

WINSTON
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the
in year
preview
2008

Contents

Winston & Strawn is pleased to present our Year in Preview 2008 publication, which focuses on key upcoming and ongoing legal business trends. We hope it demonstrates our effort to put our clients' interests and needs first. So instead of talking about us and what we've done in the past year, we wanted to give you a sense of what's coming down the pike in the next 12 months. We chose topics that both affect the business of our clients and impact the environment in which our lawyers practice. Our goal is to give you a step toward a better understanding of what lies ahead.

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2008

By understanding the evolving landscape, business can position itself to head off problems—and identify emerging opportunities.

Looking back, 2007 was an eventful year, with a variety of legal, political and regulatory developments affecting business in a number of ways. But their impact does not begin and end with the calendar year; their ramifications will be felt well into the future.

In this publication, the law firm of Winston & Strawn LLP examines several of these developments, taking a forward-looking view of how they might affect companies in 2008. Some of these topics are broad and have a high profile, such as the movement to reform the regulation of U.S. securities markets or the need to develop policies and technologies that will address a growing energy crisis. Other issues are less likely to turn up in the mainstream headlines—things such as patent reform and changing SEC regulations. But all are having an impact on the way companies do business.

This publication does not pretend to provide a complete list of emerging issues. In the coming year, businesses may see changes due to anything from increased antitrust action to fallout from the credit crisis to the growing emphasis on protecting personal information—to name just a few factors. In addition, the U.S. presidential election has the potential to bring significant change to the regulatory and political landscape.

Several themes that have become familiar in recent years will continue to play out, including that of technology-driven change. Electronic commerce is evolving on the legal front as intellectual property issues are hammered out, and on the marketing front as companies tailor their approaches to online business. For example, after several years of testing and exploration, alternative media such as online advertising will have a significant impact on overall advertising budgets, says Christopher Meyer, chief executive of the Monitor Networks consulting firm and co-author of the best-selling *Blur: The Speed of Change in the Connected Economy* and *Future Wealth*. “The economics are going to be noticeably different,” he says. Meanwhile, Meyer adds, the consumer technology front is likely to see a lull, with no new blockbuster iPhone-type products and a general sense of “gadget fatigue.”

The disruptions and shifts of globalization will no doubt color domestic business and politics, as well as international relations. In particular, China will garner even greater attention, in part because it is hosting the 2008 Olympic Games, and in part because its booming economy may well help offset any economic slowdown in the United States and Europe. In addition, says Meyer, such emerging-market growth will contribute to a seachange in how business understands both China and India. “I think we’ll see the beginning of the belief that the way that capitalism and the economic world order will evolve

The disruptions and shifts of globalization will no doubt color domestic business and politics, as well as international relations.

will be determined largely by those economies rather than by the G8 economies,” he says. In the long term, he adds, the pure market model is likely to be tempered by a growing reliance on both business and social networks as well as by business being more closely linked to broad social agendas.

Business has become accustomed to adapting to dramatic change. Looking forward, it seems clear that companies will have to continue to get better at finding new solutions for new problems. Indeed, a number of commentators cite innovation as a key theme for business in the near future. *Business Week* noted that most U.S. presidential candidates have “thoughtful” views on innovation and that “building the next-generation enterprise—and maybe even the next-generation nation—will preoccupy most of us in 2008.”

Overall, the challenges of change and uncertainty stand out when looking at the coming year. But by understanding this evolving landscape, business can position itself not only to head off problems, but also to identify the opportunities that emerge.

“U.S. capital markets are becoming less competitive, and we need to take steps to correct that.”

Over the last two years, such diverse sources as the U.S. Chamber of Commerce, Senator Charles Schumer, New York City Mayor Michael Bloomberg and the Financial Services Roundtable have taken a careful look at capital markets in an era of globalization, and their reports have come to similar conclusions. “They’ve found that U.S. capital markets are becoming less competitive and that we need to take steps to correct that,” says Christine Edwards, a partner at Winston & Strawn, who served as a commissioner on the U.S. Chamber of Commerce commission that issued that group’s report on markets.

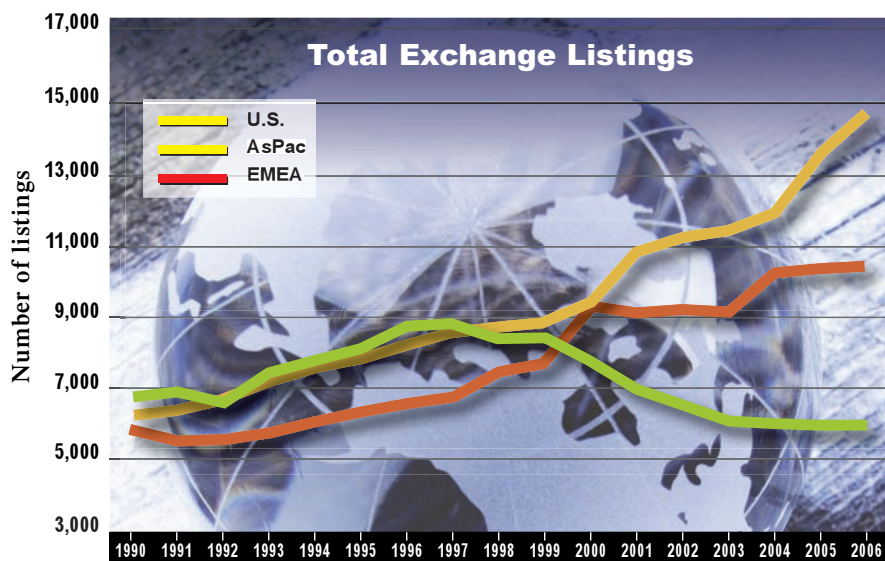
Observers cite a variety of statistics to back up that view. For example, the U.S. market share for worldwide listings has dropped 19 percent since 1997, while the U.S. share of IPOs declined from 57 percent in 2001 to 16 percent in 2006. “That’s not to say U.S. markets are about to go broke, but the trend is wrong,” says Steve Bartlett, CEO of the Financial Services Roundtable.

Why the change? First, overseas markets such as London and Hong Kong have grown stronger. In addition, says Edwards, established markets have worked with markets in developing economies to help them become more modern, efficient and competitive.

