LEVICK Weekly

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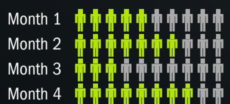
SPECIAL ISSUE:
Boardroom Challenges

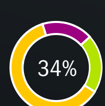
SOCIAL MEDIA & THE BOARDROOM:

Critical Questions Directors Need To Ask

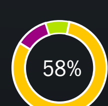


LinkedIn Network Weekly Growth

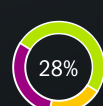
= 10 New Connections



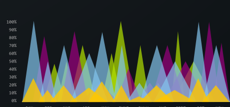
Twitter Favorite Rate



Twitter Retreet Rate



Twitter Monthly Growth Rate



Facebook Yearly Activity

Likes Friends Posts Shares

COVER IMAGE: Social media employ web- and mobile-based technologies to support interactive dialogue and “introduce substantial and pervasive changes to communication between organizations, communities, and individuals.” Andreas Kaplan and Michael Haenlein define social media as "a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of user-generated content.

This November, the National Association of Corporate Directors (NACD) released its annual list of The 100 Most Influential People in the Boardroom. In this special edition of LEVICK Weekly, we are pleased to present that prestigious list in its entirety along with in-depth articles and interviews discussing the challenges and opportunities facing boards today.

Contents

the 100 Most Influential People in the Boardroom

LEVICK
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NACD B. KENNETH WEST LIFETIME ACHIEVEMENT AWARD

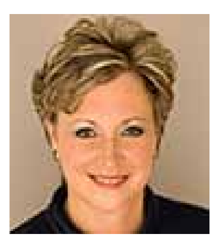
Jack B. Lowe, Jr./
Chairman; Zale Corporation; TDIndustries

Lowe became CEO and board chair of TDIndustries, one of America's premier specialty contracting companies in 1980. For 15 consecutive years, the company has appeared in Fortune magazine's list of the "100 Best Companies to Work in America". In his career, Lowe has been active in many civic and industry organizations and is a former trustee of the Dallas Independent School District.

NACD DIRECTORS OF THE YEAR

William S. Ayer
Chairman; Alaska Air Group

A veteran of more than three decades in aviation, Ayer is the incoming chairman of the NextGen Advisory Council, a panel of aviation industry leaders who are working with the FAA to modernize the nation's air traffic control system and improve airport and airspace efficiency. In addition, he is vice chairman of the Museum of Flight and serves on the Angel Flight West Foundation board. He is a regent at the University of Washington and vice chair of the University of Washington Foundation.



Linda Rabbitt
Founder, Chairman and Chief Executive Officer; Rand Construction Corp. Lead Independent Director, Towers Watson

Rabbitt is the current chair of the Federal City Council, is on the board of the Economic Club of Washington and is a trustee of George Washington University. She is a director and deputy chair of the Federal Reserve Bank in Richmond, Va.

NACD DIRECTORSHIP 100: HALL OF FAME

William B. Chandler, III
Partner; Wilson Sonsini Goodrich & Rosati

James D. Robinson, III
Chair, Directors and Corporate Governance; Coca-Cola

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Chair; Innovation Technology Procter & Gamble

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NACD DIRECTORSHIP 100: PEOPLE TO WATCH

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Deloitte Professor of Enterprise Risk Management; North Carolina State University, ERM Initiative

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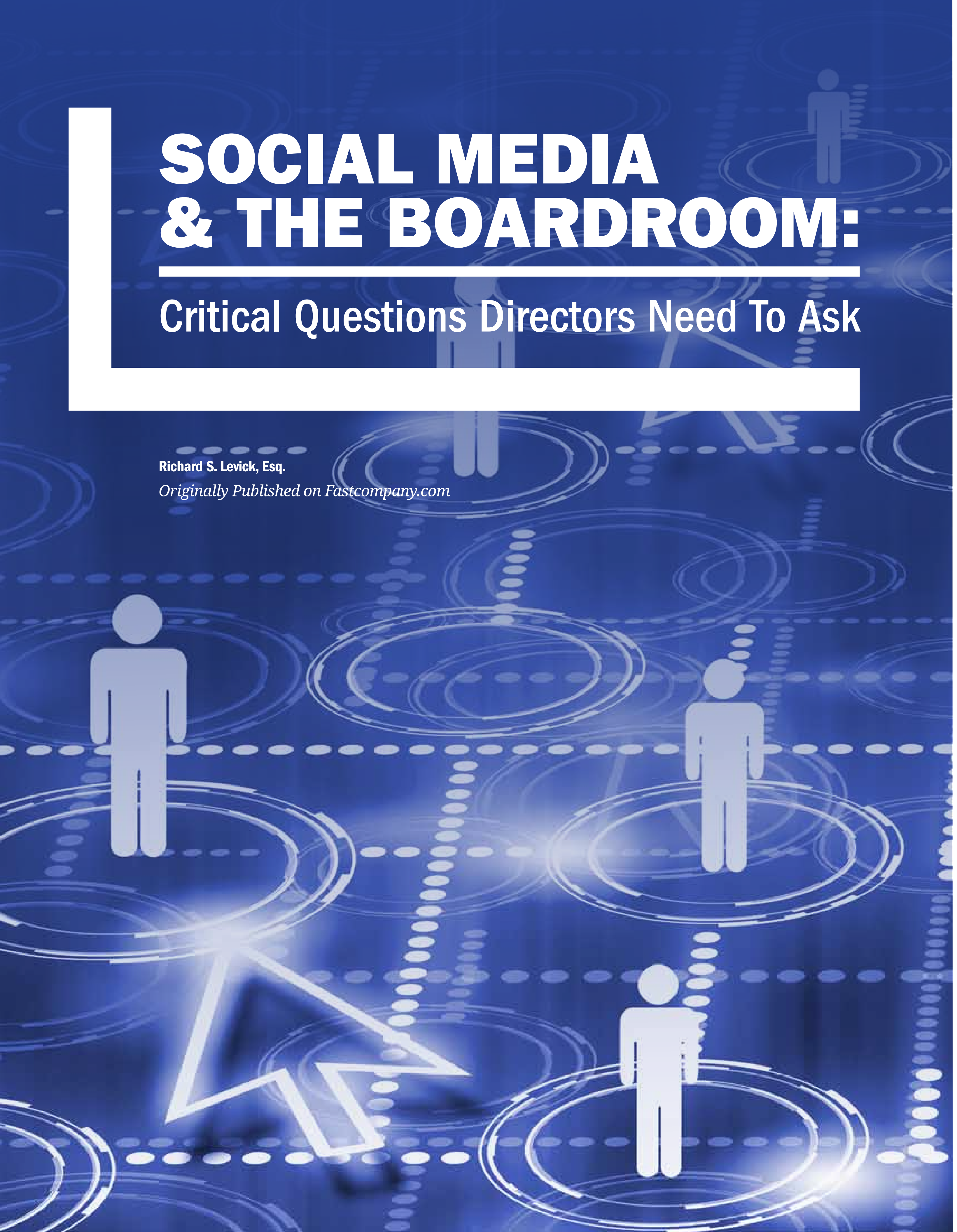

SOCIAL MEDIA & THE BOARDROOM:

Critical Questions Directors Need To Ask

Richard S. Levick, Esq.

