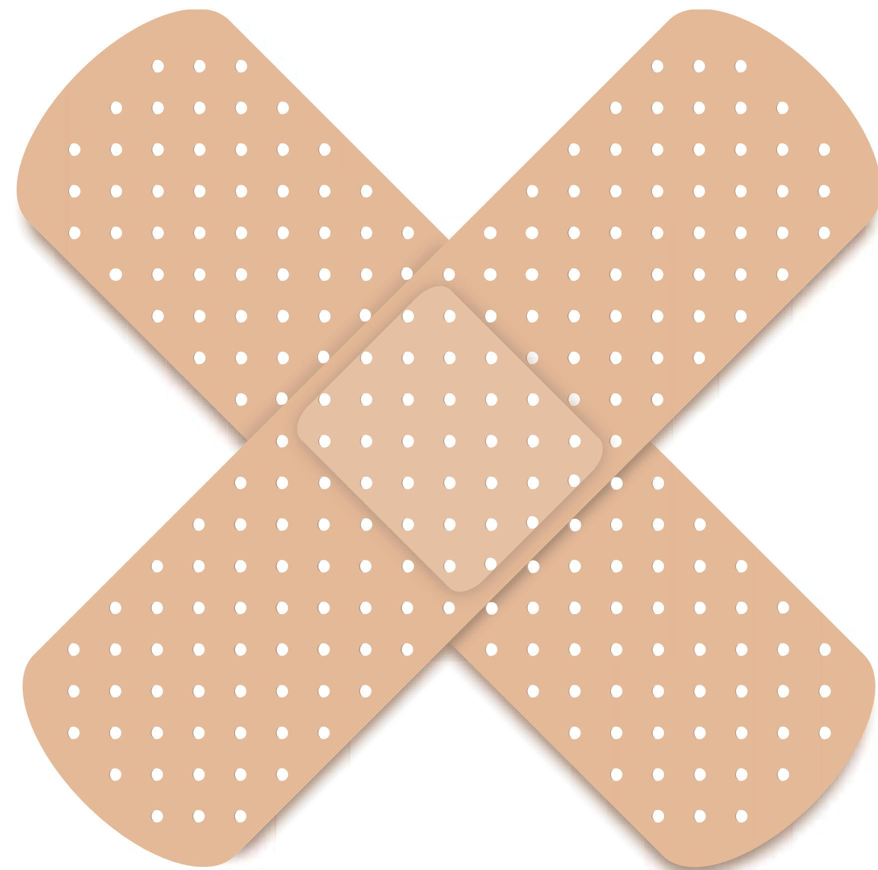


It's been two weeks since Cambodian workers at a shoe factory south of Phnom Penh died after a ceiling cave-in. In the grim game of counting casualties, it was not the kind of massive disaster that befell Bangladesh in late April when a structure housing five garment factories collapsed, killing 1,127 people.

Yet the Cambodian tragedy had an awful resonance of its own if only as a reminder that such disasters in the developing world occur with predictable regularity – and that corporations will never escape the necessity to define how or if they can do anything about it.

So far we've seen a variety of responses. The Walt Disney Company resolutely announced its decision to pull out of certain countries altogether, including Bangladesh, until local standards improve. Others are weighing their options, which include remaining in problematic areas but actively engaged in efforts to ensure that local suppliers improve worker safety.

For well-intentioned companies, it's a multifaceted quandary. Two business needs obviously clash: the need for lower-cost labor that enables them to stay competitive, and the need to maintain the loyalty of core customer sectors (and shareholders) for whom complicity in exploitation is intolerable.

Companies are quite justified in their insistence that final responsibility rests squarely on the shoulders of local governments. Whether companies decide to stay or go, the need is to intensify pressure on those governments to, say, guarantee the use of quality construction materials and require simple precautions like fire escapes.

Alas, even some governments that very much want to attract foreign investment are simply unable to comply. In some instances, their bureaucracies are intractable. In other instances, the corruption is pandemic.

