Nos. 16-5356 and 16-5357 (consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FEDERAL TRADE COMMISSION,

Petitioner/Appellant/Cross-Appellee,

v.

BOEHRINGER INGELHEIM PHARMACEUTICALS, INC.,

Respondent/Appellee/Cross-Appellant.

On Appeal from the United States District Court
for the District of Columbia
No. 1:09-mc-564
Hon. G. Michael Harvey

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND ASSOCIATION OF CORPORATE COUNSEL IN SUPPORT OF BOEHRINGER INGELHEIM PHARMACEUTICALS, INC.

Kate Comerford Todd
Sheldon Gilbert
U.S. CHAMBER
LITIGATION CENTER
1615 H St., N.W.
Washington, D.C. 20062
202.463.5685

Counsel for Amicus Curiae the Chamber of Commerce of the United States of America

John P. Elwood
VINSON & ELKINS LLP
2200 Pennsylvania Ave, NW, Ste 500W
Washington, D.C. 20037
202.639.6518

Zachary J. Howe
VINSON & ELKINS LLP
1001 Fannin Street, Ste 2500
Houston, Texas 77002
713.758.2154

Counsel for Amici Curiae

Amar D. Sarwal
Mary Blatch
ASSOCIATION OF
CORPORATE COUNSEL
1025 Connecticut Ave., N.W.
Suite 200
Washington, D.C. 20036
202.293.4103

Counsel for Amicus Curiae
Association of Corporate Counsel

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, each of the *amici curiae* certifies that it has no parent corporations, and no publicly held corporation owns 10 percent or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

OTHER

STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size, in every industrial sector, and from every region of the country. An important function of the Chamber is representing its members' interests before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the business community.

The Association of Corporate Counsel ("ACC") is the leading global bar association that promotes the common professional and business interests of in-house counsel. ACC has over 42,000 members who are in-house lawyers employed by over 10,000 organizations in more than 85 countries. ACC has long sought to aid courts, legislatures, regulators, and other law or policy-making bodies in understanding the role and concerns of in-house counsel. To ensure that clients are able to turn to their in-house counsel for confidential legal advice, ACC has

[1] No party's counsel authored this brief. No party, party's counsel, or person other than *amicus curiae*, its members, or its counsel provided money for the brief's preparation or submission. Both parties have consented to the filing of this brief.

championed the attorney-client privilege and confidentiality protections for sensitive business information produced during litigation.

Amici represent many of the businesses in the United States and their in-house attorneys. Many of the Chamber's members, and ACC members' employers, regularly engage in litigation. In doing so, they rely on the confidentiality of communications with in-house counsel while obtaining legal advice, and that confidential communications with an attorney are not subject to disclosure simply because a layperson performing the same task might have asked for similar information. *Compare* FTC.Br.16, 20, 21, 26, 31. *Amici* are concerned that the position taken by the Federal Trade Commission ("FTC"), if adopted by this Court, will undermine the traditional ability of in-house counsel to provide legal advice that considers the full range of concerns relevant to the company, and will promote a moment-by-moment, communication-by-communication approach to attorney-client privilege that would chill clients' communications with counsel and undermine the provision of legal advice. Because the FTC's proposed approach conflicts with this Court's approach to attorney-client privilege, this Court should affirm.[2]

[2] *Amici* also have a strong interest in the work product doctrine, and share respondent's concerns that courts must apply the doctrine carefully and accurately. But in this brief, *amici* address the FTC's new and aggressive theory of attorney-client privilege.

ARGUMENT

In-house counsel are uniquely qualified to provide legal advice to their employers. As insiders who focus on a single company, "they know the personnel and needs of the company intimately"[3]: the industry, the business model, the company's goals, its tolerance for risk, its competition, its personnel and management, its litigation, its litigation exposure. Compared to outside counsel, in-house counsel have "greater knowledge of the corporation and the issues that it routinely faces."[4] And since that familiarity runs both ways, the company's employees have closer relationships with, and often are more trusting of, in-house counsel, allowing them to "collaborate continuously."[5] The intimate familiarity of in-house counsel with their clients makes them especially valuable counselors because they can give advice that is informed by, and tailored to, the business needs of the

[3] Charles Fried, *The Trouble with Lawyers*, N.Y. Times Magazine, Feb. 12, 1984, §6, at 60-61.

