The Directors' Roundtable

Individual Accountability For Corporate Wrongdoing

Director & Officer Liability Considerations

Dana Kopper, Managing Director

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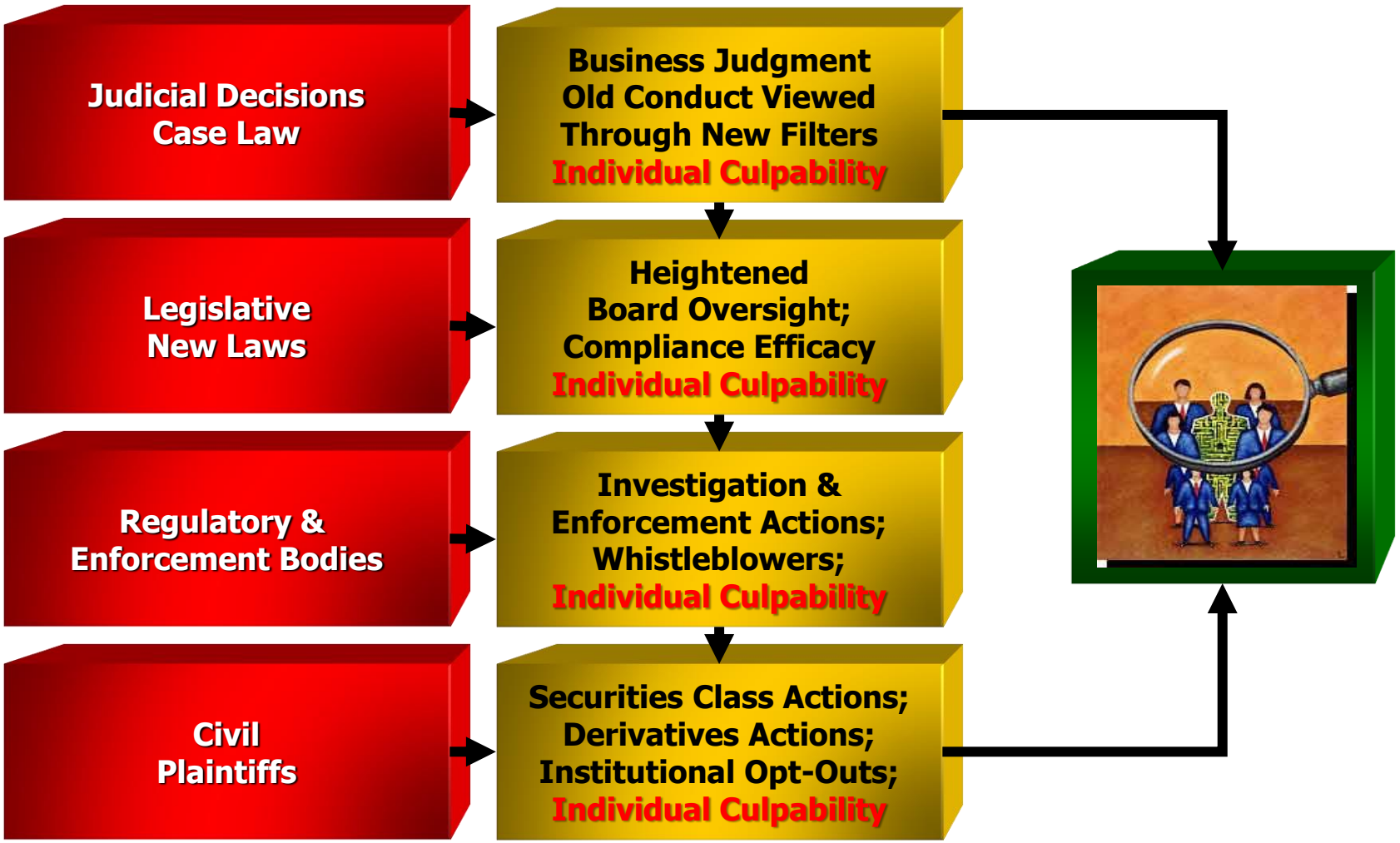
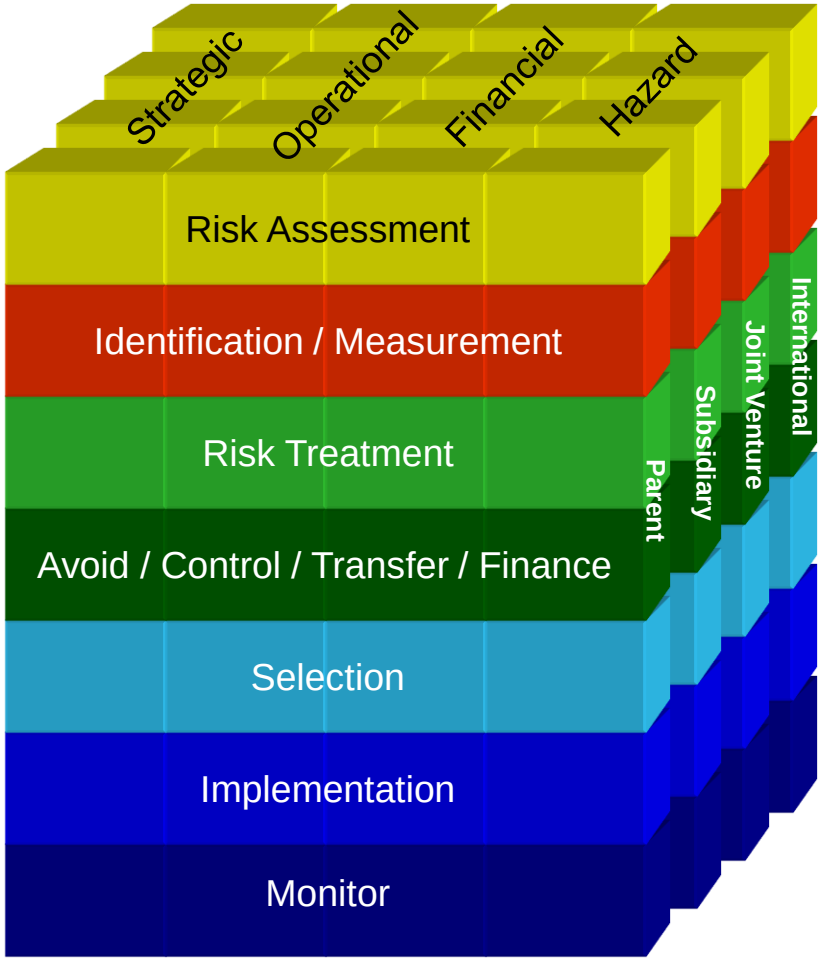
Domestic & International Environmental Scan…