The dynamics at play here are the same that corporations face with regard to the Foreign Corrupt Practices Act (FCPA) and its counterpart European laws. In both cases, a soul-searching risk assessment is the first step as "companies have to ask if they can actually do business in a country in a way consistent with their standards, and if it makes business sense to try," as one lawyer specializing in FCPA counseling advises.

Do the cost benefits of a foreign investment outweigh both the cost of implementing a compliance program and the risks that ensue should such a program prove somehow deficient? Sometimes yes. Sometimes no.

The collapses of supplier factories in Bangladesh and Cambodia don't tell the whole story of corporate exposure. As the dust was clearing from the Phnom Penh disaster, reports surfaced of over 1,000 underage workers at a separate supplier facility. Such potential issues abound way beyond worker safety: for example, are suppliers' female workers treated equally? Are women allowed to work at all?

In fact, every industrial accident can set off a chain reaction on multiple human rights fronts with concomitant risks to corporate reputation. At the end of the day, it may not even matter if the corporation has compelled its suppliers to dramatically improve working conditions. Those conditions in a country like Bangladesh will in any event remain far worse than what most workers in the West enjoy. The corporate manufacturer may then find itself still accused of exploitation after a few stopgap cosmetic improvements.

Action is therefore not enough. At every juncture, the communications component is

critical as a way to manage the expectations of customers and shareholders. Every engagement in a country like Bangladesh, every decision in one direction or another, needs to be explained in context. Long-term objectives must be articulated so that, whatever exigencies arise, there can be no doubt that the manufacturer was committed to material improvements all along – but that no company can write a check or two that magically transforms Bangladesh into a work environment conformant to Western standards.

For an example of what a shrewd, humane communications strategy looks like in this context, we need only consider what The Walt Disney Company has just accomplished.

Disney's decision to cut production in five countries – Ecuador, Venezuela, Belarus, and Pakistan as well as Bangladesh – was well-covered in the media, a not insignificant public relations coup despite reminders that, since less than 1% of the factories used by Disney contractors are in Bangladesh, the corporate sacrifice, at least on that turf, may not have been particularly painful. According to reports, companies like The Gap and Children's Place, presumably with more at stake in Bangladesh, were still mulling what to do.

Meanwhile, Disney seems to have taken a textbook communications approach. The company announced its decision two days after dozens of other companies, including Walmart, Carrefour, and Li & Fung, met with German government officials and NGOs to advance a plan ensuring safety at garment factories in Bangladesh. Intentional or not, Disney's timing dramatically underscored its leadership.

Disney also aggressively directed its whole supply line to cut production in the five countries and nimbly let the world know it had so directed. Disney also provided a credible basis for its selection of which countries to disallow, advising that a World Bank report had guided its decision. To complete the balancing act, Disney told licensees that its decision not to disengage until April 2014 provided a transitional period that "mitigates the impact to affected workers and business."

At the same time, Disney is also opting to pursue the alternative strategy of staying engaged in certain other countries ranked low in the World Bank report, including Cambodia and Haiti where Disney will do business but only with factories that participate in the Better Work program co-sponsored by the International Labour Organization and the International Finance Corporation. Should countries like Pakistan also participate in that program, they could be reinstated on the approved list. In 101 other countries, Disney will allow licensees to do business only if independent monitors approve the factories.

It is a balancing act indeed, but with real teeth and the potential to do some good. Disney did not draw up this battle plan overnight. It was obviously the product of much consideration inspired by a long series of tragedies around the world. Right now, companies like Walmart are proposing their own alternatives to the Accord on Fire and Building Safety in Bangladesh. Reactions have been mixed.

They may want to look a little harder not only at what Disney did, but how that company sold its strategy to diverse stakeholders throughout the marketplace. L

Who Really Ignited Obama's Move Against Patent Trolls?