Originally Published on Fastcompany.com

The last 10 years have seen extraordinary evolutions in the responsibilities boards of directors must assume. From Sarbanes-Oxley to Dodd-Frank, directors have been subjected to new liabilities and new mandates for elevated levels of transparency and accountability. But during that time, another development has had perhaps an even greater impact on directors' day-to-day duties than any strictures from Washington, D.C. It's the social media revolution—and no public company, large or small, has eluded its impact.

Social media are no longer novel stakeholder and consumer outreach tools; they are the new normal in the modern business operations environment. The brand-building opportunities they present are nearly limitless. The risks they introduce are just as expansive. They affect everything from reputations to value propositions. And to many corporate leaders, they remain somewhat of a mystery.

Social networks are the venues where purchasing decisions are increasingly made, investment opportunities are increasingly weighed, and corporate adversaries—such as social activists and the plaintiffs' bar—increasingly gain public support for their agendas. But despite that fact, the latest data indicate a significant divide between director engagement on social media issues and social media's impact on their companies.

Last month, Stanford University's Rock Center for Corporate Governance released the results of a survey that examined how 180 top CEOs, senior executives, and corporate directors approach the opportunities and risks associated with social media's meteoric rise. The findings are startling:

Ninety percent of respondents report a basic understanding that what is said on social media can have a major impact on their organization; but only 32 percent of their companies monitor social media to identify risks and only 14 percent utilize social media sentiment to measure corporate performance.

Only 24 percent of senior managers and 8 percent of directors request regular reports on the company's social media engagement efforts and stakeholders' social media sentiment. About half of the respondents do not collect this information at all.

Even here in 2012, only 59 percent of companies surveyed use social media to interact with customers. Only 49 percent use them to advertise. Only 35 percent use them for customer research purposes. And only 30 percent use social media to research competitors, new products and services, or communicate with employees and other stakeholders.

At the same time, 65 percent of respondents use social media for personal purposes and 63 percent utilize them for business purposes. Of that forward-thinking group, 80 percent maintain a LinkedIn account and 68 percent are active on Facebook. At first glance, these numbers may seem encouraging; but, in real-

Only 24 percent of senior managers and 8 percent of directors request regular reports on the company's social media engagement efforts and stakeholders' social media sentiment. About half of the respondents do not collect this information at all.

ity, they make the above cited statistics all the more alarming because familiarity with social media has not translated into C-Suite or board-room action.

The good news is that there are a number of questions directors can begin asking today that will immediately help them, and their organizations, get up to speed. To formulate a list of the 10 most critical, I enlisted the assistance of three thought leaders who understand the crossroads of corporate directorship and social media as well as any in the business world today. Catherine Bromilow, a partner in PwC's Center for Board Governance in the United States; Chris Wood, a Senior Manager in PwC Canada's Audit Committee Connect; and Neil Manji, a partner and leader in PwC Canada's Audit Committee Connect, shared insights and experiences that illuminate the opportunities and risks inherent in social media engagement and provide the foundation by which directors can start asking the questions that set a strong strategic course.

1. How do we use social media to engage with customers, open new markets & recruit the top talent?

"Social media engagement has evolved to the point it is absolutely essential in today's marketplace," says Bromilow. "A few years ago, social media was something companies engaged in to provide themselves a competitive advantage. Now, it's something that they have to do to keep from falling behind. Whether you're looking to promote products, recruit talent, or introduce yourself to a new market, your audience is on social media—so your company needs to be as well."

2. How are our competitors utilizing social media to achieve the goals outlined above? What can we learn from their efforts?

Wood argues that competitors' social media activity provides a great deal of insight into what works and what doesn't with respect to diverse industries that have varying audiences and different outreach goals. "It's a lways smart to look at what others in your market are doing to leverage social media. With the analytical tools available today, companies can access a wealth of information about the tactics their audiences respond to, what drives them to take desired actions, and the strategies that establish the strongest connections both online and off. At the end of the day, both you and your competitors are attempting to reach the same people.

From that perspective, your competitors are providing you added insight with every Facebook post they publish, every tweet they transmit, and every piece of video they upload to YouTube or another video platform. Unfortunately, data from the PwC 2012 Annual Corporate Directors Survey show that this point is lost on a number of board members—77 percent of respondents answered "not at all," "not sufficiently," or "don't know" when asked how their companies monitor competitors' social media activity."

3. How are our executives utilizing social media? Who are they communicating with? What are we allowing them to say?

"Executives that engage with customers, employees, investors, and other stakeholders via social media provide themselves an air of accessibility that simply doesn't come across with other, one-way forms of communication," says Manji. "Social media are conversational venues that empower the audience because it really feels it is being listened to. Some topics may be off-limits, and executives need to know where the boundaries of acceptable commentary may lie; but the risks are so far outweighed by the opportunities that most boards are well-advised to encourage senior leadership to build consumer and employee loyalty via social media outreach."

4. What are our policies on employee use of social media? Are we appropriately training employees on in this critical brand protection and promotion area? How often do we update the policies to ensure they are keeping up with technology?

Bromilow places a great deal of emphasis on the importance of a carefully crafted social media use policy. "A number of directors I've spoken to are concerned about employee social media use. There are productivity concerns, to be sure, but it goes even further than that. How can a company protect against accidental leaks of confidential information? How can it prevent employees from sending inadvertent signals by "liking" a certain article or "re-tweeting" controversial commentary? With the advent of location-based social media platforms, how can a company ensure that potentially damaging conclusions aren't drawn simply because an executive is in a certain city? Companies need formal policies to ensure that every employee, at every level of the organization, understands and follows the rules of the road.

"As important as this point is, the PwC 2012 Annual Corporate Directors Survey again shows that most board members are not fully engaged on the issue--69 percent of respondents answered "not at all," "not sufficiently," or "don't know" when asked how their companies employ social media use training and policies."

5. Does our social media outreach comply with existing and potential regulations? What are the implications in terms of Regulation Fair Disclosure?

"We haven't seen much yet from regulators such as the SEC, FTC, or FDA in terms of concrete guidance as to what is constitutes appropriate social media usage in the investor relations realm or in industries where marketing and communications are tightly controlled, such as pharmaceuticals," says Bromilow. "With so many concerns related to Regulation FD and other questions of compliance, boards need to be reassured that 1) company social media engagement comports with all existing regulations, and 2) that they know how to respond should an external connection such as a Facebook fan or Twitter follower post commentary that could be problematic."