Continuing Challenges / Evolving Risks



Enterprise Risk Management
Foundational Platform For Today's Complex Environment



- **Strategic**
  - Competition, Social, Capital Availability, Merger, Acquisition
- **Operational**
  - Cyber, Product Failure, Regulatory, Compliance, Internal Controls, Integrity, Reputational
- **Financial**
  - Pricing Risk, Asset Risk, Currency Risk, Liquidity Risk, Credit Risk, Investment Management Risk
- **Hazard**
  - Property Damage, Income, Liability, Personnel

Integrating Risk Management Strategies

CORE BENEFITS

- Reduced Risk Profile
- Reduced Cost of Risk
- Enhanced Personal and Organizational Asset Protection

Governance Risk Management

Management & Professional Liability

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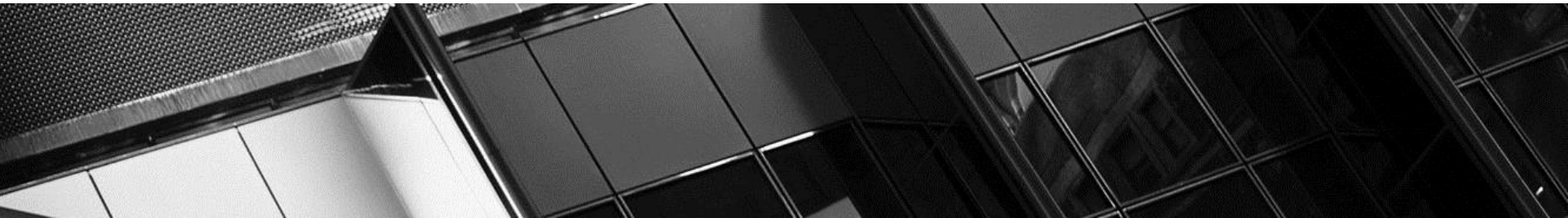
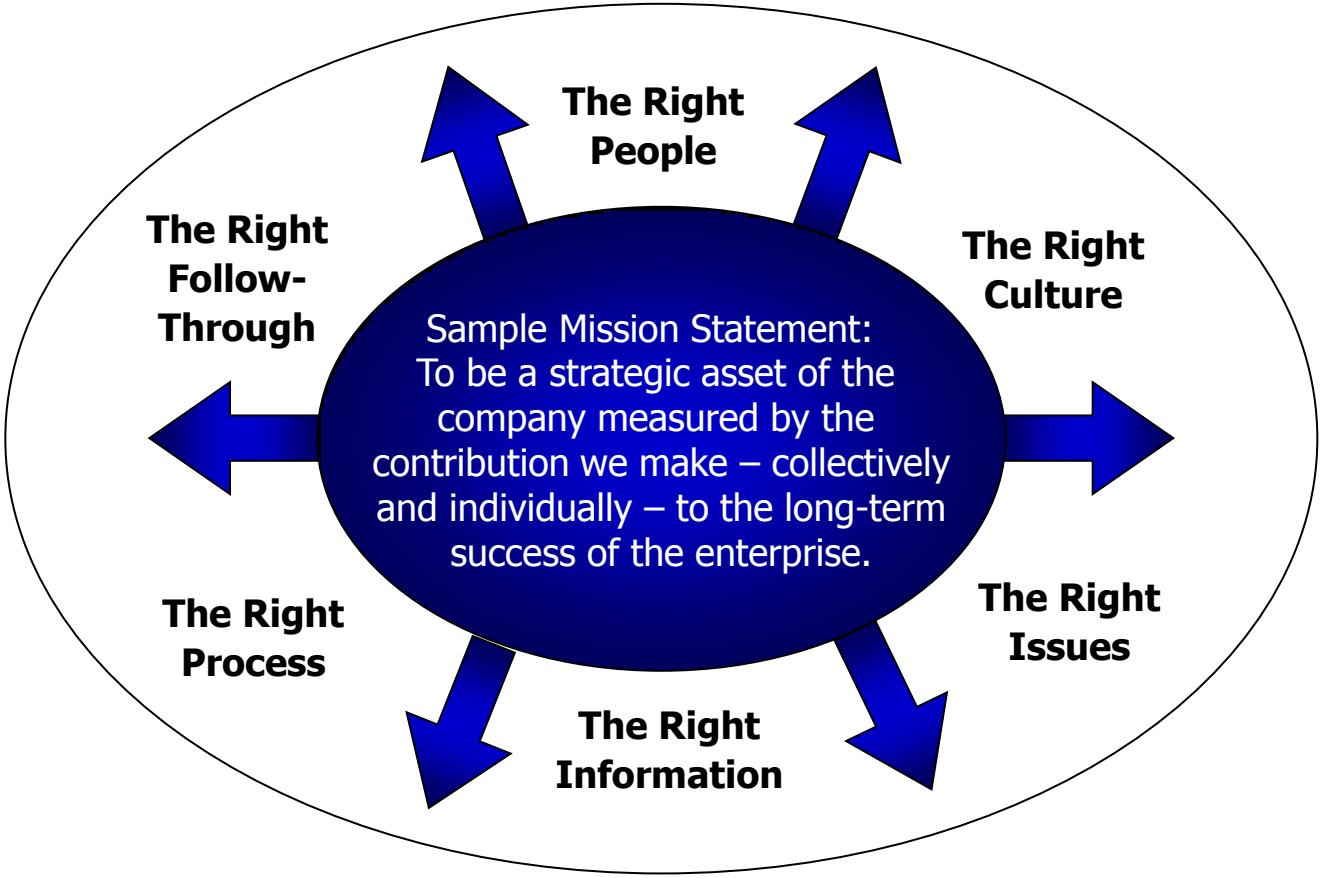