Richard S. Levick
Originally Published on Forbes.com

When earlier this month the Obama Administration proposed new steps to protect business from patent trolls – entities that hold patents for no other reason than to sue companies, often frivolously, for allegedly infringing them – the move was greeted with widespread approbation.

"Innovation, not litigation" was the byword reinforcing the general perception of trolls as parasites extorting settlements and imposing cost burdens, including onerous license fees, which discourage ongoing innovation. The Obama proposals, including seven legislative recommendations and five executive actions, were commended as a significant next step in the wake of the landmark Leahy-Smith America Invents Act (AIA).

"Our efforts at patent reform only went about halfway to where we need to go," said President Obama in February. "What we need to do is pull together additional stakeholders and...build some additional consensus on smarter patent laws."

Make no mistake, that "additional consensus" is well within reach if not already an accomplished fact as a result of the business dynamics at play. When, for instance, Lodsys sued seven small firms, claiming the apps they design for Apple iOS and Google Android infringe Lodsys patents, that troll was picking a fight with Apple and Google themselves simply because those giants rely on small developers to build smartphone apps.

The trolls have managed time and again to tick off just about everybody. If it's taking years for the marketplace to deliver the coup de 'grace, that's only because courts and legislatures naturally move at a much slower pace than the R&D they're committed to protect.

Yet it's by no means just about R&D

and innovation. The entrepreneurs and tech behemoths are certainly an intended audience but I doubt they're the stakeholders who ignited this particular reform. There's a subtext here that speaks volumes about what really drives public affairs in a democratic free market. That subtext is embedded in the proposed reforms to protect off-the-shelf use by consumers and businesses; to "empower downstream users" and "Main Street retailers" who "need an easier way to know their rights before entering into costly litigation or settlement," according to the administration's fact sheet.

The PTO is directed to provide the training and resources that, say, a coffee shop may need if it's sued over Wi-Fi. It's hardly an exaggeration to say that they can and frequently do face just such legal attacks as when, in 2011, Innovatio IP Ventures, LLC filed a bevy of Wi-Fi-related suits against individual hotel chain branches.

So it's not just the technology sector; the trolls have also aroused the ire of powers like the National Retail Federation. "Small and medium-sized retailers are…being threatened and sued, and they are seen as easy prey because they don't have the legal expertise or money to easily fight back," says that association's Senior Vice President and General Counsel Mallory Duncan.

Yes, the Obama reforms are intended to safeguard innovation. But no, that doesn't tell the whole story. To the contrary, while politicians may act in the interests of R&D, they'll act all the more aggressively on behalf of their most critical core constituencies. "Anyone who owns a computer or uses the Internet is potentially at risk," says David Donoghue, deputy practice group leader of Holland & Knight's Intellectual Property Team. "The reform effort addresses the broad harm trolls do across a spectrum of industries but the harm caused to retailers is an especially egregious component of the harm."

As an important tool in the arsenal, the Obama reforms would provide courts more discretion to award attorneys' fees for abusive filings. It's the old losers pay provision for which tort reformers have long clamored, in this case a species of tort reform that a Democratic President can live with. Who knows, it may also provide a blueprint for broader civil law system reform (broader perhaps than a Democratic administration might welcome).

In any event, losers pay seems a necessary tool against trolls because both their costs and their exposure are relatively low. They don't manufacture anything, so their discovery burden is significantly lower in a patent case. They face no counter-claims. They don't care about their reputations. There is no lost productivity as a result of litigation. Typically, their lawyers are paid on a contingency fee basis.

Yet, if losers pay is necessary to level this playing field, there are influential voices outside the administration arguing that the federal courts already have the tools they need to deal with abusive patent litigation. In a recent op-ed, Randall R. Rader, Chief Judge of the United States Court of Appeals for the Federal Circuit, along with law professors Colleen V. Chien and David Hricik, insist that Section 285 of the Patent Act as well as Rule 11 of the Federal Rules of Civil Procedure give judges ample means to shift the cost burden as appropriate.