At the same time, U.S. markets have become less attractive, due mainly to increasing regulation—and noncompliance penalties that include not only fines but also potential criminal charges and jail time for executives. While Sarbanes-Oxley receives a lot of blame, the problem runs deeper. “We have largely antiquated laws at the federal level; we have overlapping and conflicting laws at the state level,” says Richard Murray, managing director and chief claims strategist at SwissRe. That’s troubling enough for U.S. businesses. But, says Murray, “it’s frightening for those overseas who wonder how to get through this maze.”

Observers have recommended a number of specific reforms, but in general, they are calling for several broad changes. These include:

- **Shift from rules-based to principles-based regulation.** Proponents recommend that Congress formulate a few core regulatory principles, which would guide the creation of regulations—giving direction to what is now a fairly ad hoc approach. “That would give you regulations with a purpose because when you propose a regulation, you can compare it to that larger goal,” says Bartlett. “It can provide more consistency across state lines and different kinds of regulators.”





Orlando

• **Move to prudential supervision.**
Under the current adversarial approach, regulators typically take enforcement actions that interpret regulations and then apply those interpretations retroactively to other public businesses. Under a prudential approach—such as that used by federal banking regulators—the SEC and public companies would work

“The concern is about the extent to which market competitiveness influences . . . innovation and technological activity. . . . We all have a stake in this.”

together to identify and resolve issues before enforcement is necessary. The result: strong protection for consumers, less cost and confusion for business.

• **Rein in class-action litigation.**
Many observers note that shareholder class-action suits are filed almost routinely when there is a major transaction, with the idea that a company will be pressured to settle, regardless of the merits of the case.

This is not lost on overseas businesses. “The threat of securities litiga-

tion is the most frequent factor mentioned by foreign companies when they decide to list outside the United States or attempt to de-list here,” Thomas J. Donohue, CEO of the U.S. Chamber of Commerce, recently said.

These reforms, however, should not be confused with business’ traditional appeal for reduced government intervention, proponents say.

Reform efforts are moving forward on many fronts. For example, notes Edwards, the U.S. Chamber has established a Center for Capital Markets Competitiveness to pursue regulatory change, the SEC and other agencies are discussing prudential supervision, and London and other overseas markets are providing successful examples of how principles-based, prudential regulation can work. Nevertheless, change won’t come overnight, she says, and “business should stay engaged in the debate to find the right balance that will protect investors and promote competitiveness.”

“The issue isn’t about Wall Street versus regulators protecting civil society,” says Murray. “Civil society has a deep stake in getting the balance right. The concern is about the extent to which market competitiveness influences the innovation and technological activity that fuels the U.S. economy and builds jobs. We all have a stake in this.”

IMPACT: The 2008 Elections

In Congress, much of the momentum for regulatory reform has been focused on the credit crisis, which is likely to heat up once again as interest rates rise on what the Bank of America has estimated will be some \$360 billion in subprime adjustable-rate loans this year.

As a result, legislators are unlikely to follow up quickly with broad legislation aimed at reforming capital markets regulation, many observers agree. “If there is some big, dramatic problem with the markets, there may be some response from Congress—in the same way that the collapse of Enron helped drive the passage of Sarbanes-Oxley,” says Doug Richardson, a legislative advisor at Winston & Strawn. “But otherwise, it’s not likely for some time.”

What is more likely, Richardson suggests, is the continued adjustment of Sarbanes-Oxley. “The movement of investment activity from Wall Street to London, largely because of Sarbanes-Oxley, is a point that’s caught a lot of people’s attention,” he says. On the administrative front, he adds, the SEC has been working to modify the implementation of the Act, and it will probably continue on this path.

Key Conferences

Winston & Strawn is a supporter of the following conferences in 2008:

March 2008

Security & Industry Financial Management Association (SIFMA) Compliance and Legal Division Annual Seminar 2008, Orlando, Florida—Features presentations by industry professionals and leading securities regulators from the SEC, NASD and NYSE

May 2008

Ray Garrett Jr. 2008 Corporate and Securities Law Institute, Chicago, Illinois—Provides private practitioners and corporate counsel with analysis of critical securities and corporate law issues, and developments confronting publicly and privately held corporations

September 2008

Reuters Loan Pricing Corp., 14th Annual Gold Sheets Conference, New York, New York—Draws more than 500 financial professionals, bringing together key decisionmakers and participants in the commercial loan market

October 2008

American Bankers Association/American Bar Association, Money Laundering & Enforcement Conference, Washington, D.C.—Brings together top financial services, legal and law enforcement experts, and senior regulatory officials to discuss strategies to tackle complex compliance challenges

Global warming and growing demand raise questions about how we will “keep the lights on.”

In a relatively short time, global warming has become top-of-mind in places ranging from Congress and state legislatures to the U.N. and the Nobel Prize committee. But global warming is just part of a larger energy picture. “There are multiple challenges in terms of how we produce and deliver enough affordable energy to keep the lights on in the future,” says Winston & Strawn partner Jerry Bloom.

The fundamental problem is growing demand. The rapid economic growth of China and India—as well as ever-increasing usage in the U.S. and elsewhere—has dramatically increased competition for energy resources. By 2030, notes the U.S. Energy Information Administration, global energy consumption will increase by more than 50 percent. There is also rising demand for the components of energy infrastructure, such as generators, windmills and solar panels, needed to produce renewable energy and the overall expertise needed to design, build and operate energy-producing facilities.

The potential ramifications run deep. “Access to a secure, clean supply of energy is directly related to whether or not our economy will grow and our people

will prosper [and] whether or not our earth’s climate will worsen or improve....” U.S. Energy Secretary

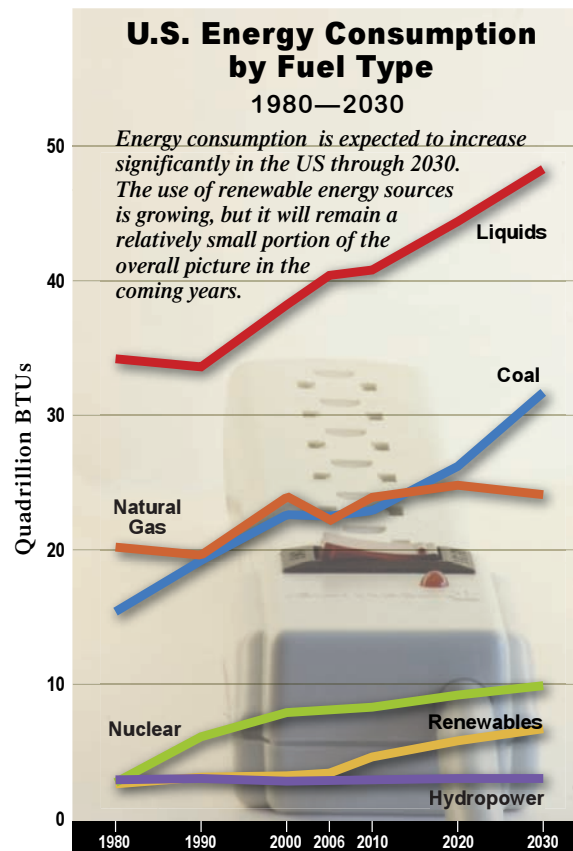
tive strengths and weaknesses. Thus, keeping the lights on will require a mix of approaches—and various stakeholders are

vying in the political arena to have a say in what that mix will be and how to get there.