Board Dynamics…

Structure Versus Execution…Substantial Source of D&O Claims
More Than Guidelines, Charters & Checklists …

These High-Performance Characteristics…

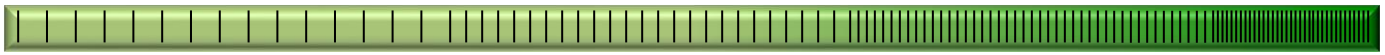


…Foster Superior Shareholder Value & Risk Mitigation

How Effective Are We?

- **Sample Core Areas of Board Governance**
  - Structure & Composition
  - Director & CEO Compensation
  - Strategic Planning
  - Processes & Procedures
  - Interaction
  - Information
  - Committees
  - Roles & Responsibilities
  - Accountability Methods
  - Risk Oversight; Organizational Compliance Efficacy
  - Code of Conduct & Ethics

How Engaged Should We Be?

LEAST INVOLVED  MOST INVOLVED

The Passive Board

- Functions at the discretion of the CEO.
- Limits its activities and participation
- Limits its accountability
- Ratifies management's preferences

The Certifying Board

- Certifies to shareholders that the CEO is doing what the board expects and that management will take corrective action when needed.
- Emphasizes the need for independent directors and meets without the CEO.
- Stays informed about current performance and designates external board members to evaluate the CEO.
- Establishes an orderly succession process.
- Is willing to change management to be credible to shareholders.

The Engaged Board

- Provides insight, advice, and support to the CEO and management team.
- Recognizes its ultimate responsibility to oversee CEO and company performance; guides *and* judges the CEO.
- Conducts useful, two-way discussions about key decisions facing the company.
- Seeks out sufficient industry and financial expertise to add value to decisions.
- Takes time to define the roles and behaviors required by the board and the boundaries of CEO and board responsibilities.

The Intervening Board

- Becomes intensely involved in decision making around key issues.
- Convenes frequent, intense meetings, often on short notice.

The Operating Board

- Makes key decisions that management then implements.
- Fills gaps in management experience.

