

Legal Risks For Consumer Products Cos. In 2018: Part 1

By **Erin Bosman and Julie Park** (June 7, 2018, 1:52 PM EDT)

Running a successful consumer products company has never been easy. Rapidly evolving technologies, an uncertain economy and changing government regulations appear primed to complicate the already challenging task of navigating legal issues. If you are concerned (or even curious) about what the legal landscape for consumer products companies in 2018 looks like, this two-part article is for you.

Developing and maintaining consumer trust is central to operating a successful consumer products company. Product recalls, contamination problems, defects, privacy violations and data breaches can all undermine consumer trust in a company and its products. These risks, and the risks of related litigation, only increase when products are connected to the internet, contain sensitive consumer information or operate autonomously.

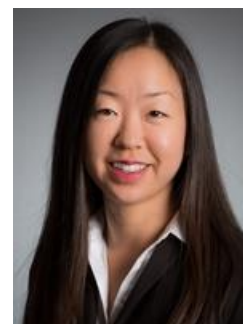
Modern companies cannot anticipate all problems or guard against all risks, but should be mindful of common industry pitfalls. We are providing this analysis to raise awareness of some of these risks, which may be the first step to avoiding unnecessary liability.

Layered on top of these concerns is the need to deal with an expanding list of regulatory agencies, which circle the globe and often have overlapping jurisdictions and competing enforcement priorities. This complex products landscape will test the existing legal framework and force companies to anticipate and plan for previously unknown risks.

Below, we identify some of the notable emerging risks that consumer companies may face in the coming year. In this first installment, we discuss the greatest drivers of business change and the evolving risk environment in 2018. In the second installment, we will look in detail at caseloads and issues of concern, the growing influence of the Federal Trade Commission and trends in corporate legal departments' budgeting.



Erin Bosman



Julie Park

Survey Methodology

Morrison & Foerster commissioned Oxford Analytica[1] to evaluate the legal landscape for consumer products companies in the United States and to provide analysis of relevant trends and areas of concern. Operating as an independent third party, Oxford Analytica relied on data from numerous sources, including interviews with Morrison & Foerster clients and partners, interviews with law professors and surveys of in-house counsel conducted by the market research company YouGov.

The surveys of in-house counsel were conducted telephonically between Nov. 13 and Dec. 17, 2017. In-house counsel across the United States at companies offering a range of consumer products participated in the survey. Approximately one-third of respondents are employed by companies with revenues over \$1 billion, nearly one-third are employed by companies with revenues of \$500 million to \$1 billion and the rest are employed by companies with revenues between \$250 and \$499 million.

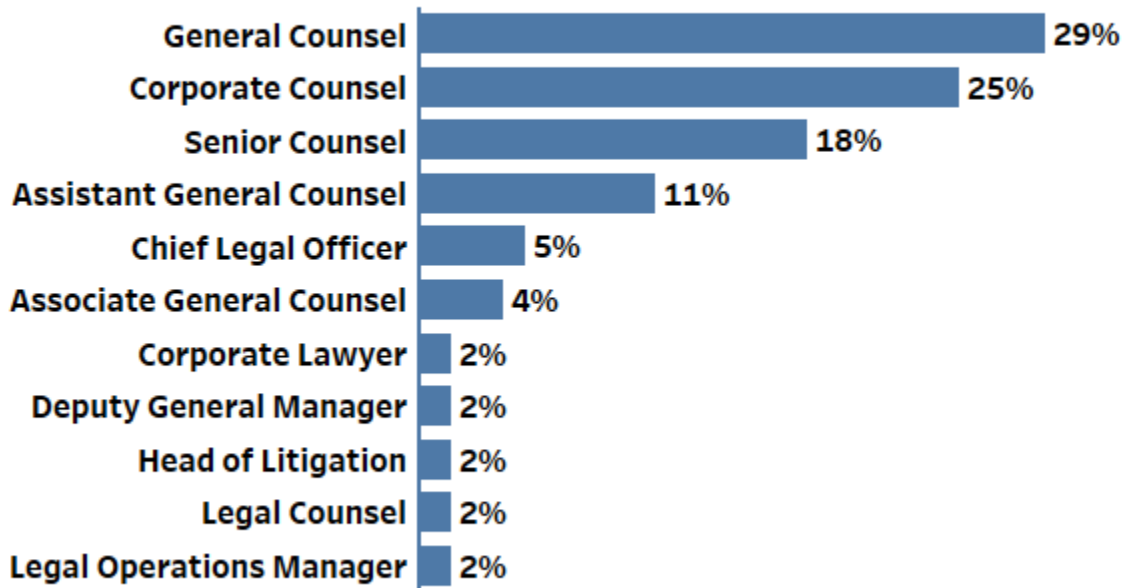
Overview

Although much uncertainty exists in the consumer products space, many survey respondents identified similar industry drivers and areas of concern. Several companies polled believed their legal endeavors (and related costs) will increase in 2018.