[4] Mark C. Van Deusen, *The Attorney-Client Privilege for in-House Counsel When Negotiating Contracts: A Response to Georgia-Pacific Corp. v. Gaf Roofing Manufacturing Corp.*, 39 Wm. & Mary L. Rev. 1397, 1397 (1998); *see also Five Benefits of Hiring In-House Counsel*, Forbes, June 2, 2016, https://goo.gl/p1b3R2.

[5] Tom Spahn, *Corporate Attorney-Client Privilege in the Digital Age: War on Two Fronts?*, 16 Stan. J.L. Bus. & Fin. 288, 293 (2011) ("[L]egal, business, and scientific members of the company collaborate continuously. In many ways, this efficient use of communication has greatly enhanced the value of in-house counsel."); Steven L. Lovett, *The Employee-Lawyer: A Candid Reflection on the True Roles and Responsibilities of in-House Counsel*, 34 J.L. & Com. 113, 131 (2015).

enterprise they serve[6]: "[H]ow the law fits . . . with a company's core business activities is the knife edge of where an in-house lawyer sits."[7] In short, for in-house counsel, "[l]egal judgment and business judgment run together."[8]

In this case, the FTC takes in-house counsel's greatest strength and attempts to transform it into a liability. According to the FTC, because in-house general counsel Marla Persky was involved in the affairs of the corporation and (as is quite common) had both a legal title ("general counsel") and corporate one ("vice president"), FTC.Br.25, Respondent/Appellee/Cross-Appellant Boehringer Ingelheim Pharmaceuticals, Inc. ("Boehringer") must "prove which hat she wore" when she made or received each communication under review. FTC.Br. 21. But this Court rejected precisely that sort of "false dichotomy," as well as that hyper-granular, communication-by-communication approach, in *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758 (D.C. Cir. 2014) ("*KBR*"). "So long as obtaining or providing legal advice was *one of the significant purposes* of the [activity], the attorney-client privilege applies, even if there were also other purposes for the [activity]." *Id*. at

---

[6] Omari Scott Simmons & James D. Dinnage, *Innkeepers: A Unifying Theory of the in-House Counsel Role*, 41 Seton Hall L. Rev. 77, 79 (2011) ("in-house counsel, when compared to other legal providers, have a greater potential impact on corporate affairs, particularly by curbing corporate opportunism and creating value"); *see also Five Benefits of Hiring In-House Counsel*, Forbes, June 2, 2016, *available at* https://goo.gl/p1b3R2.

[7] Lovett, *supra* note 5, at 145.

[8] Fried, *supra* note 3, at 56.

758-59 (emphasis added). The FTC's approach would chill the candid communication that is indispensable to the work of the in-house counsel, which in turn is "essential to ensure compliance and proper corporate behavior."[9]

I. PRIVILEGE LAW RECOGNIZES THAT LEGAL ADVICE VALIDLY INCORPORATES FINANCIAL AND OTHER CONSIDERATIONS

The FTC makes much of the fact that the documents sought here included "financial analyses," FTC.Br.1, 3, 4, 6, 20, 23, 26, 27, 28, 37, it describes as containing "only non-legal, factual information," *id.* at 29, suggesting that when a lawyer requests such "non-legal" information, it is evidence that the lawyer is acting in a non-legal capacity. But courts have long recognized that lawyers cannot provide legal advice in a vacuum. Indeed, the nature of the lawyer's role, and the information lawyers must obtain to fulfil it, make "pure" legal communications both impossible and undesirable.

"The modern lawyer almost invariably advises his client upon not only what is permissible but also what is desirable." *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950). Accordingly, lawyers' advice quite

[9] Spahn, *supra* note 5, at 302; *see also id.* at 308 ("early and often communication with in-house counsel can improve corporate ethical and legal compliant behavior"); Van Deusen, *supra* note 4, at 1407 ("In-house counsel . . . can help a corporation by reviewing business practices to make sure they comply with the law and by ensuring that business transactions protect a corporation's interests. Absent the in-house counsel performing these functions, regulatory infractions would be more frequent and the interests of corporations would not be protected adequately.").

commonly "has in addition to legal points some economic or policy or public relations aspect and hence [a]re not unmixed opinions of law." *Id.* Thus,

> The complete lawyer may well promote and reinforce the legal advice given . . . by explaining: how the advice is feasible and can be implemented; the legal downsides, risks and costs of taking the advice or doing otherwise; what alternatives exist to present measures or the measures advised; what other persons are doing or thinking about the matter; or the collateral benefits, risks or costs in terms of expense, politics, insurance, commerce, morals, and appearances.