6. Are we actively monitoring popular social media platforms for negative publicity about the company?

"It used to be that companies really only had to worry about a damaging headline in the daily paper or a negative report on the nightly news," says Wood. "Now, they have to be on the lookout for individual stakeholders who may comment about a negative experience on social media platforms, because the inter-connected nature of social networking means that the story could go "viral" before the company even knows it's out there." Bromilow adds that social media monitoring isn't just about reputational risk management; but brand building as well. "When a consumer does put something out there that could be damaging to the brand, companies need to remember that it is only the start of a conversation. If they respond quickly and act fast to resolve the problem, they often win points for their care and attention to the matter—and they do so in a public venue where others can see just how seriously they take customer service.

Even with all the ways that social media can make or break corporate reputations, the PwC 2012 Annual Corporate Directors Survey once again shows a disconnect on the issue, with 69 percent of board members answering "not at all," "not sufficiently," or "don't know" when asked how their companies monitor social media for adverse publicity."

7. Are we actively monitoring plaintiffs', activists', and regulators' social media activity for clues as to where our next crisis might arise?

Manji sees social media monitoring not just as a tool that allows for rapid response should reputational problems arise, but as an early warning system that can alert the company to problematic issues before they evolve into something worse. "You've got activists using social media to build groundswells of support around issues of corporate social responsibility. That activity represents actionable intelligence that companies can use to nip potential problems in the bud before any of these adversarial parties can leverage them to damage the company in the courtroom, the Court of Public Opinion, or in terms of customer loyalty."

It's important to note as well that the plaintiffs' bar and even regulators engage in the same type activity—and provide the level of insight into their plans. When plaintiffs' attorneys write blog posts that help them lay the groundwork for their next class action or regulators take to social media to discuss enforcement agendas, those companies that are listening understand—and can plan for—what's coming next.

8. What are we doing to build a burgeoning community of support in the social media space—one that is large enough to enable direct stakeholder communications that can circumvent the traditional media filter?

To Wood, amassing multitudes of Facebook fans, Twitter followers, or YouTube subscribers is about more than a mere demonstration of brand strength. "When a company draws stakeholders to its key social media properties, what it is really doing is creating a conduit by which the company can directly communicate with its customers, shareholders, employees, and others. In this context, social media are avenues that enable companies to bypass the traditional media filter and transmit messages precisely as they are intended. That's an asset that is particularly valuable in crisis or in situations where misinformation is permeating the marketplace; but it is also one that can't be put into action unless the company has used peacetime to build its audience."

9. What is our strategy for reaching out to the most influential social media voices covering our industry? Are we treating them with the same respect we would show 60 Minutes or the New York Times?

"Just like in the traditional media, social media are venues where some voices matter more than others," says Manji. "That means companies need to know who controls perceptions related to their industries and do what is necessary to build productive working relationships with those influential voices. It might be a blogger with 10,000 daily readers. It might be pundit with 20,000 Twitter followers. But no matter the person or the venues he or she might populate, it is incumbent on companies to understand that the most powerful commentators on social media have the same reach, and speak with the same authority, as most traditional media outlets today."

10. How are we integrating social media strategy with our Search Engine Optimization (SEO) and Marketing (SEM) efforts? Are we taking steps to ensure that these critical initiatives support each other on an ongoing basis?

It is important to remember that social media engagement is now a key element in the online "race to be found." With so much clutter online, today's companies are constantly looking for ways to ensure that their online properties rank high on the most popular search engines. As Google, Bing, Yahoo, and others evolve their algorithms to include social media content to greater and greater extents, the value of smart social media strategy rises exponentially—as it not only strengths corporate reputations, but increases the chances that those enhanced brands will be noticed amid a constant and highly competitive contest for online attention.

As the latest data indicate, there are still a number of directors that are concerned about the risks associated with social media engagement today. In some cases, that's a prudent perspective. But as Wood reminds us, "The greatest risk of all is failing to capitalize on all of the brand-building opportunities that social media present. These online venues are where consumers, investors, regulators, and the full gamut of corporate stakeholders make decisions. To be absent from the conversations that impact your industry is a hazard simply too dangerous to invite." L

Richard S. Levick, Esq., President 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.

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MICHAEL VOLKOV on Whistleblowers

Michael Volkov, a shareholder in LeClairRyan, discusses the tough whistleblower laws that were passed as part of the Dodd-Frank financial reform package. Whistleblowers that meet certain criteria are now entitled to as much as 30 percent of all recoveries that result from their cooperation with the government. That's a powerful incentive—and it dictates an urgent need for companies to ensure that employees report problems internally, before turning to regulators.

what's next?

THE TOP ISSUES OF 2013 AND BEYOND

The transition from the age of Sarbanes-Oxley to the age of Dodd-Frank has ushered in yet another massive expansion of director roles and responsibilities. Under the new regime, directors need to be engaged in the full gamut of issues that impact corporate reputation and, ultimately, shareholder value. At the same time, the host of new regulations born of 2008's financial crisis is just now dramatically escalating personal liability and introducing new exposures that boards must be prepared to successfully protect.

To help directors fulfill their fiduciary and reputational obligations, we spoke with eight leading attorneys on issues from M&A and IPOs to data loss and theft. These feature interviews delve into the marquee challenges of 2013 and beyond—providing not only insight into how they can best be solved, but tips on how companies and directors can best communicate their steadfast commitment to compliance, value, and responsible oversight. To that end, we have appended our own suggestions for best communications practices to each interview.

ACTIVIST INVESTORS: SCHULTE ROTH & ZABEL'S MARC WEINGARTEN

Marc Weingarten, a partner in the New York office of Schulte Roth & Zabel, is chair of the Business Transactions Group and a member of the Investment Management Group.

What are the reasons behind increased incidents of shareholder activism?

Marc Weingarten: The principal reason is the increased willingness of major shareholders, both institutional investors and pension funds, to support activists. Historically, they simply "voted with their feet" and sold out. But they've become so big that now they really own the market, and rather than selling and having to look to reinvest somewhere else, they join the activists in pressing for improvements.

When markets are down, investors are unhappy and will turn to activists for help. Several of the most successful financial activists now have several billion dollars in assets, and can target even the largest-cap companies. Given activists' success rate in recent years, many more hedge funds that are not typically "activist" are now trying out the strategy on their poor-performing positions.

What are some of the most common mistakes that boards of directors make when faced with pressure from activist investors?

Marc Weingarten: The most common mistake is for a board to refuse to give the activist a hearing. It's fine to evaluate your defenses, but stiff-arming or fighting the activist from the start and refusing to engage is generally not well-received by the other stockholders.

Another common mistake is to attack the activist as merely a short-term opportunist looking for a quick pop in the stock price at the expense of long-term value creation. Shareholders will be happy to take any gains they can get, even if short-term. As such, a company under attack needs to put itself in the mindset of its shareholders and come up with responses that explain prior performance and realistically support a more promising future.