- The most important drivers of change for consumer products companies in 2018 will be: the economy (78 percent), government regulatory change (71 percent) and technological advancements (59 percent)
- One out of three legal matters in 2017 was high-risk or complex, with one out of five in-house counsel expecting more high-risk products lawsuits in 2018.
- The following areas are expected to give rise to the most new case activity in 2018: product liability (45 percent), data privacy (44 percent) and regulatory/compliance (42 percent).
- The biggest concerns within legal departments are: litigation (69 percent), protection of brand equity (60 percent), privacy and data security (56 percent), regulatory issues/government enforcement (49 percent) and product liability (44 percent).
- Approximately two out of five legal departments expect their litigation costs to increase in 2018.

ABOUT THE SURVEY

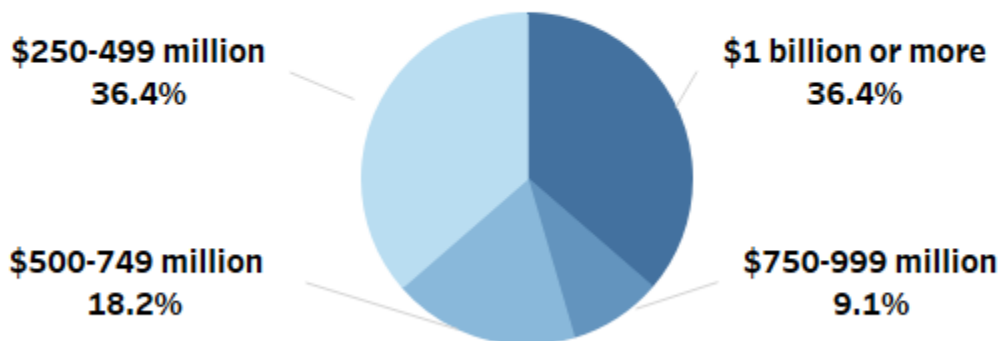
Respondents were asked to identify their job title.



Source: 2018 Legal Risks to Consumer Products Companies, Morrison & Foerster

ABOUT THE SURVEY

Respondents were asked to estimate their company revenue in the last financial year.



2018 Legal Risks to Consumer Products Companies, Morrison & Foerster

2018 Drivers of Business Change

In-house counsel at consumer products companies expect the economy, government regulatory changes and technological advancements to be the top drivers of change for their businesses in 2018. Below we provide additional information about each of these categories, and how we expect them to affect the consumer products industry.

The Economy

Unsurprisingly, industry leaders anticipate the economy will generally drive developments in the consumer products industry. With U.S. unemployment at its lowest level in 17 years, and wages expected to grow approximately 3 percent, consumers should have more disposable income and confidence in 2018.

But this growth may be short-lived: Consumers are also dipping heavily into their savings, which have fallen to their lowest level since the Great Recession of 2007. This could limit future spending, especially if combined with faster-than-expected increases in inflation or interest rates as the Federal Reserve revises its monetary policy.

If the U.S. economy is healthy, or at least stable, in the coming year, consumer products companies will be more willing to invest in new and emerging markets to drive growth. In addition, consumer products companies will continue to respond to changes in the U.S. population, focusing on brands intended to appeal to growing demographic groups, including Hispanics, baby boomers and millennials.

This sharpening focus on specialized brands, along with relatively low interest rates and stiff competition, is expected to spur merger and acquisition activity beyond the 2017 benchmark of \$311.6 billion in deals reported in the consumer products sector. Concurrently, consumer products companies will likely spin off secondary brands in order to maintain traditional product lines and account for decreased consumer spending in the near future.

Technological Advancements

The internet of things may prove to be the most significant technological development for consumer products companies in this decade. Connecting devices and harnessing the power of data provides immense opportunities for industry players, but can also give rise to potential liabilities.