"There's a chance that such powerful voices may slow at least portions of this current patent reform effort," says Donoghue. "The opinions were limited to the issue of a prevailing party seeking its fees. So, hopefully any impact on the reform will be limited to the portions of the reform targeting fee recovery and will not touch the other reform proposals."

But without fee recovery, do the other reform proposals carry enough fire power to put the trolls out of business? Does Obama's initiative go far enough?

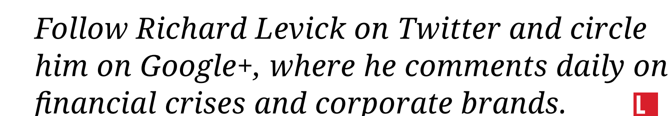
One otherwise skeptical writer found solid collective agreement among venture capitalists that the proposed reforms are indeed an effectual next step. At the very least, just as these proposals may enhance the impact of the AIA, so too will future initiatives build on the current reform efforts. Long-term, the die is cast and the trolls are living on borrowed time.

Maybe, but two nagging questions remain.

First, is the Obama Administration actually protecting the very retailers who seem to have ignited this current reform in the first place? Possibly not, "absent some form of strong immunity for end-users that trolls cannot work around," says Donoghue. "Creating such bright-line immunity from a lawsuit will remain a complex task."

The second question is even broader. Are any protections reliable without what Kelly G. Hyndman describes as "much bolder and far-reaching change?" By this view, patent trolls are "only a symptom of a system that needs a major, visionary overhaul," says Hyndman, a partner at Sughrue Mion, PLLC. "I was disappointed that an administration so audacious in other areas failed to move boldly for such an overhaul. The current focus on patent trolls is somewhat akin to tweaking the electric typewriter, whereas what is needed is a word processor."

That may be true. But at least it's a step toward assuring retailers and consumers they won't get sued for using the wrong typewriter or word processor.



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Monsanto Further Complicates the Biotech Foods Debate

Gene Grabowski
Originally Published on LEVICK Daily

Monsanto Co. made news, and some new enemies, recently when it was discovered that the company's experimental genetically modified wheat – planted in several states between 1998 and 2005 – was found to have escaped containment

Monsanto Co. made news, and some new enemies, recently when it was discovered that the company's experimental genetically modified wheat – planted in several states between 1998 and 2005 – was found to have escaped containment.

The USDA's Animal and Plant Health Inspection Service confirmed that the strain growing in an Oregon field is indeed a genetically modified strain that is not approved for human consumption.

When the story broke, grain futures plummeted as governments in Europe and Asia halted U.S. wheat imports and began examining earlier shipments for contamination. Now lawsuits are being filed – the first by a Kansas farmer who claims his livelihood is at risk due to what his lawyer calls "zero tolerance for genetically modified food" overseas. That might be overstating the case, especially since government officials assert that the wheat poses no health risk.

Export issues, added inspections, and lawsuits certainly present headaches, but the biggest blow from this mistake is that it reinforces public concerns and provides ammunition to the anti-biotech crowd. Because of that, Monsanto and others in the industry need to take immediate action.

Right now, for example, Monsanto needs to come forward with a fuller and more transparent explanation of what happened and to provide the best assessment possible of how much genetically engineered wheat may be out there. Rather than merely stating that its tests are conducted under USDA and EPA safety protocols, it should explain why it is beneficial to be experimenting with biotech wheat in the first place.

Talking about developing traits for resistance to herbicides and insecticides is meaningful to farmers and botanists, but not to consumers. Instead, Monsanto scientists and spokespeople must discuss the value in seeking ways to create greater crop yields that bring down food prices and to boost nutritional benefits in food ingredients. Otherwise, food companies and the consumers they rely on will continue to be skeptical of the company's motives.