BEST COMMUNICATIONS PRACTICES:

1. In the age of transparency, boards need to direct their Investor Relations and communications team to focus on more than just the analysts. The democratization of the market is underway, investors are newly empowered, and companies need to think differently about how they engage potential activist threats.
2. Don't let the shuttering of MoxyVote fool you; the activists are online and they use the Web to drum up support. Boards need to direct their teams to better understand how WikiInvest, Seeking Alpha, and other social and digital media have an impact on their value.

BANKRUPTCY & RESTRUCTURING: KAYE SCHOLER'S TYLER NURNBERG

Tyler Nurnberg is a Partner in Kaye Scholer's Bankruptcy & Restructuring Group and Managing Partner of the firm's Chicago office.

How can directors best serve a company during bankruptcy or restructuring?

Tyler Nurnberg: A board will want practical outside advice early in the process on how to fulfill its fiduciary duties, and how those duties may change when the company is insolvent or approaches insolvency. The board will want to maintain a proper supervisory role and not exercise undue influence over day-to-day operations. Prior to filing bankruptcy, the board and its advisors should also assess the adequacy of the D&O insurance policies. Also, directors should be alerted to the discrete areas where they could potentially be liable personally for the bankrupt company's debts.

How can a company best position itself for post-bankruptcy operations?

Tyler Nurnberg: The company should determine its exit strategy before it files bankruptcy wherever possible, and view the process as an opportunity to fix both financial and operational problems. Get as much negotiated in advance of filing as possible. There has been an increase in the number of "prepackaged" or "pre-negotiated" cases in recent years and we see that trend continuing. Filing with an exit plan already negotiated enables the company to shorten the time it spends in bankruptcy, maintain control over the process and reduce restructuring costs.

Another piece of practical advice is that the board needs to stay focused on the business plan during the bankruptcy. While external factors may have contributed to the need to file, larger underlying problems with the business model or the balance sheet likely drove the decision. Those issues need to be resolved for the company to emerge as a viable business and, while bankruptcy can be a powerful tool, it is not a panacea for the problems that led the company to file bankruptcy in the first place.

BEST COMMUNICATIONS PRACTICES:

1. Boards must ensure that exit strategies and future growth are the hallmarks of communications during bankruptcy, beginning with the initial announcement. When companies control the "new day" narrative, internally and externally, they keep stakeholders focused on future success, not past mistakes.
2. Boards must understand the power of social and digital media to disclose. Teams need to be ready to respond publically from the very moment a company begins to seriously consider restructuring—in other words, go on the offense so you don't have to play defense.

CIVIL AND CRIMINAL LITIGATION & INVESTIGATIONS: WHITE & CASE'S GREGORY LITTLE

Gregory G. Little is a trial lawyer who counsels clients on successfully avoiding, resolving, and winning litigation.

How is Dodd-Frank implementation most dramatically affecting director liability issues?

Gregory Little: There are many provisions in Dodd-Frank that impact director liability. The provision that has the most potential impact is the SEC whistleblower bounty program. This program authorizes the SEC to pay monetary awards to whistleblowers who provide information that relates to violation of the federal securities laws and results in sanctions exceeding $1 million. The whistleblower bounty program has been described by the SEC as a "game changer."

What do directors need to know about SEC enforcement trends?

Gregory Little: In the past several years, the SEC has been involved in a number of high-profile insider trading cases. Insider trading cases, of course, have been around for years. However, recent cases have demonstrated that the SEC is working more closely with the Department of Justice and taking full advantage of the DOJ's ability to bring criminal actions and seek enhanced investigatory powers like wiretaps and informants. At the other end of the spectrum, the SEC has also announced a willingness to pursue civil cases in which defendants are accused of negligence only.

How can boards of directors best serve a company in the midst of a civil or criminal investigation?

Gregory Little: In the beginning stages of the investigation, every effort should be made to demonstrate to investigators that the company intends to be part of the solution—not part of the problem. Regulators and prosecutors are very quick to make a determination as to whether your company is truly committed to solving a perceived problem or perpetuating it.

If the investigation proceeds to the second stage where the regulators believe a problem exists, the company should make an objective assessment as to whether that is the case and, if so, demonstrate why that problem is an aberration in an otherwise strong compliance program.

BEST COMMUNICATIONS PRACTICES:

1. New whistleblower rules have changed the game. Boards must ensure that all employees know every channel by which they can report compliance issues internally, before they turn to the government.

2. Companies are naturally reticent to aggressively communicate on compliance. But the more they do, the more they condition the marketplace, investors, and regulators to give them the benefit of the doubt should trouble arise.

DATA LOSS AND THEFT: BAKER HOSTETLER'S TED KOBUS

Ted Kobus is National Co-Leader of the Privacy, Security and Social Media Team at Baker Hostetler.

What are the most common mistakes companies make in data loss situations?

Ted Kobus: Too many companies fail to understand that data security events are not your typical legal problem. While complying with legal requirements is critical, companies cannot forget the impact these events have on employees, customers, the public, and regulators. Appropriately protecting the people affected by the incident will protect the brand and the company's most valued relationships.

Also, companies fail to understand that messaging is more important than the speed of notification. There are several laws that require notification within a certain time frame. At the same time, people who are impacted by a data security event expect that notification will take place immediately. Unfortunately, notification typically cannot, and should not, be made just to get the notice out the door. If a company isn't ready to provide answers as to what happened, how it happened, what's being done to protect impacted parties, and what's being done to prevent future breaches, then it isn't ready to notify its stakeholders.

How can boards best serve a company embroiled in a data loss situation?

Ted Kobus: The most important thing to remember is that each incident presents a different set of circumstances. As such, the board has to rely on the company's incident response team, which hopefully knows the facts better than anyone. Directors should start to worry if they sense panic or disorganization. Some questions to ask of the team include:

- Is there any insurance to help offset the costs of the breach response? If not, how much is it going to cost the organization to respond?
- Is this event so large that our employees will be concerned? If so, what resources will be made available to answer their questions?
- Have you considered where all of the affected people reside and have you complied with all state and local laws?

BEST COMMUNICATIONS PRACTICES:

1. Boards must understand that stakeholders want answers in data breach situations. If the company isn't prepared to answer all of the questions, then it isn't ready to disclose the breach publically.

2. Data loss is a topic that thrives in the tech-savvy digital media. That means boards must ensure that any response strategy must emphasize bloggers and social media to truly control the narrative.

PILLSBURY'S DAVID KEYKO ON GENERAL LITIGATION

David Keyko's practice focuses on major complex litigation. He has defended clients in matters involving securities allegations and various types of fraud, antitrust violations, ethics issues, trusts and estates issues, and government probes.

What are the hot issues in corporate litigation today that most acutely impact directors?

David Keyko: It is commonplace for derivative litigation to be commenced against directors when a major lawsuit is filed against the company. Ensuring that the company has appropriate controls is important to limit claims and to establish that, if problems do arise, the board has engaged in proper oversight.