Consumer products companies embracing the internet of things, particularly those offering health care-related products and home devices, will face a myriad of legal, regulatory and reputational complications. For example, concerns about privacy and security may lead to increased government scrutiny. Accordingly, companies should develop safeguards and systems designed to ensure compliance with relevant standards.

Such efforts, in turn, need to be evaluated through both legal and business lenses. Many questions, including how traditional legal standards guiding the product liability industry will apply to novel products, remain unanswered, setting the stage for complicated legal proceedings to determine consumers' and companies' rights in the digital age.

Many industry leaders believe the benefits of the internet of things outweigh its risks. In this vein, many consumer products companies are actively developing technology to efficiently and creatively optimize customer engagement and influence consumers' path to purchase.

For example, while traditional brick-and-mortar retailers have suffered from declining foot traffic as consumers order products online, some have responded to the digital commerce era by offering increased customization and "buy online, pick up in-store" options. Companies harnessing internet of things technologies are also likely to have more modes of communication with their customers, enabling timely delivery of warnings or firmware updates related to safety or customer satisfaction.

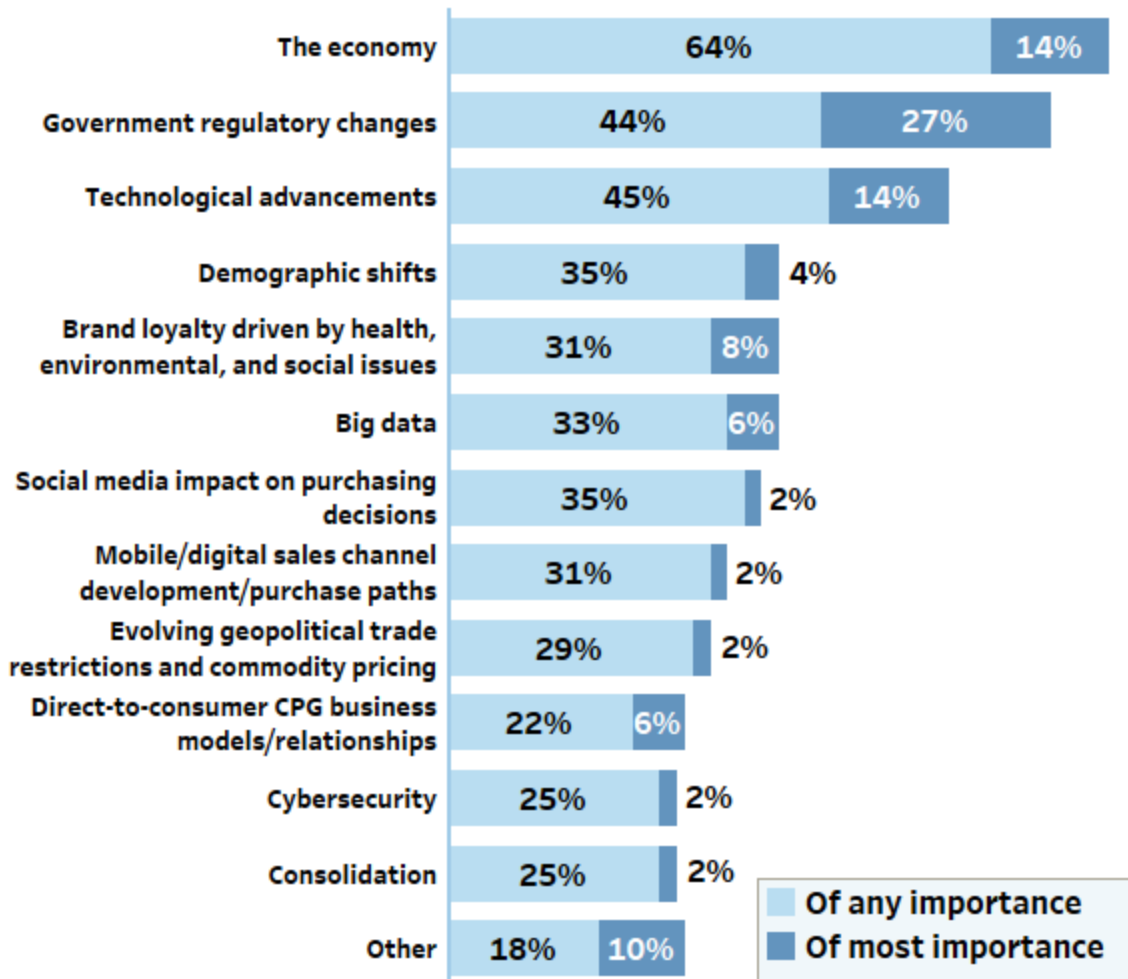
Government Regulatory Changes

Politics play a role here. The perceived effect of government regulation is mixed because of the current political climate in the United States. On one hand, the current White House and Congress are unlikely to actively regulate consumer products companies, particularly in the areas of health, environmental or labor issues. On the other hand, absent federal action, many state and local governments will look to fill that void, and are likely to push through legislative and regulatory changes on a range of issues that will affect consumer products companies, including climate change, nutrition, privacy and the minimum wage.

This piecemeal approach may be representative of increasing divergence in regulations globally. Such varying legal standards will put more pressure on in-house counsel to ensure compliance across multiple jurisdictions.

