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Public Policy — Private Peril

Public Policy is a Risk to be Managed

By Jamie S. Gorelick

The last three years in the life of American business have driven home a message to senior business executives across America: Ignore the public policy environment at your peril. Just as businessmen and women manage financial and operational risk, they now must have the skills to manage policy risk. That means understanding the risks that policy-makers – legislators, regulators, enforcers – will find a company practice or action objectionable. It also means understanding the opportunities for achieving a policy environment that is better aligned with the company's business model. Both require understanding the policy environment in which the company operates.

A quick look at even a few industries illustrates the dangers lurking in the policy arena:

• The financial services industry – always heavily regulated – has been so buffeted by one scandal after another that its federal and state overseers are warily scrutinizing transactions companies were previously free to pursue and products companies were previously free to promote.

• For the pharmaceutical industry, the difference between profit and loss may depend on how a prescription drug benefit is crafted by the U.S. Congress or whether states permit the use of imported drugs.

• Communications regulations that could swing one way or the other on one regulator's vote will pick the winners and the losers in critical segments of the telecommunications industry, from cable to wireless.

• The defense industry can be turned upside down by a defense secretary's rejection of long-nurtured Army or Air Force procurement plans.

• The auto industry's love affair with the SUV can be brought to a screeching halt by a change in energy policy or environmental regulation.

• Broadcaster revenues can drop precipitously if public opinion – and then government – turns against entertainers' values and modes of expression.

• Companies needing the government's ear on a trade or taxation issue find the decision to outsource jobs to more efficient venues harder to make.

These are just a few of the many recent examples of policy risk that needs to be managed in the executive suite.

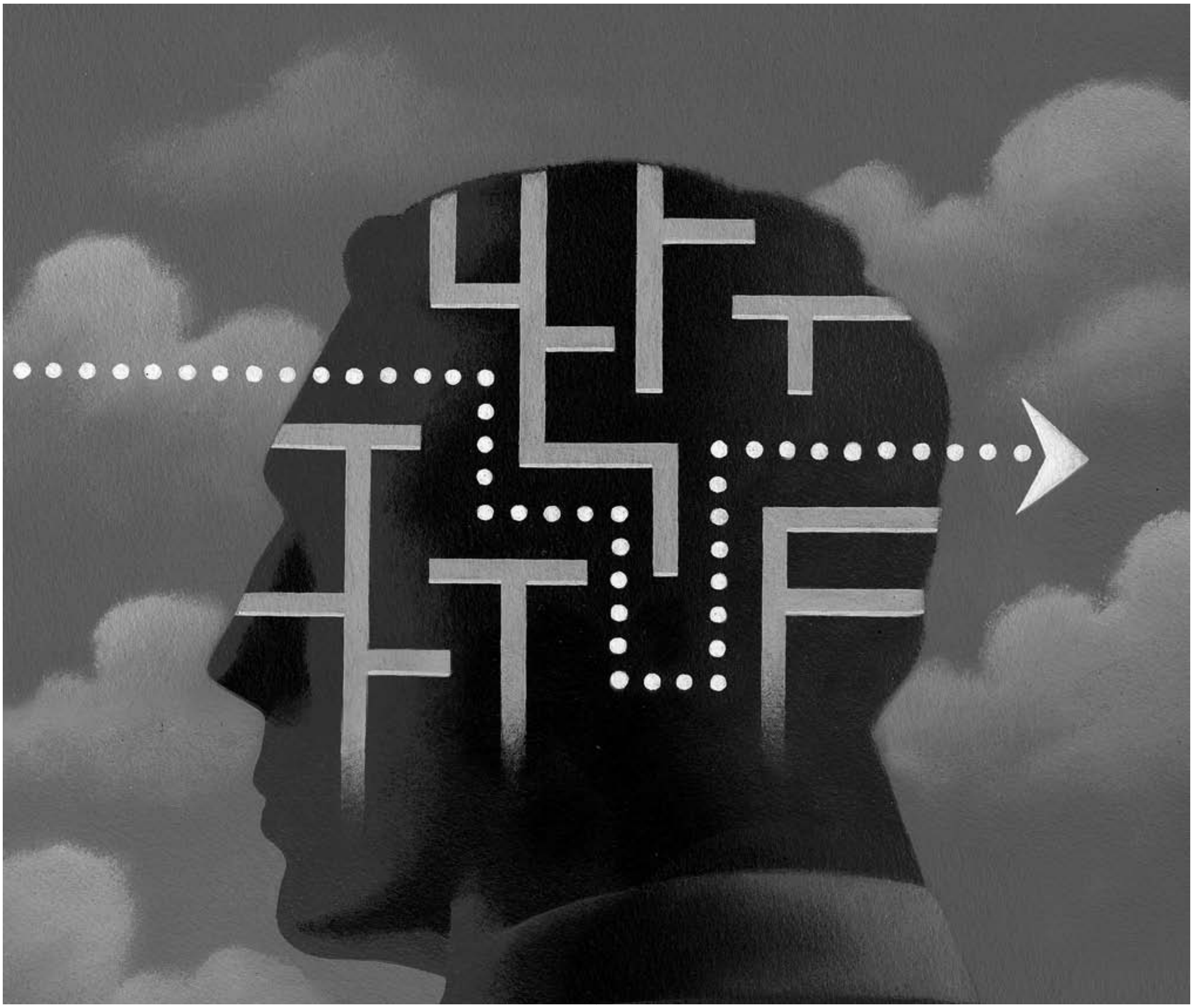
At the same time, we see companies pressing to mold the legal and regulatory structure into alignment with new and changing business models. The boldest example was the merger of Travelers and Citibank before the passage of laws that would have permitted such a combination of financial services and insurance businesses, provoking the long-delayed Gramm-Leach-Bliley Act. But other examples abound: enhancing the voice of the Department of Defense in antitrust consideration of defense industry consolidation, to permit national security interests to be brought to bear; the current attempt to change the asbestos claim process; the significant efforts to harmonize U.S. and European Union regulatory regimes. The list is long.