In re Cty. of Erie, 473 F.3d 413, 420 (2d Cir. 2007). Indeed, the Model Rules of Professional Conduct—adopted by 49 of the 50 states—recognize that lawyers have an obligation to render fully informed legal advice that incorporates more than purely legal analysis. Rule 2.1 of the Model Rules makes clear that, "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." Model Rules of Prof'l Conduct 2.1. And as the Model Rules' commentary explains, "[a]dvice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate." *Id.*, Comment [2].

But that does not change the fundamental nature of the advice: When advice encompasses such considerations, that discussion is "not other than legal advice or severable from it." *Erie*, 473 F.3d at 420. Lawyers' provision of such advice does

not render them "business advisers." *United Shoe*, 89 F. Supp. at 359. "[I]t is in the public interest" to protect communications that further such advice because a lawyer's "duty to society as well as to his client involves many relevant social, economic, political and philosophical considerations." *Id.* Because a wide range of information can be "legally relevant," and because lawyers can seldom provide effective legal advice without also addressing other considerations, this Court and other circuits have explained that it is neither possible nor desirable to try to draw a "bright line" or "rigid distinction" between legal and non-legal purposes. *Cty. of Erie*, 473 F.3d at 420; *KBR*, 756 F.3d at 759. "After all, trying to find *the* one primary purpose for a communication motivated by two sometimes overlapping purposes (one legal and one business, for example) can be an inherently impossible task. It is often not useful or even feasible to try." *KBR*, 756 F.3d at 759.

In recognition of these principles, this Court has held that, "[s]o long as obtaining or providing legal advice was one of the significant purposes of the [communication], the attorney[-client] privilege applies, even if there were also other purposes for the [communication]." *Id.* at 758-59. Numerous other courts have reached similar conclusions. *See, e.g.*, *In re Ford Motor Co.*, 110 F.3d 954, 966 (3d Cir. 1997) ("Even if the decision was driven, as the district court seemed to assume, principally by profit and loss, economics, marketing, public relations, or the like, it was also infused with legal concerns, and was reached only after

securing legal advice."), *abrogated on other grounds by Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009); *ABB Kent-Taylor, Inc. v. Stallings & Co., Inc.*, 172 F.R.D. 53, 57 (W.D.N.Y. 1996) ("Often intertwined with legal advice as to substantive issues are counsel's strategic assessment of alternative courses of action available to the client."); 1 Restatement (Third) of the Law Governing Lawyers § 72, Reporter's Note, at 554 (2000) ("American decisions agree that the privilege applies if one of the significant purposes of a client in communicating with a lawyer is that of obtaining legal assistance.").

The FTC's proposed approach is fundamentally at odds with *KBR*. To begin with, the FTC candidly states that under its view "th[e] burden is even higher" when claiming privilege for communications involving in-house lawyers than for communications involving outside counsel because in-house lawyers are more commonly called upon to consider the company's business interests in giving legal advice. FTC.Br.30-31. But that conclusion conflicts with this Court's direction "that a lawyer's status as in-house counsel 'does not dilute the [attorney-client] privilege.'" *KBR*, 756 F.3d at 758 (quoting *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984)). The FTC's standard plainly does "dilute" the privilege because it necessarily means that communications that would be privileged if made to outside counsel will be non-privileged if made to in-house counsel, who commonly have non-legal responsibilities.

Second, the government asks this Court to inquire, apparently on a moment-by-moment, communication-by-communication basis, "which 'hat' the lawyer was wearing"—that of a lawyer or a business executive. FTC.Br.35; *see also id*. at 20, 21, 39. But the FTC's choice of metaphor reveals the basic error of its approach. According to the government, if a particular communication concerns a "non-legal" subject or advances a business purpose, it cannot *also* be in furtherance of the provision of legal services, because the choices are (like the choice of which "hat" to wear) mutually exclusive.[10] That is the precise conclusion *KBR* rejected. *See* 756 F.3d at 758-59 (rejecting "false dichotomy"). Not only can a communication serve two purposes simultaneously, as this Court noted, it is often "inherently impossible" and "not useful or even feasible to try" to parse communications to determine which predominates. *Id.* at 759 It is enough that a "significant purpose[]" of the activity to which a communication relates was the provision of legal services. *Id.* at 758-59.