Recent California legislation provides some insight into where that debate might go. One state law now restricts utilities from signing long-term contracts for power produced from resources with high carbon emissions—essentially, coal-fired facilities. A second law mandates that California’s businesses reduce greenhouse gas emissions by 25 percent by 2020. The result is likely to be a cap-and-trade system, in which the government provides credits for emissions and companies with lower emissions can sell their surplus credits to companies with higher emissions.

State governments all across the United States are looking at the energy issue. By late 2007, notes the Pew Center for Climate Change, 35 states

had or were in the process of creating a climate action plan and 25 states had mandates requiring electric utilities to generate a certain percentage of power



Source: U.S. Energy Information Administration

Samuel Bodman recently said. However, there is no single “right” answer to the question. Renewable energy, fossil fuels and nuclear power each have their respec-

IMPACT: The 2008 Elections

Energy is an important issue, but don't expect to see sweeping change from Congress in the coming year, observers note. "Some discrete energy provisions might go through in 2008, particularly on the tax side and the global warming side. But we probably won't see big changes in overall energy policy," says Doug Richardson, a legislative advisor at Winston & Strawn. While major legislation may not be in the cards, he says, "Congress is putting ideas together about cap-and-trade systems. My sense is that they're laying the groundwork for a more intensive effort in 2009."

As for the elections, a Republican president would probably be more inclined to modify approaches to existing energy sources, such as oil and coal, while a Democratic chief executive might increase the emphasis on wind and solar, says Governor James Thompson, a partner and senior chairman at Winston. And either party might be ready to rethink the ethanol program (which Senator McCain opposes), due to a growing awareness that it may not be as effective as it was supposed to be. "But that's a third rail of electoral politics in Iowa and some other Midwestern states," says Thompson. "So they'd have to do it right after they took office."

from renewable sources. These efforts may signify progress, but, the Center reports, "when states take individual approaches to an issue, a 'patchwork quilt' of policies can result across the nation. This patchwork of policies may be inefficient for complying businesses."

On a national level, businesses can expect to see a changing energy-tax picture. "Over time, I think we'll see economic incentives to move toward a car-

their "carbon risk." Markets are already aware of that risk, says Lorentzen. He points to the acquisition of TXU by private equity investors, which led the Texas energy company to scale back plans for 11 new coal-fired generation units to just three—a recognition of the risk associated with a large carbon footprint. "You have to think beyond today's numbers and consider tomorrow's risk profile," he says. It's not just big manu-

Companies will have to find ways to get an integrated view of what changing energy costs and policies will mean for them.

bon-neutral economy—probably a carbon-emissions tax, imposed like a sales tax on the sale of things that emit carbon," says John Lorentzen, another Winston partner. That tax would probably be coupled with a carbon import tax, so that domestic companies are not put at a competitive disadvantage with foreign companies. Such changes are likely to be evolutionary, with bits and pieces of legislation falling into place in a fairly fragmented fashion. "I believe we will move forward in fits and starts—but we will move in that direction," Lorentzen says.

In this environment, companies will have to aggressively manage their energy consumption and costs and consider

factors and energy companies that have to make those assessments. Office buildings, warehouses and vehicle fleets can all contribute. The issue is so far-reaching that Congress recently heard proposals for having the SEC mandate corporate reporting on carbon emissions to help investors gauge risk.

Going forward, companies will need an integrated view of what changing energy costs and policies will mean to them, says Bloom. "There are social, economic, technological, political and tax issues," he says. "Companies need to be on the offensive in terms of managing their energy costs and risks. This issue does not go away."



Las Vegas

Key Conferences

Winston & Strawn is a supporter of the following conferences in 2008:

February 2008

Platts, Nuclear Energy 2008, Bethesda, Maryland—Leading U.S. nuclear power operators, Wall Street firms and nuclear regulators discuss key questions for the growth of nuclear power

April 2008

Platts, Global Power Markets Conference, Las Vegas, Nevada—Provides platform for exploring the issues crucial to the development of electric power markets worldwide

October 2008

Platts, California Power Markets, San Francisco, California—Provides the opportunity to question panels of utilities, regulators and developers about climate change, capacity markets and renewables

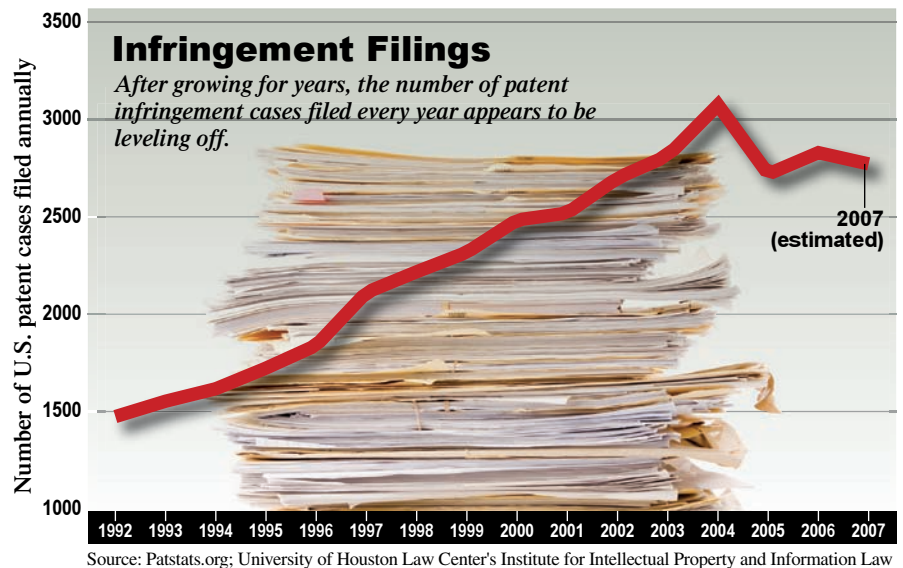
Solar Power 2008, San Diego, California—Business-to-business solar conference and expo. An event designed for the industry to come together with potential customers, policymakers, investors and other parties necessary for continued rapid growth.