Audit committees, in particular, plays an important role in overseeing corporations' financial reporting. Accounting firms tend to be very skittish when any issues come up that might reflect negatively upon the accuracy of financial reports – and investigating such issues can be very expensive. The audit committee needs to ensure that financial reporting and projections are appropriately conservative. And the board needs to ensure that there is a "proper tone at the top."

What are the most common circumstances under which directors find themselves the targets of lawsuits?

David Keyko: Again, derivative claims against directors are now regularly made when a major lawsuit is filed against the company. The allegation in the derivative lawsuits is that the directors failed to take steps to ensure that the company's actions were proper or that they approved improper activity.

To limit their exposure, directors should:

- Ensure that the company has appropriate financial controls in place, that the audit committee regularly meets, and that the directors receive regular reports about the company activities, in particular significant actions being taken by the company (this can be used to demonstrate that the directors have engaged in appropriate oversight);
- Ensure that the bylaws limit directors' liability to intentional misconduct and fraud (this will require any shareholder filing a lawsuit to allege with particularity the intentional misconduct or fraud in which the director has purportedly engaged—a heavy burden);

BEST COMMUNICATIONS PRACTICES:

1. Social and digital media monitoring provides companies with early warning of issues that might drive future litigation. Boards need to see detailed analytics reports on what's being said about their top risks or a developing issue—and who's saying it—to ensure the company is ready for what lies ahead.

2. Companies need to own their risk terms on the search engines in order to ensure that their narratives and messages are the ones seen and heard first on the Web; rather than those disseminated by potential courtroom adversaries.

WEIL GOTSHAL'S ALEX LYNCH ON INITIAL PUBLIC OFFERINGS

Alex Lynch is a partner in Weil Gotshal's Capital Markets practice.

What are the responsibilities of boards of directors in the IPO process?

Alexander Lynch: Directors have a number of unique responsibilities in the IPO process. First and foremost, directors have personal liability for material misstatements and omissions in the registration statement and prospectus. Directors also personally sign the registration statement. As a result, it is critical for directors to give themselves the time necessary to read and review the registration statement carefully in advance of the initial filing and throughout the process. They should then compare the disclosure to what they know about the business and alert the IPO company's advisors of any disclosure issues.

Second, focus on accounting issues. Is the IPO company ready to report on a quarterly basis? Can it produce financial statements on a timely basis? Are there any accounting policies that need to be reconsidered? Do you have any material weaknesses or significant deficiencies? If so, how are they being remediated and will they be remediated in advance of the IPO?

And third, make sure the IPO company is ready to be public by asking the tough questions. Do you have the right management team in place? Why is the IPO company going public? Is the business model mature enough to withstand investor scrutiny? If you don't have the right answers to these questions, the IPO company is likely not ready to be public.

How can boards of directors best prepare themselves for the transition from private to public ownership?

Alexander Lynch: Remember, IPOs are the beginning; not the end. An IPO will not be the last time the IPO company accesses the market. Preparation for life as a public company is critical for success. Also, a well-executed IPO provides a substantial amount of goodwill and positive publicity, while a poorly executed IPO can damage an IPO company's reputation for a long time. Accordingly, preparation by the board is critical.

BEST COMMUNICATIONS PRACTICES:

1. The price at which you set your IPO communicates a lot about your value proposition. What happens to that price after the offering communicates even more. Boards need to maintain investor confidence by allowing room for the share price to grow.

2. The IPO is the beginning, not the end. It is not only a financial event, but a corporate branding opportunity. Boards need to ensure that newly-public companies communicate their value just as aggressively post-IPO as they do in the critical months leading up to it.

PILLSBURY'S PAULA WEBER ON LABOR & EMPLOYMENT ISSUES

Paula Weber is leader of Pillsbury's Employment & Labor practice.

How can boards best serve companies embroiled in a discrimination scandal or union battle?

Paula Weber: Once litigation or some other form of labor unrest arises, the board has a specific oversight role to ensure that management has the proper legal counsel and that the costs and risks are being appropriately weighed. The board also has a responsibility to see that any bad actors are held accountable for their misdeeds.

Of course, it's always preferable that the board be involved long before labor and employment issues evolve into full blown scandals. Directors need to ensure that employees are always treated fairly and with dignity and respect. They need to identify ways to ensure employee satisfaction, perhaps by tying management compensation to human resources specificmetrics, such as ensuring that diversity is an element of the selection process. When it comes to labor and employment matters, it is always better for the board to be proactive. If it isn't, it's too easy for adversaries to force the company into a defensive position.

What's next when it comes to the labor and employment issues?

Paula Weber: We will continue to see a number of wage and hour matters. We will continue to see a lot of litigation pertaining to workers that are classified as independent contractors as opposed to employees.

One area we are likely to see the biggest increase in labor and employment litigation, however, is in the area of disability. Even though it is extremely difficult to bring collective actions on disability discrimination claims because of the individualized nature of the cases, directors need to know that accommodation requirements of those with disabilities is a hot issue for the federal and state anti-discrimination agencies right now. Federal regulations underwent a major overhaul a few years ago and this has resulted in many more workers being deemed disabled and protected by the Americans with Disabilities Act. As a result—and because the law remains quite ambiguous as to what accommodations are required for employees with disabilities—we can expect the government and the plaintiffs' bar to be far more aggressive in asserting claims.

BEST COMMUNICATIONS PRACTICES:

1. With the prospect of more class action litigation looming, directors need to ensure open lines of communication between management and employees by which potential issues can be addressed before they become systemic problems.
2. The post-verdict or settlement phase of L&E litigation represents a critical opportunity for companies to share messages about fair and equitable labor practices with a captive audience of investors, regulators, and employees.

MERGERS & ACQUISITIONS: WHITE & CASE'S WILLIAM WYNNE

William Wynne represents principals in major corporate transactions and financings, mergers and acquisitions, international corporate debt restructurings, and public and private securities offerings.

How can boards of directors effectively prepare for inadequate hostile takeover bids?

William Wynne: Boards should periodically review their companies' structural defenses to an unsolicited offer: a staggered board, ability of shareholders to act by written consent, poison pills, etc. Just as important, however, is being comfortable with the transaction process and not panicking upon receipt of a hostile offer. A team of advisors that has the board's confidence should be immediately available. This team should not just include bankers and lawyers, but public relations professionals and proxy solicitors as well.

Boards should also review what similar companies in their space have done in response to hostile transactions. This will let directors know what to expect and allow them to learn from their competitors' successful tactics and missteps.