DRIVERS OF BUSINESS CHANGE

Most Important Drivers Of Change For Business In 2018



Evolving Risk Environment

Approximately one in three legal matters faced by consumer products companies in 2017 was considered high-risk or complex. Although nearly one out of five respondents (18 percent) predicted an increase in high-risk cases in 2018, approximately the same number (20 percent) predicted a decrease. The majority of respondents (60 percent) predicted no change.

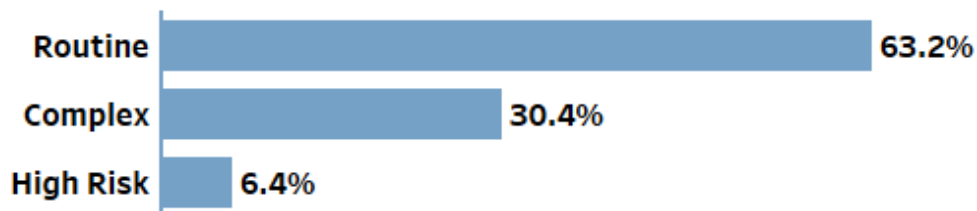
These responses may reflect the disparate risk profiles among consumer products companies, with those in the internet of things space facing more uncertainty than others. Even though consumer products companies generally do not expect growth in high-risk litigation, those that do likely have concerns about risks associated with regulation and technological advances.

Gavin Grover, co-head of the global corporate finance practice group at Morrison & Foerster, comments:

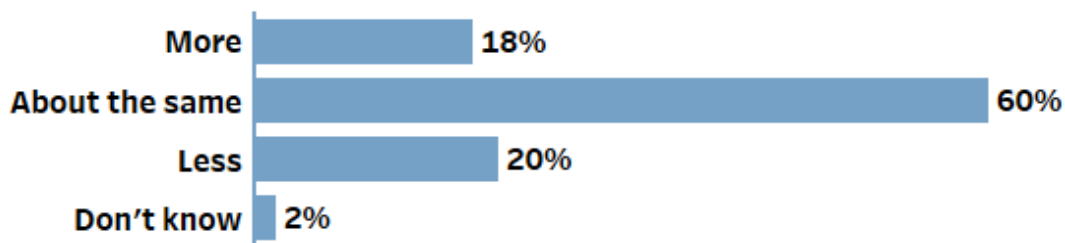
Many traditional business models are undergoing massive change in the consumer area. These market forces capture the attention of top management. Legal cases follow closely with disruptive changes in any industry, and many cases are inevitably high-stakes. Talent moves more frequently in times of rapid business evolution as new business models lure management teams. All these factors drive litigation and controversy practices across the spectrum. We always see spikes in high-stakes litigation where industry forces are in flux. The San Francisco Bay area in particular seems to capture an outsized share of disruptive new business models and the related cycle of controversy practices for growth companies.

EVOLVING RISK ENVIRONMENT

Classification Of Consumer Products Legal Matters



High-Risk Consumer Products Law Suits Expected In 2018



The second part of this article will consider trends in caseloads and concerns for consumer products companies, how the FTC's influence is increasing and how legal departments are deploying their resources.

Erin M. Bosman and Julie Y. Park are partners at Morrison & Foerster LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Oxford Analytica is an international consulting firm that provides strategic analysis of world events and industries.