With the future of patent reform in doubt, companies get “back to basics.”

For years, business has been calling for patent reform in the United States while voicing its concerns about patent quality and the growth of patent litigation. Last April, those discussions culminated in the introduction of the Patent Reform Act of 2007—a bill with bipartisan backing and broad goals. “The patent system is the bedrock of innovation, especially in today’s global economy,” said Utah Senator Orrin Hatch, a co-sponsor of the bill. “America’s ingenuity continues to fund our economy, and we must protect new ideas and investments in innovation and creativity.”

The bill, introduced to committees in both the House and Senate, appeared to have significant momentum behind it, but it soon ran into opposition. Among other things, it provides a new process for challenging patents after they are granted and changes a variety of substantive and procedural rules in ways perceived as making it harder to win infringement cases.

Some industries saw such provisions as liberating them from baseless lawsuits, while others saw the provisions restricting their ability to protect their inventions. The issues at stake are in fact fundamental to innovation and the competitiveness of companies and entire industries. They haven’t lent themselves



to easy compromise. Thus, it will probably take time to hammer them out.

But stalled legislation hasn’t meant the end of reform. The U.S. Patent and Trademark Office (USPTO) has been working to modify the patent process, motivated in large part by the need to keep up with growing workloads and emerging technologies. The number of annual patent applications doubled between 1996 and 2006—a burden that has led to quality issues and a backlog of some 400,000 applications. On average, it now takes more than two and a half years to get a patent—which can be a problem for companies dealing with

fast-changing technologies and markets. “It is possible that this backlog could approach about 1.4 million by 2012—unless something is done,” notes the USPTO’s latest strategic plan.

The USPTO has proposed a number of new rules, such as asking applicants to provide more background information on their inventions. Implementation of these rules has been delayed and modifications are likely, but in general, the direction seems clear. “The changes are designed to reduce examiners’ workloads by shifting more of the work to the patent applicant,” says Allan Fanucci, a partner at Winston & Strawn. “It’s going

to take more effort and cost more to file, and companies filing applications will need to do more up-front work.”

Meanwhile, the courts have weighed in, as well. This past year, the Supreme Court’s *eBay v. MercExchange* decision made it more difficult for patent holders that don’t actually use their technologies—the so-called patent trolls—to get injunctions against possible infringers. In another case, *KSR v. Teleflex*, the court

Such recent cases as *KSR v. Teleflex* “generally make it easier to defend patent lawsuits—and harder to bring and enforce them.”

took a broad view of what made an invention too obvious to patent, essentially making it easier to prove a patent invalid. “These cases generally make it easier to defend patent lawsuits—and harder to bring and enforce them,” says Michael Brody, another Winston partner.

At the same time, patent litigation may be seeing a kind of “market correction,” as companies take a hard look at the economics involved. The median

damage award in patent cases is about \$1 million, says Brody, while the median cost of a patent trial is now closer to \$2 million. U.S. court statistics show that after continuous growth in patent cases over 20 years, there has been a leveling off of filings in the past few years.

“People may be starting to recognize that the incentives might not be as compelling as everybody thought they were,” says Brody. “They are realizing that just because one person rang the bell doesn’t mean that everybody gets to.”

Whatever happens with patent legislation, the system is evolving—and some of these developments may be making new legislation less critical.

“While patent-troll litigation and questionable patents aren’t going to go away, I think that in the next couple of years we will continue to see relatively flat filing rates and may even see a decrease in filings,” says Brody.

As a result, he adds, “companies considering investments in intellectual property will renew their focus on the fundamental issues—namely, having a strategic understanding of their IP position and exposure and making sure they have good protection for their core competitive advantages. So in the long run—and maybe the not-so-long run—it will be ‘back to the basics.’”

IMPACT: The 2008 Elections

In the debate over the Patent Reform Act of 2007, one battle line that appeared quickly was between Big Tech and Big Pharma. Big Tech companies often combine features, many of which are allegedly patented, to create complex products such as computers and thus like the bill’s proposed limits to infringement lawsuits. Big Pharma tends to rely on patents to protect their products and thus feels that such limits undermine their ability to invest in innovation. Meanwhile, everyone from smaller tech companies to manufacturers, entrepreneurs and research universities have raised objections.

Looking at such issues, Representatives John Boehner and Roy Blunt wrote, “We are very concerned that the bill in its present form picks winners and losers among industries with different business models in a way that has never before been attempted in patent law or practice.”

“Each of the discrete points in the bill causes a small war,” says Charles Kinney, a partner at Winston & Strawn. With the bill more or less shelved, Kinney expects discussions to be picked up again this year. But passage in its present form is not likely. “I think Congress will drag out consideration,” he says, “and they are unlikely to get it done. There are too many competing interests with too much at stake.”



Geneva

Key Conferences

Winston & Strawn is a supporter of the following conferences in 2008:

March 2008

Fordham University Law School, 15th Annual Conference International Intellectual Property Law & Policy, New York, New York—Premier IP event discussing a wide variety of intellectual property issues in today’s world.

May 2008

Defense Research Institute (DRI) Drug & Medical Device Seminar, New Orleans, Louisiana—Features live demonstrations of trial techniques and jurors’ reactions to those techniques, with commentary by jury consultants, as well as presentations by corporate and outside counsel on a range of topics

November 2008

International Generic Pharmaceutical Alliance (IGPA) Annual Conference, Geneva, Switzerland—International experts address the most pressing and relevant business and regulatory issues impacting the international manufacturing, distribution and sale of generic medicines

Companies have to balance the risks of managing IP in China—and on the Internet—with the clear benefits.

For years, intellectual property (IP) has been playing an increasingly vital role in business. Recently, however, protecting IP has become a good deal more complicated, due to two fundamental factors—globalization and the Internet.

In terms of globalization, the simple fact is that solid legal protection for IP is not in place in much of the world. In 2007, the Office of the U.S. Trade Representative named 43 countries with IP protection issues and, like many observers, cited China as an especially important area of concern. That country has enhanced IP protection in recent years, but there is still a long way to go. In entertainment media, for example,

piracy rates are as high as 90 percent there, according to a report from the McKinsey & Company consulting firm. The U.S. government has taken up China's IP problems with the World Trade Organization. And EU Trade Commissioner Peter Mandelson recently told Chinese officials, "Last year, European manufacturers estimated that [IP] theft cost them one dollar in every five that they made in China. Seven in 10 European companies doing business here say they have been victims of [IP] theft."