[10] Perhaps for that reason, knowledgeable commentators have suggested metaphors under which the legal and business roles are complementary rather than exclusive. Lovett, *supra* note 5, at 128-29 ("general counsel . . . wear[] two different shoes at the same time: one shoe as a lawyer and one shoe as a company executive").

II. BEDROCK PRIVILEGE LAW SUPPORTS THE DISTRICT COURT'S CONCLUSION THAT THE DOCUMENTS AT ISSUE ARE PRIVILEGED

The FTC raises two principal arguments in contending that the documents it seeks are not covered by attorney-client privilege. First, it argues that the general counsel here was performing a function—settling litigation—that "businesspeople also serve." FTC.Br.21; *id.* at 31. Second, it argues that "the content of the disputed communications . . . plainly addressed business and financial matters." *Id.* at 21. Based on those two facts, the government asserts that Ms. Persky was acting "as a typical business executive" when she requested and received the documents. *Id.* Neither of those factors supports the conclusion that the materials are unprivileged. A straightforward application of basic privilege principles compels the conclusion that the documents at issue here are privileged.

To begin with, "[t]he mere fact that non-lawyers could also have performed the services in question does not in any way destroy the privilege." *Chore-Time Equip. v. Big Dutchman, Inc.*, 255 F. Supp. 1020, 1023 (W.D. Mich. 1966). "[T]he test of a client's legal purpose is not whether the work could have been performed by a non-lawyer, or whether the attorney at times took non-legal considerations into account in rendering assistance." *Attorney Gen. of U.S. v. Covington & Burling*, 430 F. Supp. 1117, 1121 (D.D.C. 1977); *accord* 1 Paul R. Rice, *Attorney-Client Privilege in the U.S.* § 7:10 (Supp. 2016) ("The fact that the task performed

could have been accomplished as easily by a nonlawyer does not necessarily mean that the privilege will not apply."). Non-lawyers can perform many legal activities, such as interviewing witnesses or gathering documents for an internal investigation. But it is not open to serious dispute that when such activities are undertaken at the direction of an attorney, or are performed by a lawyer, communications concerning them are privileged, because plainly "providing legal advice was one of the significant purposes of the [activity]." *KBR*, 756 F.3d at 758-59.

Nor does it matter that "the content of the disputed communications" purportedly "addressed business and financial matters." FTC.Br.21. While the general counsel must take financial matters into consideration when negotiating the settlement of litigation, that does not change the basic nature of the general counsel's role. It has long been understood that "*of course*" "communications between [lawyers] and [their] clients for the purpose of . . . conducting the negotiation of the [litigation] settlement . . . are privileged." *Gould Inc. v. Mitsui Mining & Smelting Co., Ltd.*, 825 F.2d 676, 679 (2d Cir. 1987) (emphasis added). Because a legal assessment is at the heart of litigation settlements, attorneys are "peculiarly qualified" to negotiate them. 1 *Attorney-Client Privilege in the United States* § 7:23 (quoting *Studiengesellschaft Kohle mbH v. Novamont Corp.*, 1980 U.S. Dist. LEXIS 15042 (S.D.N.Y. Nov. 17, 1980)). In addition, this case implicates anti-

trust issues, and it is widely recognized that consideration of a wide variety of "business matters" is "essential to assess the company-specific risks of anticompetitive activity." 2 Antitrust Adviser § 12:6 (5th ed.) ("A clear understanding of the company's organizational structure, compliance history, business operations, and competitive position in the industry is . . . essential to assess the company-specific risks of anticompetitive activity.").

Even though settlement "discussions . . . obviously involve[] commercial considerations" about the financial terms of proposed settlement agreements, "the fundamental consideration animating the discussions and counsel's involvement in those discussions [i]s the need to protect the legal interests of [the client] by attempting to construct an arrangement . . . that would be consistent" with the client's legal interests. *Boss Mfg. Co. v. Hugo Boss AG*, No. 97 CIV. 8495 SHS MHD, 1999 WL 47324, at *2 (S.D.N.Y. Feb. 1, 1999). At bottom, the person negotiating the settlement must determine whether the consideration its client is receiving under the settlement is adequate given the legal claims it is resolving and any legal exposure it may be assuming. Thus, "counsel's direct involvement in the negotiations"—including their receipt and consideration of financial analyses of the value of certain alternatives—"is entirely consistent with the traditional role of the attorney as a legal adviser and legal representative of the client." *Id.* "That [the lawyer's] goal may have been to make the most financially favorable deal pos-