Another recommendation: Divert some of the tens of millions of dollars now applied to fighting the biotech labeling wars – as was done last fall in California and soon again this November in Washington State – and use them to talk more openly and forcefully about how their products have created the world's most affordable, abundant, and safe food supply in history and why this work must continue for the benefit of everyone.

As Monsanto is learning yet again the hard way, the road to trouble is too often paved with good intentions. It's not experimenting with biotech wheat that creates the problem; it's reinforcing everyone's worst fears about secrecy and perceived scientific arrogance that puts roadblocks in the way.

Gene Grabowski is an Executive Vice President at LEVICK and a contributing author to LEVICK Daily.

Does Apple's Holy Grail of Tax Avoidance Runneth Over?

Richard S. Levick
Originally Published on Forbes.com

In this era of sequestration, the Democrat-controlled Senate has seemingly identified the catalyst it needs to criminalize this particular brand of "avoidance" and redefine it as "evasion."

After all, that's the only remedy available to the cash-strapped U.S. government. There's no question that Apple's shielding strategies are perfectly legal. This, despite the fact that some of its offshore entities have no offices or employees; and that one such Irish affiliate protected $30 billion in profits alone during the four-year period in question. But there will be no Department of Justice inquiry, no settlements, and no recoveries. The best Senator Levin and his allies can hope for are tax reform measures that close existing loopholes and swell the Treasury's coffers with a bigger slice of overseas corporate cash.

That said, even legislative fixes may be out of reach. During CEO Tim Cook's appearance before the Committee on Tuesday, Senator Rand Paul wasted no time coming to the company's defense – pointing out that there is nary a politician who "doesn't try to minimize their taxes" and that when "we punish Mr. Apple...we are punishing ourselves." Senator Paul's sentiments are no doubt shared by the Republican House majority. At the same time, the optimistic CBO deficit projections and encouraging unemployment numbers touted by Democrats just last week only serve to diminish the case for reform.

Then there's the fact that Wall Street isn't batting an eye. As of this writing, Apple's stock is slightly up since Monday, which is a clear indication that investors don't see any needle-moving legislation on the horizon. Furthermore, there is no uproar on financial social networks such as Seeking Alpha that aim to aggregate and gauge investor sentiment. Nor is there much criticism on the myriad websites devoted to the Apple rumor mill. One Seeking Alpha post even pointedly shares that RIM stock is down during Apple's embarrassing episode.

In fact, Apple shareholders are likely still basking in the afterglow of last month's bond deal that netted them $17 billion without the company having to repatriate one red cent of the $145 billion it is holding overseas. Not only did the move satisfy the likes of David Einhorn and other activists who had been clamoring for greater returns; it provided Senator Paul with the cover he needs to paint Apple's profitability as a rising tide that lifts its fair share of ships.

With Wall Street sated and the government paralyzed, only the issue of customer loyalty remains a potential pain point. Having lost its visionary CEO in an intensely competitive marketplace, and having been no stranger to controversy in recent years, will this evolve into the brand crisis that finally takes a serious bite of the Apple?

Thus far, consumer ire in the digital space (where it is best measured) is somewhat limited in scope. Based on our research, Apple adversaries aren't controlling key terms such as "Apple tax evasion" or "Apple tax avoidance" on the search engines.

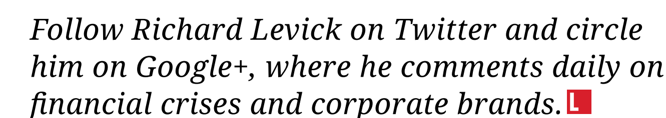
Social networks are not proving troublesome either. Apple's Facebook page is where nearly all of the criticism is concentrated, with posts calling Apple's tax practices "shameful" and demanding that the company "pay [its] fair share!" That much is to be expected – and it is certainly manageable given that more than a few of the company's 9,000,000 "likes" are posting messages of support.