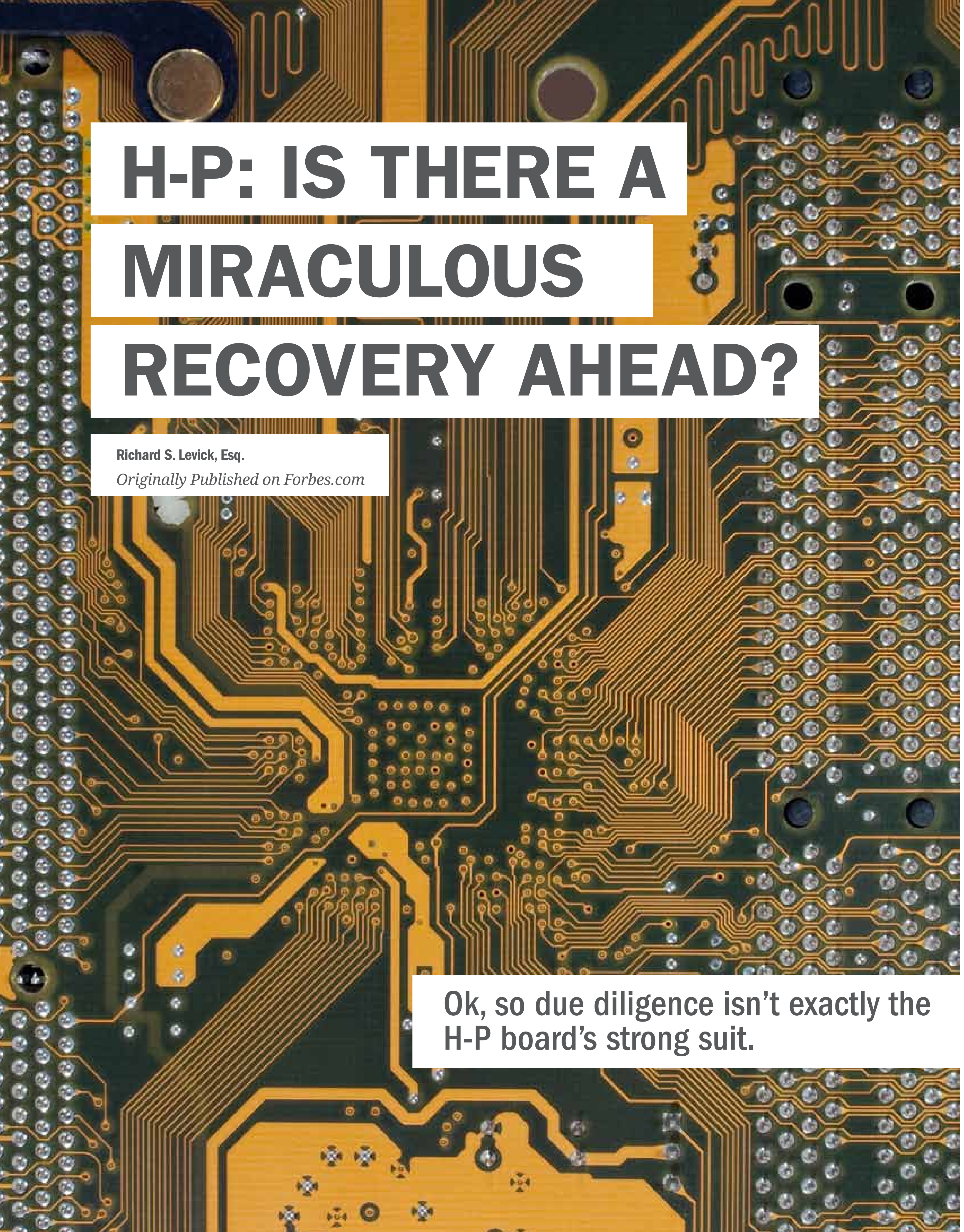
What's next with regard to M&A law?

William Wynne: Merger-related litigation has reached epic proportions. In 2007, 53 percent of mergers valued at $500 million or greater attracted litigation. In 2011, almost all deals (96 percent) attracted litigation. The reality is that parties to a merger will get sued and need to be prepared.

Process is paramount. Boards should hold meetings to discuss and decide all materials issues, and careful minutes should be taken. Courts will hesitate to overturn board decisions if there is a solid record. In particular, boards need to be acutely aware of conflicts of interest, both actual and perceived. Boards should record their deliberations over the pros and cons of each potential conflict in the context of how the proposed relationship will bring value to the shareholders in spite of the conflict. Without evidence that such conflicts have been considered by the board, exposure to shareholder litigation increases significantly.

BEST COMMUNICATIONS PRACTICES:

1. Boards need to ensure that every employee understands the confidential nature of M&A transactions—and that they know what can and cannot be said, especially in the social media (and then be certain aggressive monitoring is in place to detect even a hint of a leak).
2. Boards that are seen as in control of the transaction process are best positioned to deflect criticism and defend against the inevitable litigation.



H-P: IS THERE A MIRACULOUS RECOVERY AHEAD?

Richard S. Levick, Esq.
Originally Published on Forbes.com

Indeed, after the announcement of an $8.8 billion write-down related in part to "serious accounting improprieties" and "outright misrepresentations" by UK software company Autonomy, H-P's board is being loudly castigated for failing to flag problems some say were hidden in plain sight.

Because of those purported improprieties, later disclosed during an internal H-P probe, the company acquired Autonomy in 2011 at what now seems to have been an exorbitantly inflated $11.1 billion price tag. According to reports, financial analysts had raised questions that H-P only addressed after the internal audit began.

Observers like Richard Windsor, a former technology analyst with Nomura, are unequivocal: H-P needs a new board of directors, period. To be sure, this board has a long history of conspicuous missteps, including successive controversies over the firing of former CEOs Carly Fiorina, Mark Hurd and Leo Apotheker. Meanwhile, relatively strong performance numbers during Hurd's tenure has rekindled sharp criticism of the board for failing to stand behind him.

> Ok, so due diligence isn't exactly the H-P board's strong suit.

Although there is the inevitable speculation about her becoming a target, it's noteworthy that we do not now hear the same explicit calls for current CEO Meg Whitman's scalp as we do for a boardroom coup. In fact, in the blame game now raging, no one is playing their part more pointedly than Ms. Whitman. On the one hand, she has directly accused Autonomy of a "willful sustained effort" to misrepresent its top and bottom lines.

On the other hand, she has separated herself from her own company's bungled due diligence. While not everyone is buying her arguments, she reminded us that Apotheker was responsible for the acquisition and, shrewdly, expressed her own bewilderment that, prior to her ascension as CEO, due diligence reported to "strategy chief" Shane Robison rather than to the CFO. "I've never seen that before in my career" and made a decision "right away" to fix it, said Whitman.

At the same time, Whitman has commandeered the current massive write-down, only part of which is directly tagged to Autonomy's alleged malfeasance. To be sure, analysts are closely scrutinizing the charge. Some have observed that the $5 billion attribution to accounting irregularities simply doesn't "make sense." Others point out that, even if we swallow that claim, the other $4 billion can only be blamed on the "boneheaded decision" to buy Autonomy in the first place.

Yet irrespective of how the specific write-down numbers are interpreted, H-P has seized on the Autonomy debacle as an opportunity to wipe the slate clean. One way or another, a new era can begin.

Or at least there's that possibility. A simple question still looms Damocles-like, and it goes well beyond bookkeeping or due diligence. The question is: What happens next?