It's debatable how far international pressure will move China. Many Chinese citizens make their living from counterfeit goods, and China is still in the process of developing a legal infrastructure for the protection of IP. In

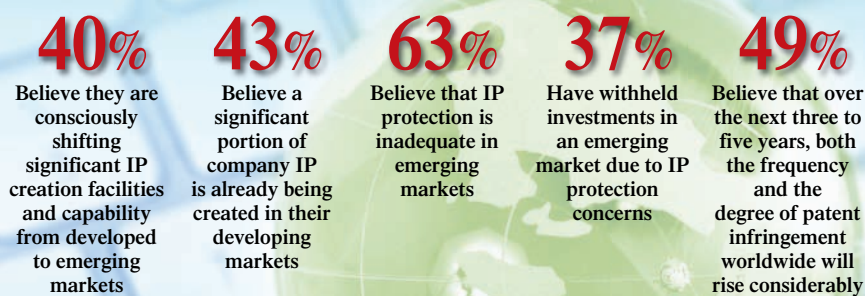
time, however, ongoing economic expansion may accelerate change. Currently, there's little incentive to have strong IP protection because Chinese businesses don't yet have that much IP. "But they are getting it—the Chinese are one of the largest filers of patents in the United States and Japan," says Winston & Strawn partner Virginia Richard. "As they have more at stake, they are likely to see the benefit of stronger IP protection." Until then, companies will have to continue to pay close attention to managing IP risk in China—and weighing that risk against the value of having access to one of the largest relatively untapped markets in the world.

Meanwhile, IP protection on the Internet is also evolving. Media companies have been taking online intermediaries to court, essentially alleging that search engines enable people to easily find unauthorized copyrighted material. Copyright holders have gone after sites that allow users to post content—which sometimes includes copyrighted material. "The common theme in all of this is that the Internet reaches many consumers, and this is a fierce battle for the attention of those consumers," says Winston partner Andrew Bridges.

In the coming year, says Bridges, companies should keep an eye on cases

IP Protection

Technology executives see emerging markets as key sources of their IP—but they are concerned about IP protection in those markets.



Source: "Exploiting Intellectual Property in a Complex World," PricewaterhouseCoopers

IMPACT: The 2008 Elections

As IP protection on the Internet continues to evolve, developments in the near future are likely to take place outside of Congress, in the courts and corporate executive suites. But the issue of IP protection overseas may be a different story.

There is a good chance that Congress will indeed tackle the international IP issue in the coming year, albeit in a somewhat roundabout fashion, says Governor James Thompson, a partner and senior chairman at Winston & Strawn. “I think the government will be getting tougher on trade, with attempts to get labor reform from some of the countries that export to the United States,” he says. “The demand for IP protection is likely to get a lot stronger as a by-product of this tightening up of trade relations.”

The results of the 2008 election will have some impact on the shape of trade legislation, as well, Thompson continues. “If you get a Democratic president and a Democratic Congress, they will want to put some substance on the campaign rhetoric they’ve had in the area of trade. But even if there’s a Republican president, I think you’ll still see a significant effort to tighten trade. That animal has been let out of the cage during the campaign, so there will probably be some movement in that direction in any case.”

that focus on secondary liability. For example, some plaintiffs want to hold payment providers, such as credit card companies, liable for failing to stop the transactions of online infringers. “In essence, they’re trying to apply the idea of negligence that we have in product liability to the Internet—and that might be a real concern for businesses,” he says.

Such legal battles will probably continue in the near future, says Winston partner Michael Elkin. “On the one hand, you need to enable people to earn their livelihood from their original work,” he explains. “On the other, you’ve got an interest in fostering electronic commerce and innovation. The courts and Congress will be loath to side with either group completely. So we are likely to see a hodgepodge of decisions, without a resounding victory for either side.”

Outside the courtroom, companies may simply try to adapt to the new realities of online IP. “The tough-guy act typified by the music industry of the early 2000s...may be going out of fashion,” Columbia law professor Tim Wu recently wrote in the electronic magazine *Slate*. Instead, he explains, some media companies are practicing “tolerated use” in which they “watch and see whether infringements are actually harmful or not before sending out their

copyright pit bulls.” Wu notes that in 2006, NBC ordered YouTube to take down clips from *Saturday Night Live*, then reversed itself and actually began feeding show clips to the site—with an eye to increased exposure.

“We’ll see more compromises and new business models that let content owners and distributors alike take advantage of electronic commerce.”

Similarly, rather than fight infringement, MTV created an application that lets users watch and share its videos on the Facebook site. And in another sign of cooperation, a consortium of major media and Internet companies recently established agreed-upon rules for posting copyrighted material on the Web. “I think we’ll see more compromises and new business models that let content owners and distributors alike take advantage of electronic commerce,” says Elkin.

Nevertheless, the Internet—like China’s IP infrastructure—is still relatively new. In both realms, says Elkin, “business will have to navigate through fairly turbulent waters for some time.”



Berlin

Key Conferences

Winston & Strawn is a supporter of the following conferences in 2008:

February 2008

Association of Corporate Counsel—Southern California, Navigating Legal Issues in the Electronic Age, Los Angeles, California—Provides tools and tips for protecting companies’ intellectual property, avoiding potential pitfalls in advertising and selling products online, and dealing with employees’ use and misuse of electronic resources

May 2008

International Trademark Association (INTA) Annual Meeting, Berlin, Germany—Educational programs include skill-building workshops, industry breakouts, educational sessions focused on international topics, and table topics during breakfast and lunch

November 2008

Promotion Marketing Association (PMA) Annual Marketing Conference, Chicago, Illinois—Marketing executives, corporate counsel and outside counsel lead discussions on new rules and developments in marketing law, sports marketing, user-generated content, children’s advertising and other topics

By putting deals on a fast track, the tender offer provides less time for deal-killing changes.

Tender offers have long been a familiar part of the business landscape—and the tool of choice for many dealmakers. They provide a simple, straightforward approach in which the buyer offers to purchase stock directly from shareholders.