What's surprising is that the vitriol hasn't metastasized to other social networks. Right now, Twitter is serving as more of an informational hub than sounding board, with the hashtag #Apple directing followers to news-related items or updates on CEO Tim Cook's Senate testimony.

The Twitter commentary – or lack thereof – puts Apple at an advantage because its prophylactic messaging is front and center. In fact, eyeballs are being drawn to online content espousing that the company's tax practices are legal, enable greater R&D investments, and help spur expansion into new European and Asian markets. That provides a modicum of narrative control that will only serve the company well as the week wears on.

As Tim Cook wraps up his testimony, it already looks as if Apple is merely doing what any smart company would – and that this latest "scandal" is destined to go the way of FoxConn, antenna-gate, and other issues that failed to threaten Apple's standing as one of the world's most lucrative and powerful companies.

Some may think Apple's Holy Grail hath runnethed over. But when you've amassed the stockpile of brand loyalty that Apple enjoys, it takes a great deal more for the ensuing stain to set.



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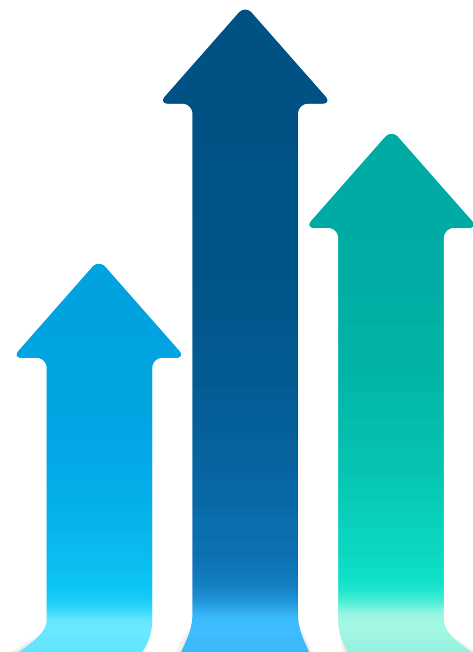
Beyond Herbalife: Compliance Is This Industry's Growth Engine

Richard S. Levick
Originally Published on Forbes.com

Herbalife must have looked like a sitting duck to Bill Ackman when he announced in late 2012 that he was shorting more than 20 million shares of the direct selling company.

Here, after all, was a presumed opportunity for the founder and CEO of Pershing Square Capital Management to make another fortune, this time wearing a white hat by savaging an alleged pyramid scheme at a point in history when a weary public has no tolerance for Ponzi schemes or anything that resembles them. The envisioned dismantling of Herbalife HLF +1.78%would be, as Ackman put it, the "greatest achievement" of his life.

Well, things didn't quite turn out that way – for reasons that go well beyond Herbalife itself or the stock buy that buoyed the company, compliments of Ackman arch-rival Carl Icahn. The conspicuous good fortune of a number of direct selling companies in recent months may actually be attributable to the erstwhile efforts of the industry itself to self-police. In the Herbalife matter, Icahn describes his purchase of 16 million shares as encouraged by sound financial and regulatory analysis. The "financial" analysis was not likely more important to Icahn's decision than the "regulatory" and the culture of compliance that permeates the direct sales marketplace.



Wall Street, meanwhile, responded to Ackman by saying yes, not just to Herbalife (stock soon rose over 8.2%), but to other direct selling companies as well. It is important to note that most analysts have not at any point downgraded Herbalife or companies like it. Quite to the contrary, USANA shares were initially up 107% and Nu Skin 70% (duly noted by DA Davidson analyst Tim Ramey). In fact, both companies reached all-time highs.

Even during the latest wrinkle – when interested parties have asked the FTC to investigate Herbalife – Ramey was being quoted to the effect that Pershing Square could be short over 20 million of the 31 million shares shorted. "We wonder if it has been quietly unwinding its short," he added.