Any answer to that underscores what has really been the H-P board's principle failure over the last few years, a failure amply shared by the company's officers. It is a strategic failure in every sense of the word. Underlying all the mistakes of which Autonomy is the latest example, there has been the persistent inability of the board to actually define the company it manages.

What can be a more fundamental boardroom responsibility than to insist on a coherent strategic plan girded by realistic growth projections and, crucially, guided by a sense of what the company actually sells? Is H-P a tablet company? A printer company? A software company?

No due diligence in the acquisition of a Compaq or an Autonomy can ultimately serve the shareholders absent this very basic sense of what the company is all about. No deliberations over a Hurd or an Apotheker can mean much when the board is content to let a company like H-P lurch from pillar to post in hopes of quick revenue injections to stave off inevitable market share erosions.

Assume that Autonomy was beyond reproach in every particular. Why was H-P buying it, was the price realistic, would it fit into an existing business model? Whitman may have effectively jockeyed to buttress her power in 2013 but she is only delaying the inevitable if she and her board do not come up with a short- and long-term agenda to which a majority of shareholders can confidently sign on.

Response to the current write-down proves the point. It's not just H-P's failed due diligence that concerns the marketplace. To an even greater extent, it's the company's multiple other failures represented in the numbers. No wonder some view H-P's move simply as a cover-up of its own mismanagement (a view powerfully expressed by Autonomy founder Mike Lynch in no uncertain terms and within hours of H-P's announcement).

Yet even if one does take that jaundiced view, the good news is that H-P has at least gained some critical breathing room despite share prices sinking to 10-year lows. If a stunning corporate recovery is in the offing, it will be the result of a new focus by the company's leadership, a collaborative leadership in which officers and directors set a single definable course and stick to it.

If that's a realistic possibility, the current write-down with all its attendant controversy can turn out to be an effective medicine, albeit a bitter one. L

Richard S. Levick, Esq., President 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.

THE FUTURE OF DIRECTORSHIP:

Key Takeaways

This edition of NACD BoardVision is a response to the panel on the future of directorship at the 2012 NACD Board Leadership Conference. Join Peter Gleason, managing director and CFO of NACD, and Mary Ann Cloyd, leader of the PWC Center for Board Governance, as they discuss key takeaways from the panel's speakers.

Buy Me, Sell Me, Sue Me

Richard S. Levick, Esq.
Originally Published on Forbes.com

At 7:16 a.m. EDT on April 2, Reuters reported an unsolicited offer by Coty Inc. to purchase cosmetics legend Avon Products. At 8:04 a.m., Avon formally rejected the offer—a smart move, according to some observers, in light of the purportedly low-ball offer.

The specific timing here is interesting and important because of what happened immediately afterward. At 10:18 a.m., the law firm Harwood Feffer LLP announced it was pondering a lawsuit against Avon's board of directors, based on concerns that Avon, by rejecting the $10 billion, $23.50 per share offer out of hand, failed to meet its fiduciary duties to shareholders. At 12:18 p.m., the firm Brower Piven announced it too was investigating Avon for the same reason.

There'd been no time to come up for air. A scant five hours after a proposed merger was first publicly announced, and four hours after it was rejected, not one but two potential lawsuits were already in the works. Those who understand the power of instantaneously viral communications to incite litigation might wonder what took them so long.

> *"...we have not encountered a case in which shareholders rejected the deal after the additional disclosures were provided."*

So pervasive have such lawsuits become that some observers have taken to calling litigation a de facto "deal tax," simply a cost of doing business. Studies by Cornerstone Research show that the incidence of lawsuits in deals valued at more than $500 million jumped to 96% in 2011, up from just over 50% in 2007. In other words, there's now almost an absolute certainty that, if you do the deal, you get sued.

Just as startling is the rise in the average number of lawsuits per deal, which more than doubled to 6.1. Cornerstone found 11 transactions in 2011 beset by at least 15 lawsuits apiece.

We're talking about a phenomenon that doesn't only involve how bankers craft the deals or lawyers dot the i's. Nor are we just necessarily talking about corporate fire sales under generally distressed circumstances.

Even the best positioned deals involving the healthiest companies must inevitably run a contentious legal obstacle course. Google's announcement in August 2011 that it planned to purchase Motorola Mobility resulted in no fewer than 16 lawsuits even though the $12.5 billion, $40 per share offer was widely praised throughout the mobile communications industry as a good fit for all concerned.

As the legal press recently reported, ExxonMobil is likewise a very good example of a company that does "everything we can up front to make sure the buyer knows exactly what they are buying." Yet the most commendable of such efforts won't plug all the holes either. In February, for example, a Texas court ruled against Exxon, awarding 21 plaintiffs' law firms $8.8 million in fees for their work on shareholder lawsuits related to the 2010 acquisition of XTO Energy Inc. It was a good payday for the lawyers if not their clients as shareholders won important new disclosure guarantees but no money.

By contrast, Del Monte shareholders recently got $89.4 million to settle a class action suit prompted by conflict of interest allegations against the company and Barclays Capital in the sale of Del Monte to a group led by KKR. But the Exxon scenario is really the norm, according to the Cornerstone data, as outcomes more often involve governance changes than pecuniary awards. "Interestingly," the study comments, "...we have not encountered a case in which shareholders rejected the deal after the additional disclosures were provided."

Not one case! Thereby hangs an instructive lesson about the kind of communications that may

still effectively deter litigation, at least shareholder suits. (Lawsuits between buyers and sellers, with different sets of problems, are also on the rise.) Lawyers like Stuart Grant of Grant & Eisenhofer, who represented the investors in the Del Monte case, say that litigation ensures fairness to the shareholders, especially in a market where, absent antitrust concerns, the regulators don't scrutinize the deals all that closely.

Yet it also stands to reason that if, in lieu of cash, disclosures imposed after cases are brought suffice to placate claimants, why not assure those disclosures in the first instance and cut out the expensive middle men, i.e., the lawyers who file the now-inevitable lawsuits?

To explain why there's been this uptick in litigation, we probably need look no further than the Internet and the social media. How else explain the precipitous rise in case volume compared to past markets when M&A transactions proliferated even more abundantly but activist shareholders and high-volume class actions did not? Human beings have not changed since the 1980s but their tools have.

In addition to the shareholders themselves, influencers with both interested and disinterested motives to challenge deals range from business journalists to investment bankers looking to build a reputation as consultants. They often deploy a combination of old and new media. The opening salvo might be a column in a respected print publication or an appearance on a cable business news network. The fire gets lit and the stage is thus set for a social media conflagration.

If the problem starts online, solutions can be found there as well. Not just the substance of the messages whizzing around the Internet, the Cornerstone research powerfully underscores the importance of timeliness as approximately two-thirds of M&A-related lawsuits are filed within two weeks of the announcement. What's demanded is as much transparency as possible as fast as possible.