In 1986 the SEC adopted the “best price” rule, which provides that in a tender offer, all shareholders must receive the same share price. Over time, clever plaintiffs’ lawyers persuaded some federal judges to interpret the best price rule to mean that the value of “golden parachute” change of control payments to company executives had to be considered as part of the share price—and factored into the offer to all shareholders. Doing so would, of course, drive the share price up dramatically. Not surprisingly, the tender offer fell out of favor in friendly deals. Dealmakers were left to rely on the merger process, which involves writing and sending out a proxy statement

and holding a stockholder vote on the issue—a process that takes four to six months or longer.

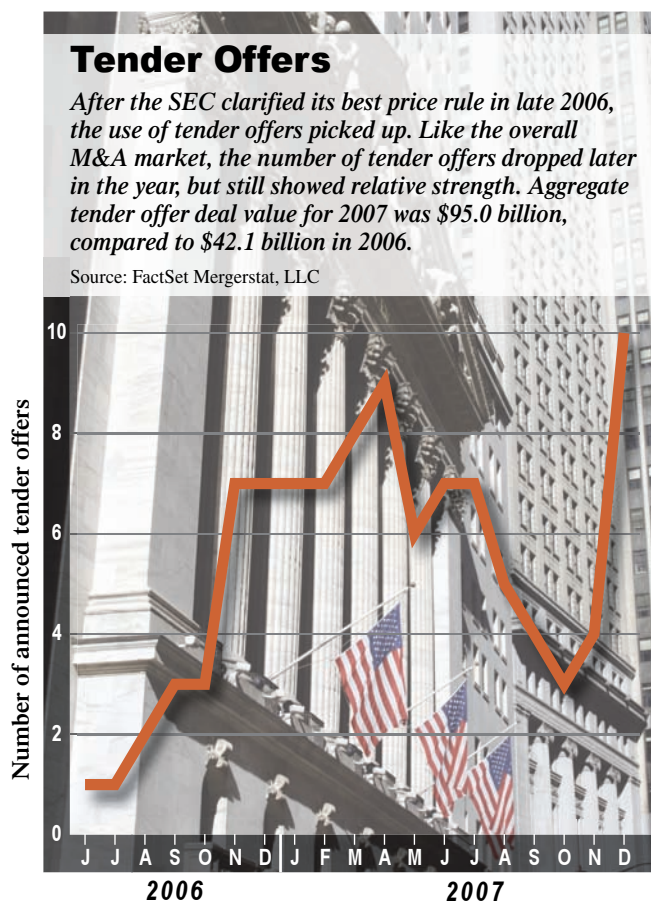
In late 2006, however, the SEC amended the best-price rule to make it clear that such employment-related payments were not to be considered part of

the tender offer consideration.

“Confusion over whether compensation, severance and other employee benefits are counted for the purpose of the best-price rule has injured investors by discriminating against tender offers,” SEC Chairman Christopher Cox said.

Thus, tender offers are once again part of the dealmaker’s tool kit. They generally move much more quickly than the traditional merger process—the offer has to be held open for 20 business days and does not require the whole proxy and vote process. “You get the deal completed faster. You just file your tender documents and off you go,” says Phil Cavatoni, managing director at JP Morgan Securities in Chicago. “You tender for a price, and the shareholder votes immediately by accepting or rejecting it. It gives you speed and simplicity.”

Other factors can accelerate the process even more. In a tender offer, buyers often target 90 percent of shares, rather than a simple controlling interest. “That opens the door to a short-form merger, in which you can close without a shareholder vote,” says Terrence Brady, a partner at



Winston & Strawn. What's more, if the buyer falls a little short of that 90 percent, the target company can allow it to take a "top-up option" and purchase new shares to make up the difference.

By putting deals on a fast track, the tender offer helps reduce risk, because there is less time for deal-killing changes in the market to occur. Similarly, there is less time for people to interfere with the vote. That's an

or product lines, as opposed to financial buyers such as private equity funds. "Strategic buyers frequently use their own cash on hand in a tender offer, while financial buyers often need to put together financing," says Brady. "The recent upheaval in credit markets will probably make banks more cautious in providing that financing, making financial buyers less able to use tender offers. So that could give strate-

In the coming years, events may make tender offers especially appealing to companies purchasing firms to expand market share or product lines.

increasingly important point, says Winston partner Leland Hutchinson, with the recent rise in "dissident shareholders and arbitrageurs attempting to game the system by engineering 'no' votes to drive up the price."

Tender offers aren't right for every deal, of course. "For example, they are best suited for cash acquisitions rather than deals done by exchanging securities of the acquiror for securities of the target," says Bob Ericson, another Winston partner.

In the coming years, events may make tender offers especially appealing to strategic buyers—that is, companies purchasing firms to expand market share

or product lines, as opposed to financial buyers such as private equity funds. "Strategic buyers frequently use their own cash on hand in a tender offer, while financial buyers often need to put together financing," says Brady. "The recent upheaval in credit markets will probably make banks more cautious in providing that financing, making financial buyers less able to use tender offers. So that could give strate-

gic buyers an advantage because they can offer to close quickly without waiting the several months needed for a straight merger." The recent slump in the M&A market—driven by that same credit crisis—has naturally affected the number of tender offers made since mid-2007. But that is likely to be a temporary lull, observers note. "The credit situation will be sorted out," says JP Morgan's Cavatoni. "In the meantime, it hasn't altered the fundamentals that drive mergers—the need to expand and strengthen a business. The stock market still wants growth and performance. That's not going to change."

IMPACT: The 2008 Elections

From time to time, Congress has discussed legislation to give shareholders more influence over company management, says John McMickle, a partner at Winston & Strawn. He notes that these efforts have fallen short and are not likely to succeed with a Republican president. "But if Democrats take the White House and Congress in the election, you could see legislation that gives shareholders greater ability to challenge tender offers," he says.

Such political change could have ramifications for M&A activity in general. "Historically, Democratic administrations are more aggressive in enforcing antitrust laws," says McMickle. "Also, the FTC chairmanship would go to a Democrat appointee, who would presumably be more interested in antitrust enforcement."

"In a scenario with a Democratic controlled Congress and administration, it's likely that more attention would be paid to all types of business transactions, including mergers," says Governor James Thompson, a partner and senior chairman at Winston. "If Congress undertakes legislation to address merger activity, regulatory agencies, such as the SEC and DoJ, may feel compelled to assert expanded regulatory authority in at least select types of merger transactions."