sible for his client does not alter the[] fact[]" that the communications are privileged. 1 *Attorney-Client Privilege in the United States* § 7:23 (quoting *Studiengesellschaft Kohle*, 1980 U.S. Dist. LEXIS 15042). As Boehringer argues, "one of the significant purposes" of Persky's involvement in the negotiations was to provide her employer with legal advice about whether the settlement served Boehringer's legal interests—particularly regarding the potential competitive impact of the settlement. As such, the communication of the financial analyses at her request in furtherance of those negotiations is privileged. *See KBR*, 756 F.3d at 758-59.

Indeed, there is serious reason to doubt the government's claim that a nonlawyer actually could have negotiated the settlement of this lawsuit without the close supervision of a lawyer, FTC.Br.21, 31, since such negotiations require legal judgments about whether the settlement serves the client's legal needs and whether the consideration offered warrants resolving the legal claims at issue. It is unclear how the FTC believes Boehringer would have been able to assess whether the settlement was a "good deal" without a lawyer's expert judgment about the strength (and thus value) of the legal claims resolved and about any legal exposure that might result from the settlement. The financial analyses at issue here were, of course, integral to Ms. Persky's ultimate legal advice about the transaction.

III. THE FTC'S APPROACH WOULD UPEND SETTLED LAW AND UNDERMINE THE ABILITY OF IN-HOUSE COUNSEL TO FUNCTION

The FTC's proposed rule would require courts to distinguish on a moment-by-moment basis between individual communications that purportedly concern "business matters" and those that concern "legal matters." FTC.Br.1, 4. That approach is wholly unworkable; if adopted, it would chill communications and thereby undermine the ability of in-house counsel to obtain information that is indispensable to providing fully informed legal advice.

A. The FTC's Approach Would Upset Settled Understandings Regarding the Scope of Privileged Communications

It has long been recognized "that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). To that end, "the attorney-client privilege 'exists to protect . . . the giving of information to the lawyer to enable him to give sound and informed advice' . . . because the 'first step in the resolution of any legal problem is ascertaining the factual background and sifting through facts with an eye to the legally relevant.'" *KBR*, 756 F.3d at 757 (quoting *Upjohn*, 449 U.S. at 390-91). It is of paramount importance that businesspeople feel confident that they can share communications with counsel without risking disclosure so counsel may give well informed legal advice.

Having privilege turn on an after-the-fact determination of whether a particular communication facially concerns "business matters" rather than "legal matters" is artificial, because lawyers frequently must consider "financial information," FTC.Br. 12; "financial forecasts" of alternative outcomes, *id.* at 13; and other business-related factual material when forming legal opinions. Moreover, this approach would create tremendous uncertainty. The FTC is vague about how to establish with certainty whether a document concerns "business matters," when so many types of business information are relevant to the provision of legal advice. The answer seems to be that privilege could only be established afterwards, through fact-intensive litigation. But that kind of ad-hoc after-the-fact review would badly undercut lawyers' ability to determine with certainty what information would be deemed privileged. "[U]ncertainty matters in the privilege context, for the Supreme Court has told us that an 'uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'" *KBR*, 756 F.3d at 763 (quoting *Upjohn*, 449 U.S. at 393). The results of such an indeterminate test is obvious: "businesses would be less likely to disclose facts to their attorneys and to seek legal advice, which would 'limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.'" *Id.* at 759 (quoting *Upjohn*, 449 U.S. at 392).

This case aptly illustrates the damage that the FTC's proposed rule would do. If Boehringer's employees had been unwilling to prepare the financial analyses of the proposed settlement for in-house counsel out of fear that those figures would later be turned over to the FTC, it is hard to see how Ms. Persky could have given her employers advice regarding what proposed settlement terms would have been most advantageous, let alone assessed the transaction for antitrust compliance purposes and its potential competitive impact. As discussed below, that would only be the beginning of the mischief such a rule would work.

B. The FTC's Approach Would Create Widespread Uncertainty, Chilling the Candid Communications Necessary for In-House Counsel to Provide Effective Legal Advice

If the FTC's argument prevails, it will upset settled understandings regarding the scope of privileged communications and make it nearly impossible for counsel to obtain the information they need to do their jobs effectively. It is no exaggeration to say that this "novel approach to the attorney-client privilege would eliminate the attorney-client privilege for numerous communications that are made for both legal and business purposes and that heretofore have been covered by the attorney-client privilege." *KBR*, 756 F.3d at 759. A few examples suffice to show the dangers of the FTC's proposed rule.