So it looks like the market is doing what it's supposed to do: self-adjusting despite what one blogger calls "the phony criticisms of the bears." Financial performance is obviously a decisive factor but so too is the extent to which these direct selling companies are also secure buys, sufficiently self-regulated to ensure that their returns are no bubble. In this context, Ramey sees "tremendous upside in the stocks given the powerful growth dynamics."

To understand why the direct selling industry inspires such confidence, we should take a look at just how compliant it's been. The mood is set by the industry trade organization, the Direct Selling Association (DSA), with around 200 well-known American companies as members. DSA's stated mission is to "ensure that the marketing by member companies of products and/or the direct sales opportunity is conducted with the highest level of business ethics and service to consumers." (Full disclosure: My firm has a business relationship with DSA.)

As Herbalife has reminded us, the Association's Code of Ethics is required of all members. The company says it was disappointed that critics didn't reach out to them before going to the FTC: "...we would have explained how, as an active member of the U.S. Direct Selling Assn., Herbalife adheres to a stringent self-regulatory code of ethics," administered by a fully independent Code Administrator, to which every member company pledges as a condition of admission and continuing membership.

In fact, because of such efforts to achieve transparency and compliance, the direct selling industry has been commended by some of the very regulators whom Ackman sought to turn against Herbalife. Bob Paul, for one, is unstinted in such commendation.

"When I think about direct selling, I think about basically the free market in the United States," says Paul, a former General Counsel of the FTC. "Direct selling...is a type of distributorship, and the distribution model is geared toward people who, quite frankly, cannot do what the great big companies do."

"... The FTC does not go after legitimate direct selling companies," says Paul, adding that the DSA Code of Ethics is "one of the best that I have seen," providing inventory buy-backs and prohibiting overloading and excessive fees." If companies abide by such a code, "they should never have a problem with the Federal Trade Commission" (emphasis added).

In any event, the overall growth numbers are certainly impressive. Globally, there are more than 90 million sales people selling some $166 billion in goods and services per year. It's a $30 billion dollar industry in the United States, providing economic opportunity to nearly 16 million Americans – twice the population of New York City – at a time of uncertain jobs growth.

The impact of such numbers on so many lives demands strict accountability on the part of those who run this nonpareil industry. They have provided it. Such numbers likewise impose responsibility, on those who are in a position to critically affect the industry's future, to carefully distinguish companies that, in Bob Paul's words, never have a problem with the Federal Trade Commission from those that should.

Despite an environment polluted by the memory of garish Ponzi schemers, major investors and regulators have apparently accepted that responsibility.

Follow Richard Levick on Twitter and circle him on Google+, where he comments daily on financial crises and corporate brands.

THOUGHT LEADERS

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Amber Naslund is a coauthor of The Now Revolution. The book discusses the impact of the social web and how businesses need to "adapt to the new era of instantaneous business."

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Guy Kawasaki is a Silicon Valley venture capitalist, bestselling author, and Apple Fellow. He was one of the Apple employees originally responsible for marketing the Macintosh in 1984.

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Seth Godin is an American entrepreneur, author and public speaker. Godin popularized the topic of permission marketing.

INDUSTRY BLOGS

Holmes Report
holmesreport.com

A source of news, knowledge, and career information for public relations professionals.

NACD Blog
blog.nacdonline.org

The National Association of Corporate Directors (NACD) blog provides insight on corporate governanceand leading board practices.

PR Week
prweekus.com

PRWeek is a vital part of the PR and communications industries in the US, providing timely news, reviews, profiles, techniques, and ground-breaking research.

PR Daily News
prdaily.com

PR Daily provides public relations professionals, social media specialists and marketing communicators with a daily news feed.

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fastcompany.com

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Forbes
forbes.com

Forbes is a leading source for reliable business news and financial information for the Worlds vvbusiness leaders.

Mashable
mashable.com

Social Media news blog covering cool new websites and social networks.

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