Tucson

Key Conferences

Winston & Strawn is a supporter of the following conferences in 2008:

March 2008

Capital Roundtable, Mezzanine Finance Master Class and Pre-Conference Workshop, San Francisco, California—Key points of discussion include the benefits of traditional mezzanine financing, choosing the right mezzanine lender, and seasoned private equity professionals' view of the different types of financing

April 2008

Tax Executives Institute (TEI), Midyear Conference, Washington, D.C.—Covers a full range of federal, international, state and local, Canadian and tax management topics

October 2008

Association for Corporate Growth (ACG), Midwest ACG Capital Connection, Chicago, Illinois—Brings together middle-market M&A professionals from around the United States, including executives from leading private equity sponsors, preeminent investment banks and intermediaries, senior lenders and other service providers

December 2008

American Bankruptcy Institute, 20th Winter Leadership Conference, Tucson, Arizona—Addresses timely topics such as private equity and hedge fund strategies in bankruptcy, the lessons learned from the subprime mortgage industry downturn and issues in health care bankruptcies



U.S. regulators are now seeing increased cooperation from countries that are trying to tackle corruption.

As business has gone global, so too has corruption—and recently, U.S. officials have stepped up their efforts to take the fight against bribery global, as well.

Increasingly, officials are using the Foreign Corrupt Practices Act (FCPA) to do so. Passed 30 years ago, the FCPA prohibits U.S. citizens and companies from paying bribes to foreign government officials. And lately, the FCPA, which was largely unused over the years, is taking on a high profile. “What used to be thought of as a sleepy little law has become one of the main topics of concern,” Fred Miller, co-leader of FCPA services at PricewaterhouseCoopers, recently told the *Financial Times*.

There’s good reason for that concern. The FCPA is enforced by both the U.S. Department of Justice and the U.S. Securities and Exchange Commission, and both agencies have been “casting a wider net with a finer mesh,” says Winston & Strawn partner William Sullivan. Penalties can be significant, too. In mid-2007, for example, the Baker Hughes oil services company paid a record \$44 million fine for bribing officials to do business in Kazakhstan. Assistant U.S. Attorney General Alice Fisher recently told an audience that the number of FCPA cases being handled by the DoJ had doubled



Source: Transparency International 2006 Bribe Payers Index. On a scale of 1 to 10.

since 2006, and that she expects that growth trend to continue in 2008.

This increased activity is the result of a number of factors, observers say. One is simply the growing interaction of U.S. businesses with foreign governments in a global economy. In addition, corporate accounting scandals have motivated agencies to look into other types of corruption. And after years of working mostly on their own, U.S. regulators are now seeing increased cooperation from other countries that are trying to tackle corruption.

The U.S. is widening its FCPA net in a number of ways. For example, the DoJ has extended the Act to include foreign companies that have any financial deal-

ings in the United States—in part to help level the playing field. The DoJ, Fisher recently said, wants to “ensure that the major foreign competitors to U.S. companies are subject to the same stringent rules—and the same penalties for violating those rules—as U.S. companies.” That stand was made clear in the 2006 FCPA case against Norway-based Statoil, a New York Stock Exchange-listed firm, which had to pay some \$21 million in fines and other penalties for bribing Iranian officials.

The U.S. view of just who is a foreign government official is fairly broad, as well. Individuals who work for state-owned enterprises or who receive a gov-

IMPACT: The 2008 Elections

As the stock-option backdating scandal runs its course, companies may be wondering what regulatory hot spot is likely to flare up next. “It’s hard to say where the next troubling thing in corporate governance is going to emerge,” says Governor James Thompson, a partner and senior chairman at Winston & Strawn. “In addition to a focus on the FCPA, there is a growing trend in favor of the so-called shareholder’s rights provisions—giving shareholders an alternative to elections of boards of directors, giving shareholders the right to vote on compensation packages, and so forth.”

Thompson says that the SEC is not likely to tackle the issue in the near future. If there is movement on shareholder rights, it may come from corporations themselves—perhaps in the interest of heading off regulatory action or simply in response to pressure from shareholder groups. “The SEC is pretty conservative, and they have a lot on their plate already,” Thompson explains. Nevertheless, he adds, a change in political landscape may alter that: “If there is a Democratic president and Congress elected, you might see a congressional initiative around shareholder rights that the SEC would then have to enforce.”

ernment paycheck are viewed by regulators as government officials. “For example, that means that in countries where there is socialized medicine, doctors can fall into this category, and attempts to influence medical purchasing decisions through extravagant and luxurious seminars and trips have come under harsh scrutiny,” says Sullivan.

What’s more, regulators are increasingly inclined to pursue company personnel, as well as the overall company.

Companies are choosing to disclose potential problems to stave off prosecution and fines. A better strategy: Avoid trouble in the first place.

“We have seen increased prosecution of individual officers and executives,” says Dan Webb, Winston’s chairman. “It’s not only those who actually pay the bribes, but also a kind of second tier of executives who fail to take the necessary steps to prevent bribery, who ignore red flags, who don’t pursue the appropriate compliance measures.”

Faced with high penalties, more companies are choosing to voluntarily disclose potential problems in the hope of staving off prosecution and fines. A better strategy, experts say, is to avoid trouble in the first place. Companies should be especially cautious in high-risk countries that have had previous bribery prob-

lems. They also should make sure they have a robust compliance program in place—one that includes guidelines for doing business in various countries, training for employees and exhaustive due diligence. These guidelines should extend to companies being acquired and third parties that are providing support and guidance in a foreign country.

Such efforts might help prevent problems—and they are likely to be looked on kindly by officials. “The fact

is, if you are doing the things you should be doing—whether it is self-policing, self-reporting, conducting proactive risk assessments, improving your controls and procedures, training on the FCPA, or cooperating with an investigation after it starts—you will get a benefit,” Fisher recently said.

“I think it’s clear that FCPA investigations will only become more numerous and more serious in the future,” adds Sullivan. “The price of violating the FCPA is high and likely to become higher. But one way for multinational businesses to minimize risk is to maintain and follow a robust compliance program—it could become a company’s insurance policy.”



San Francisco

Key Conferences

Winston & Strawn is a supporter of the following conferences in 2008:

June 2008

American Lawyer Media (ALM), 20th Annual GC Conference, New York, New York—Offers sessions on key developments in FCPA compliance, e-discovery and enterprise risk management among other topics

September 2008

Legal Week, European Corporate Council, Geneva, Switzerland—Brings together general counsel from the world’s leading companies to share their insights on finding and retaining the best talent for in-house legal teams and improving leadership skills

November 2008

American Lawyer Media (ALM), 6th Annual GC West Conference, San Francisco, California—Offers a blend of recent regulatory developments, management insights, and important business trends impacting the roles and responsibilities of general counsel

Winston & Strawn
alumni from all
around the
country discuss
critical trends and
issues in their
industries—and
the sources they
turn to for news
and information.