One envisions a situation, perhaps not unlike the Exxon-XTO Energy case, in which the grievances that lead to a lawsuit are fully aired on a social media channel, perhaps an activist site, that allows shareholders to vent any and all such grievances. Recent signs point toward a prudently self-interested participation by public companies—Johnson & Johnson was a pioneer here on the now-defunct Moxy Vote —in such discussions on the very sites where they're happening. By going to the same sites their potential adversaries go, they won't eliminate litigation but they will take a meaningful step in that direction.

It's called getting down into the trenches. From a cost/benefit perspective, that sure beats showing up at court.

Richard S. Levick, Esq., President 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.

JEFF ROSENBLUM

on *The Naked Brand*

In this LEVICK Daily video interview, Questus Founding Partner Jeff Rosenblum discusses *The Naked Brand*—the feature film he directed that examines how traditional advertising has failed to keep up with consumer behavior. When brands are defined by actions, not words, companies must abandon the "Mad Men" approach of saying they're great. They need to be great.

The Next Big Superstorm Sandy Story:

ARE WE REALLY IN GOOD HANDS?

Richard S. Levick, Esq.
Originally Published on Forbes.com

It's the most opportune moment in recent memory for the insurance industry to invest in its own reputation.

A few weeks after the ravages of Superstorm Sandy, affected policyholders, residential and commercial, are completing the cleanup even as their insurers assess the damages and their own exposure. Opinions as to whether the industry is being reasonably helpful, responsive, forgiving, and flexible during this crisis are therefore premature.

Yet it's noteworthy how reputational concerns have already figured prominently into published commentary on the challenges facing the industry. Industry experts specifically reference the litigious mess that occurred after Hurricane Katrina along with reminders of how public officials are eager to avoid similar delays post-Sandy. Insurers would likewise do well to remember the reputational bath some companies took as a result of 911 coverage disputes that haunted the front pages for so many months.

Of course, we need to be realistic. Insurers are not going to relinquish their contractual entitlements in some sort of multi-billion dollar post-Sandy potlatch, and nor should they. At the same time, horror stories about inadequate coverage and excluded claims will continue to attract attention simply because they're great human interest stories, in which insurers are at least implicitly depicted as impersonal and indifferent. For insurance companies, that familiar caricature is simply a reputational cost of doing business in the aftermath of many disasters.

The governors of nine affected states already gave homeowners a big break by forbidding insurers from declaring that Sandy made land as a hurricane. If categorized as a hurricane, residential policyholders would be subject to deductibles based on a percentage of property value instead of fixed rates. But it's the governors who get the public's thanks for that, not the insurance industry. Especially problematic for insurance companies are reports that their total exposure ranges from $10 billion to $20 billion, while total storm damage is estimated at $50 billion. Much of that differential has been tagged to flood exclusions or sub-limits, as well as a bevy of other policy provisions.

All that said, the insurance companies remain most favorably positioned. As Peter Gillon points out, the industry now enjoys a significant fiscal surplus. "There were no other major catastrophic claims in 2012, their premiums have increased slightly, and the equity markets in which insurers invest have been steadily going up," says Gillon, a partner at Pillsbury Winthrop Shaw Pittman LLP who represents major corporate policyholders.

With bottom-line pressures so much lower, the industry can afford to be generous where possible. Such generosity is certainly in their interest. They will want to be seen paying claims quickly and to reap significant goodwill by eschewing some purely technical coverage disputes in order to both strengthen customer loyalty and appease politicians. As always, "seen" is the operative term in any such communications strategy.

No less than banks or hedge funds, the insurance industry has suffered its own considerable share of public hostility in recent years. For elected officials (especially those perceived to have played heroes' roles during the Sandy crisis), insurance companies are, politically, sitting ducks if they take a Scrooge-like approach to claims at the very moment when they can presumably afford to behave more like Old Fezziwig.

As Gillon points out, however, commercial policies are a lot trickier than residential coverage in terms of what the insurers can or cannot do on behalf of insureds. Because commercial coverage and pricing are often extensively negotiated, and done so at arm's length, insurers are more inclined to stick to the terms.

That said, in the interest of being "commercially reasonable," there are areas at least open to discussion. For example, commercial policies typically carry two deductibles, one for wind and one for flood—even when the flooding is caused by the wind. For good commercial reasons, the insurers might simply forgive the second deductible. The fact that, since Hurricane Irene, so many more businesses have purchased flood insurance, until Irene relatively uncommon in the Northeast, should further encourage the insurers to be as flexible on deductibles as possible.

Yet the surest reputational investment for insurance companies may be the least costly in terms of hard dollars. Simply determine what major policyholders are being responsibly advised to do—and then help them do it.

The determination is easy enough to make. After any major disaster, diverse professional insurance counselors predictably distribute in-depth collaterals specifying best practices in dealing with insurance companies. For example, Gillon's Insurance Recovery & Advisory team at Pillsbury published a paper right after Sandy that urges companies to review and evaluate all potentially applicable coverage (including everything from marine cargo policies to pollution policies); "meticulously" follow instructions for providing notice to the insurer; document and photograph all losses, including losses directly following the storm (such as inventory exposed to moisture); recruit specialist advisors such as forensic accountants to detail business interruption loss; and memorialize in writing any deadline extension for submitting sworn proofs of loss.

There is ample opportunity here for insurers to surpass their existing policyholder support systems. Not just by advancing insurance payments for cleanup and other initial response work, insurers can also provide enhanced customer service to expedite each of these specific customer needs if only by being impeccably responsive when inquiries as to scope of coverage are made, or clarifications on notices or extensions are sought.

There is ample opportunity here for insurers to surpass their existing policyholder support systems. Not just timelier claim payments, the seller can provide enhanced customer service to expedite each of these specific customer needs if only by being impeccably responsive when inquiries as to scope of coverage are made or clarifications on notices or extensions are sought.

Who knows, such value-added service might become a permanent part of the insurer/insured relationship—even when the industry is no longer sitting on a pot of money right after a devastating emergency. L

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BLOGS *worth following*

THOUGHT LEADERS

Amber Naslund
brasstackthinking.com
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.

Brian Halligan
hubspot.com/company/management/brian-halligan
HubSpot CEO and Founder.

Chris Brogan
Chrisbrogan.com
Chris Brogan is an American author, journalist, marketing consultant, and frequent speaker about social media marketing.

David Meerman Scott
davidmeermanscott.com
David Meerman Scott is an American online marketing strategist, and author of several books on marketing, most notably The New Rules of Marketing and PR with over 250,000 copies in print in more than 25 languages.

Guy Kawasaki
guykawasaki.com
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.

Jay Baer
jaybaer.com
Jay Baer is coauthor of, "The Now Revolution: 7 Shifts to Make Your Business Faster, Smarter and More Social.

Rachel Botsman
rachelbotsman.com
Rachel Botsman is a social innovator who writes, consults and speaks on the power of collaboration and sharing through network technologies.

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

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

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prweekus.com
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prdaily.com
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