1. Internal investigations. Courts often apply the privilege to communications made to facilitate internal investigations even when business motivations are

a significant reason for the investigations. As one court noted, "[r]are is the case that a troubled corporation will initiate an internal investigation solely for legal, rather than business, purposes; indeed, the very prospect of legal action against a company necessarily implicates larger concerns about the company's internal procedures and controls, not to mention its bottom line." *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 530 (S.D.N.Y. 2015). The considerations which may cause a company ultimately to make a disclosure to a regulator or to the public may not be exclusively legal, but may incorporate both an assessment of the legal obligation to disclose and non-legal considerations such as goodwill, risk of reputational harm, and long-term market position.

Under traditional doctrine, the attorney-client privilege is robust enough to "account for the[se] multiple and often-overlapping purposes," so that information would be privileged "regardless of whether [the client] had other purposes in retaining [the attorney], and regardless of whether [the attorney's report] *itself* contained legal as opposed to business advice," because "the underlying investigation, and the interviews conducted as part of it, had *a* 'primary purpose'"—but not an *exclusive* purpose—"of enabling [the attorney] to provide [the client] with legal advice." *Id.* at 530-31 (emphasis added). This Court, after all, could not have been clearer that even "when attorney-client communications may have had both legal and business purposes," the attorney-client privilege applies "[s]o long as obtaining

or providing legal advice was one of the significant purposes of the internal investigation." *KBR*, 756 F.3d at 758-59.

The FTC's rule, if adopted, would require courts to reconsider that conclusion. According to the FTC, even if the internal investigation were ordered by the general counsel, the company would be in the position of having to prove "which hat she wore" in sending or receiving individual communications if "any competent [manager]," FTC.Br.20, would have ordered the investigation for the business purpose of improving "the company's internal procedures and controls, not to mention its bottom line," *Gen. Motors*, 80 F. Supp. 3d at 530. Clearly, under *KBR*, that is not the law. 756 F.3d at 758-59.

2. Tax advice. "Generally, courts are in agreement that tax planning—the structuring of transactions for the best tax consequences—and advice on the tax consequences of proposed action are legal advice." 1 *Attorney-Client Privilege in the United States* § 7:25. Moreover, courts have specifically embraced the idea that privilege encompasses related business advice: "[I]n the area of tax advice, many courts accept that a measure of business advice is inherent in the protected legal communication." Van Deusen, *supra* note 4, at 1416. For example, one court applied the privilege to tax advice that entailed analyzing "the mechanics and consequences of alternative business strategies." *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1038 (2d Cir. 1984).

The FTC's proposed rule would throw that understanding into doubt. For example, suppose one company sought to acquire another, and an in-house counsel with tax expertise were asked to help value the target company by analyzing the deductibility of expenses and liabilities associated with a company's employee benefit plan. In order to properly advise the company, counsel would need to evaluate both legal and financial data about the benefit plan, and would likely request analyses from the company's actuarial staff to inform her recommendations. Those communications would be privileged under existing law. Under the FTC's proposed rule, however, it would be at best an open question whether documents concerning such "business matters," which might "appear to be non-legal business documents consisting of financial forecasts," FTC.Br.13, would be privileged.

3. Acquisitions. Corporate acquisitions represent a commonly recurring circumstance when lawyers may be called upon to assess legal risks relating to a potential acquisition target for various purposes—perhaps for purposes of determining an appropriate price, or to determine what contractual steps must be taken to insulate the acquiring company from risks. Frequently, it will be necessary for lawyers to obtain what might be called "business information" about companies in order to reach informed legal judgments. For example:

- During a merger, in-house counsel for the acquiring company is assigned to evaluate the Foreign Corrupt Practices Act ("FCPA") risk of the target company and make a recommendation regarding whether any discount to the purchase price should be applied as a result of the FCPA risk. The in-house

lawyer notices questionable behavior by the acquisition target and directs the finance department to prepare analyses to evaluate how much less the acquisition target would earn absent the questionable behavior. The finance department produces documents that might "appear to be non-legal business documents consisting of financial forecasts," FTC.Br.13, to allow her to assess the magnitude of the FCPA risk and make a discount recommendation.