A Matter of Balance



For the entertainment industry, the key issue is tied into the options people now have for receiving programming. It's not just delivered on TV; it's streamed

through the Internet and to your iPhone. It's much more interactive and cohesive. Everyone is working to figure out how to make it part of the business model. And it's at the heart of the recent writer's strike. When you look at all these other media, the questions are whether or not the writers are getting their fair share, and what should be considered "fair." There's also the question of companies' rights in terms of such social networking sites as MySpace and YouTube—and how do we enforce these rights (and when shouldn't we enforce them). Viral marketing is key when you're trying to create a buzz about your product, so you need to figure out how to balance protecting your IP with creating the necessary awareness.

For news, I turn to online sources such as CNN.com and Newsweek.com. Like a lot of my friends, I watch the Jon Stewart show. And I read *Entertainment Weekly* for an industry perspective.

—Fania Washington, vice president and employment counsel, MTV Networks

FCPA Is Hot Issue



I see three trends in the investigation and prosecution of Foreign Corrupt Practices Act (FCPA) matters: 1) Cooperation among regulators. The SEC

and the DoJ routinely work together now, often in conjunction with overseas regulators, on these matters. 2) A focus on certain "hot spots" around the world that have weaker regulatory structures and a higher tolerance for kickback payments. In particular, regulators are focused on Indonesia, Nigeria, parts of South America and most importantly, China, where businesses encounter many government officials. 3) The imposition of specific remedies when a violation is found, such as financial penalties and the assignment of corporate monitors to "watch" the wrongdoer and report back to the regulators on the wrongdoer's conduct.

So what are the lessons for U.S. companies? They need to have robust FCPA training and compliance programs in place, particularly if they are doing business in one of the identified hot spots.

To stay current on FCPA matters, I review the SEC's daily e-newsletter, *SEC Today*, for any new FCPA cases.

—Ken Cunningham, associate general counsel at Grant Thornton. Cunningham investigated FCPA matters while at the SEC from 2000 to 2004.



Focus on Oversight



As a public company, we're focused now on the board's overall heightened sensitivity to oversight. Sarbanes-Oxley is a burden, particularly in the

way we interact with accountants—their need for greater documentation can cause tension from a legal point of view. In addition, heightened oversight causes tension with regard to executive compensation disclosure issues. And another concern: dealing with shareholder proposals for majority voting—"destaggering the board."

On the real estate front, given the current problems in the credit market, REITs have to be more cautious about which developments they pursue because financing is not as readily available as it used to be. Credit issues can also make acquisitions less attractive.

I read both the *Wall Street Journal* and the *New York Times*, but I find that the best source of information for me is the informal meetings I have with 10 or so general counsel from the major REITs once a year during the National Association of REITs Conference. Between conferences, we maintain a continuous email communications chain on critical trends and issues.

—Alan Rice, corporation counsel,
Vornado Realty Trust

Defining Success



Our clients tend to be professional services firms or their affinity groups. We help them achieve sustained organizational change and we

assist them with the tactical implementation of strategic plans. These groups, we're finding, are facing two critical trends.

First, they need to create inclusion. Clients are demanding it, and business schools are teaching it. Generational issues are also having a dramatic impact, partly because professional services firms have not been as skilled at succession as their corporate counterparts have been, and partly because the existing business model doesn't allow for Gen X and Gen Y workers to define success in a way that makes sense for them. Escalating salaries, for example, which result in escalating billable hours, don't leave room for balance. Part of the problem: Baby boomers are making the decisions without finding out how Gen X'ers and Gen Y'ers want to be rewarded.

The *Harvard Business Review* is essential for anyone who wants to understand trends because it is written by professors whose business it is to think about these issues all day long. It is also concise and readable.

—Jane DiRenzo Pigott, managing director,
R3 Group LLC

Agreeing on Energy



For the California energy market, the issue is the interface between two primary problems: the state's policy goals regarding climate change and renew-

able energy resources, and the state's desire to encourage investment in the energy projects that meet reliability standards.

Although California sees itself as a trendsetter, these aren't just California issues. Throughout America, climate change and renewables are pretty broadly the issues of the day. Though there is still significant debate concerning the nature and scope of global warming, there's no one out there—Republican or Democrat—who doesn't see this as an important issue. The consequences of global warming are uncertain, but there is broad support for taking steps to reduce greenhouse gas emissions and establish sound policies that will reduce these emissions without crippling the economy.

The resource I use most is the book *Law of Independent Power* by Steven Ferrey, a professor at Suffolk University Law School. I also rely on the newsletter *California Energy Markets*.

—Berj Parseghian, senior attorney,
Resource Policy & Planning,
Southern California Edison



Additional Winston & Strawn Resources

Winston & Strawn is pleased to offer its clients and friends of the firm a variety of educational resources designed to help simplify their business lives, whether it's learning about areas of the law that are important to their business through firm-sponsored seminars, webinars and briefings, obtaining MCLE credit hours*, or even training their employees.

Seminars

Winston & Strawn regularly schedules a variety of seminars available to clients and friends of the firm. Topics to be covered in the coming year include labor and employment, employee benefits, financial services regulation, restructuring and insolvency, hedge funds, private equity, energy, intellectual property, environmental law and other areas.

Please visit www.winston.com/seminars for information on upcoming programs.

eLunch Program

Our eLunch Program is a series of webinars where Winston & Strawn attorneys speak about the latest legal news that matters to your business. It's easy to attend an eLunch—just watch and listen to the presentation at your own computer. Please visit www.winston.com/elunch for information on upcoming programs.

Briefings and Newsletters

We regularly send and post to our Web site periodic briefings and newsletters to update clients on new developments in various areas of the law. For example, our attorneys publish the weekly *Financial Services Update*, monthly *Labor News* and quarterly *Privacy and Technology Bulletin*, as well as regular briefings on energy, labor and employment, securities, appellate, patent and other topics.

Please visit www.winston.com/briefings and register to receive newsletters and briefings in areas of interest.

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Winston & Strawn attorneys can provide on-site or online presentations and training programs on a variety of topics. Past presentations have covered appellate, patent law, harassment and arbitration training, among others.

Call your regular Winston & Strawn contact for more details.

This Year in Preview publication is also available at www.winston.com/YearinPreview, where you can find links to the resources described here, as well as information on the legal services provided by Winston & Strawn, significant matters on which we have been assisting our clients and other news about our firm.

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