In the last six months, I have spoken with senior executives at over fifty companies about the risks they run in the policy arena. Strikingly, none of them expresses confidence that they can manage this risk well. And most know that the failure to do so can be the difference between profit and loss, between meeting and failing to meet the expectations of their boards and their shareholders. These risks keep executives – and particularly their general counsel to whom CEOs turn on these issues – up at night. Why? Because, to executives trained in managing other business risks, these risks seem harder to understand and less predictable. Most companies do not have a structure for surfacing and addressing these risks, so often they just fester.

The reality is that, like other risks, policy risk cannot be eliminated, but it can be mitigated. However, one cannot assign the management of this risk to one person or segment of the company, while the rest of the company goes about its business. Policy risk is too embedded in the day-to-day business of the enterprise.

To minimize and mitigate policy risk, one has to acknowledge that it exists, identify it and act on it:

• **Take Yourself to School** – Because most executives do not have an instinct for where policy risks lie, you need to make sure that you read broadly and familiarize yourself with the elements of the policy-making com-



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munity that can do your company the most harm or good. The astute executive will find ways to become sensitive to public opinion and to get to know key policy-makers and opinion leaders.

• **Imagine a Policy Environment Aligned with Your Business Model** – At the same time, you don't need to accept the current policy environment as a given. Consider what the ideal environment might look like and how that environment might look to other potentially interested parties. While you may need to align your business model with the realities of current regulations and laws, there is no reason for you not to try to change that environment.

• **Hire the Expertise** – There must be someone in the company whose day-to-day responsibilities include managing public policy risk and looking for opportunities. This is not a lobbying job but a strategic one. The best general counsels today have had some government experience or have taken the time to understand the policy world. Ben Heineman, General Electric senior vice president, law and public affairs, has called on corporate America to look to "lawyer-statesmen" for counsel. Whoever is tapped for this responsibility must be in a position to see the policy issues that are embedded in key business decisions. He or she cannot be isolated from the business, but needs to be in the operational mix of the company's work.

• **Scan the Environment** – Just as you probe and scan the competitive environment, you need to affirmatively assess where your policy vulnerabilities might lie. This requires an understanding of two basic metrics: the business practices that an adversary might attack, and how public opinion might change so that a practice that is acceptable today would become unacceptable tomorrow.

• **Be As Aggressive in Managing this Risk As You Are in Managing Other Risks** – We are all, to a certain extent, captive of our in-boxes. And, goodness knows, the press of daily business can be oppressive. The lurking, latent, inchoate policy risk too often falls to the bottom of that in-box. I know this because I have been asking executives and their counsel, "What is keeping you up at night?" Most of them can indeed identify such a concern that they are not addressing. They fear that they will wake up one morning to the headline they anticipated but did not confront.

• **Create a "Skunk Works"**- Once you've identified the latent or potential problem that too often falls to the bottom of the in-box, you need to make sure it is dealt with. One way is to create a group within the company – or outsource it to a group – that is free to work unhampered by the day-to-day press of business. Demand concrete alternatives in a fixed period of time.

• **Confront Problems and Seize the Initiative** – In the policy arena, as in so many other business arenas, it is better to act than to react. You never want your first meeting with someone to be one in which you are asking for something from them. Your plans are more likely to be successful if you can execute them on your schedule, so begin that process. Don't wait until a problem is upon you.

• **Keep Your Antennae Up** – Whether you have an immediate problem or a long-term problem, you'll never know if the latter is turning into the former unless you have multiple sources of information who are both well-chosen and motivated to keep you informed. The great Washington lawyers help their clients see around corners. They have a sense of "what is in the water" – when a seemingly minor issue is about to take hold. That information is invaluable both in sensitizing the corporate executive to the changing winds and in identifying opportunities to act.

• **Don't Accept the Status Quo** – If business is to continue to be dynamic, agile and adaptable, it must demand regulatory regimes that permit innovation. Too frequently, business executives accept a limiting status quo in the policy arena, though they would never be so passive in attacking other aspects of the competitive business environment.

To be sure, changing public opinion and the views of opinion leaders is difficult, but it is not impossible. It requires an understanding of all three branches of government. It requires alliances – sometimes with competitors – that are not second-nature to business. It requires the use of tools – building intellectual capital supporting a policy change, educating those who could be third-party validators of such a change, generating legislative or regulatory interest, etc. – that are too often unfamiliar to business. It requires the expertise of thoughtful practitioners of policy development. And like any other business initiative, it requires both the support of corporate leadership and a quarterback to coordinate these various participants and drive toward a successful result.

Today, business leaders must address – and sometimes even embrace – the policy aspects of their jobs. The tools for effectively managing policy risk and for effectively taking policy opportunities are at hand. Smart executives will learn how to use them as comfortably as they use financial, operational and strategic tools at their disposal.

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