- In-house counsel is asked to review documents related to a proposed acquisition of another company's properties, and to comment on any environmental issues raised by the acquisition. Counsel later acts as the acquiring company's negotiator for environmental indemnity provisions in the acquisition contracts, using her legal opinions to inform the indemnity provisions proposed in the contracts. *Cf. Lee-Bolton v. Koppers Inc.*, No. 1:10-CV-253-MCR-GRJ, 2015 WL 11110543, at *2 (N.D. Fla. Apr. 20, 2015).

Under *KBR*, the outcome of each of those examples would be straightforward, because the provision of legal advice would be, at the very minimum, a significant purpose of the communications. But under the FTC's proposed standard, the company would have to point to each communication and prove to a judge after the fact that the specific communication was undertaken for the purpose of providing legal advice and was not part of a "business decision." FTC.Br.11, 14.

C. The FTC's Approach Would Undermine Broader Interests in Corporate Compliance

The effects of this constriction of the attorney-client privilege would be significant. "Corporations turn to in-house counsel . . . in part because of the assurance that the attorney-client privilege will guard from public view communications between attorneys and corporate executives." Van Deusen, *supra* note 4, at 1397. Absent that assurance, "businesses would be less likely to disclose facts to their

attorneys and to seek legal advice, which would 'limit the valuable efforts of corporate counsel to ensure their client's compliance with the law.'" *KBR*, 756 F.3d at 759 (quoting *Upjohn*, 449 U.S. at 392). If communications with in-house counsel are not privileged simply because some aspect of the legal advice touches on a business concern, the employee trust that permits the candid disclosure of necessary information would evaporate. The FTC's approach would thus "frustrate[] the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." *Upjohn*, 449 U.S. at 392. In other words, a flimsy attorney-client privilege will beget flimsy legal advice.

The "chilling of intra-corporation legal dialogue" would not simply harm businesses, however; it could also "lead to significant social consequences as corporate officers simply stop asking the difficult questions rather than risk exposure during litigation." Spahn, *supra* note 5, at 308. Businesses "'constantly go to lawyers to find out how to obey the law,'" and applying an overly "narrow scope" to the privilege "makes it difficult for corporate attorneys to formulate sound advice." *Upjohn*, 449 U.S. at 392 (citation omitted). Such advice is critical because, given the complexity and breadth of modern regulation, compliance "is hardly an instinctive matter." *Id.* Thus, "[a]s a society, we should encourage corporations to involve their legal personnel in important decisions to ensure legal and regulatory

compliance." Spahn, *supra* note 5, at 309. The FTC's restrictive view of the attorney-client privilege undermines these important interests.

CONCLUSION

This Court should affirm the district court's judgment.

Respectfully submitted.

Of counsel:

Kate Comerford Todd
Sheldon Gilbert
U.S. CHAMBER
LITIGATION CENTER
1615 H St., N.W.
Washington, D.C. 20062
Telephone: 202.463.5685
Facsimile: 202.463.5346

Counsel for Amicus Curiae
Chamber of Commerce
of the United States of America

Amar D. Sarwal
Mary Blatch
ASSOCIATION OF
CORPORATE COUNSEL
1025 Connecticut Ave., N.W.
Suite 200
Washington, D.C. 20036
202.293.4103

Counsel for Amicus Curiae
Association of Corporate Counsel

/S/ JOHN ELWOOD
JOHN P. ELWOOD
VINSON & ELKINS LLP
2200 Pennsylvania Avenue, N.W.
Suite 500 West
Washington, D.C. 20037
Telephone: 202.639.6755
Facsimile: 202.639.6604
jelwood@velaw.com

ZACHARY J. HOWE
VINSON & ELKINS LLP
1001 Fannin Street, Suite 2500
Houston, Texas 77002-6760
Telephone: 713.758.2154
Facsimile: 713.615.5004

Counsel for Amicus Curiae

June 2, 2017

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,074 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

Dated: June 2, 2017

/s/ John Elwood
John Elwood

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed with the Clerk using the appellate CM/ECF system on June 2, 2017. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

Lawrence D. Rosenberg
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
ldrosenberg@jonesday.com

David C. Shonka
Acting General Counsel
Joel Marcus
Deputy General Counsel for Litigation
Mark S. Hegedus
Attorney
FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Dated: June 2, 2017

/s/ John Elwood
John Elwood

US 5026605v.4