Individual Contractual Indemnity
A Critical Tool

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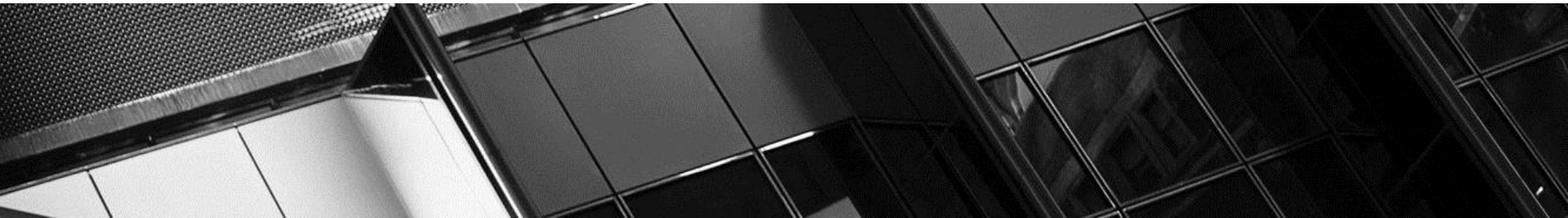
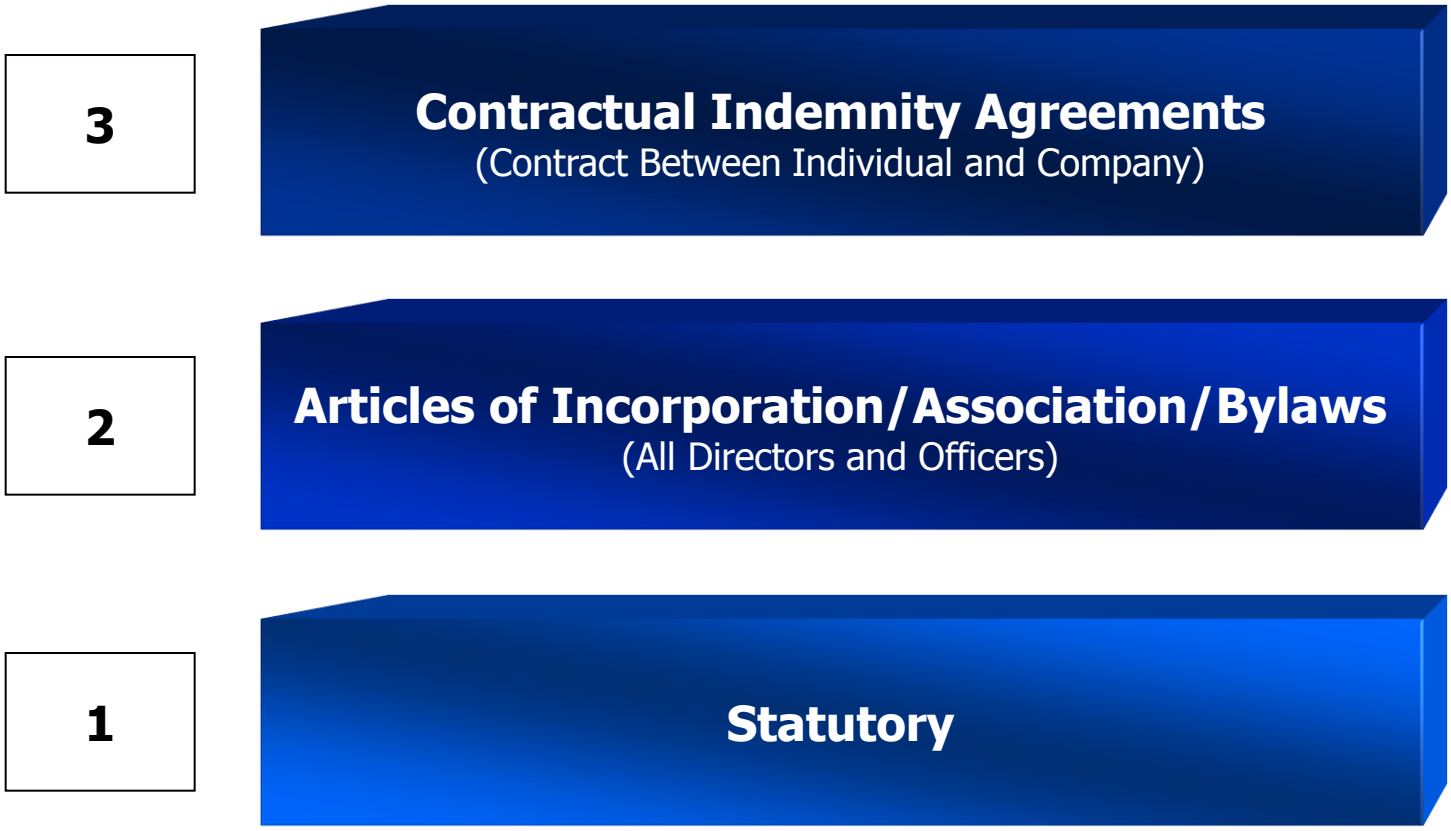
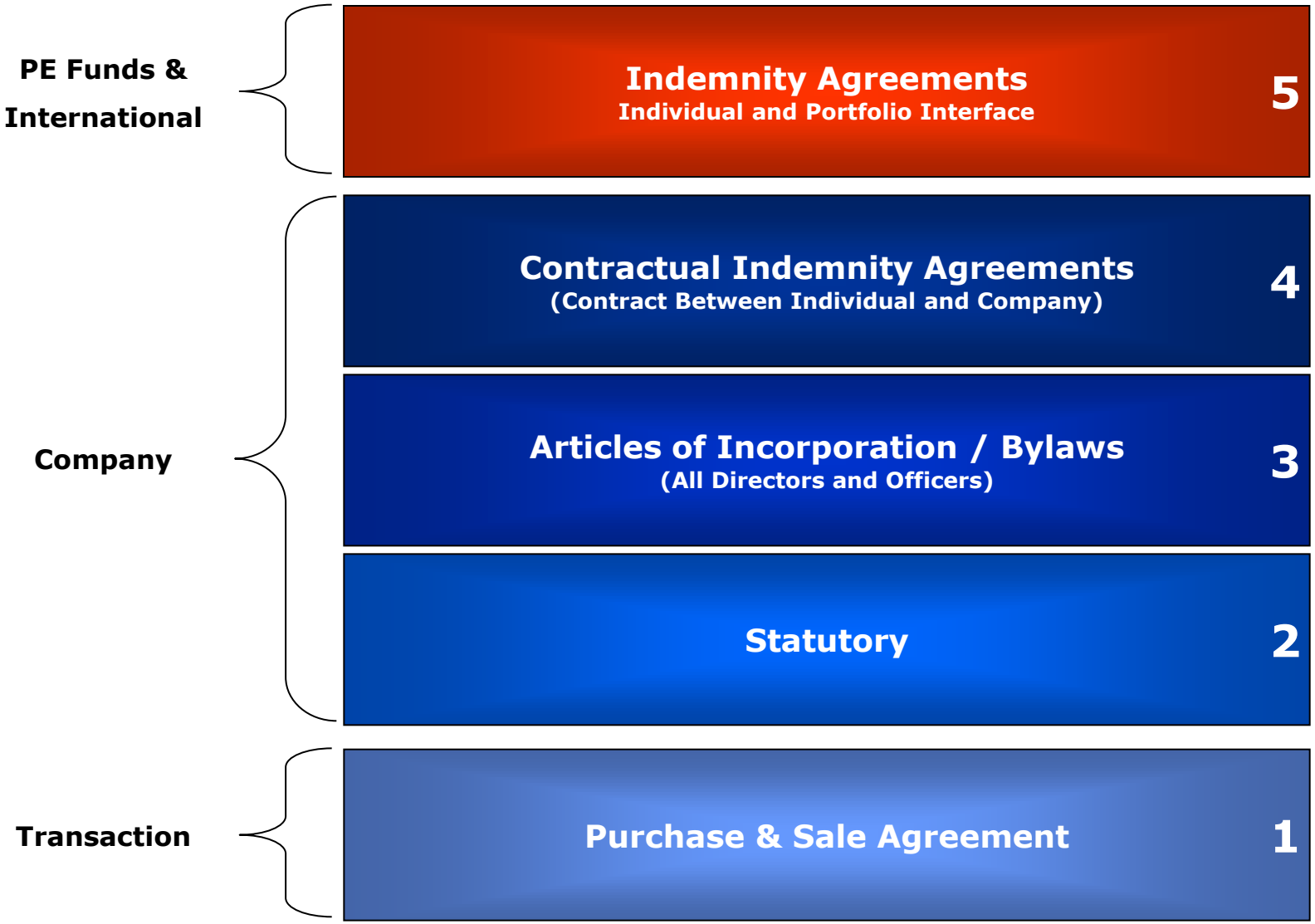


Indemnification…Generally



Harmonized Indemnification



International Indemnity Topics
A Sampling

- **Individual contractual agreements (U.S. and international) expand and clarify the nature and scope of indemnification.**
- **Enhanced indemnification will create more financial risk for funding organization.**
- **Enhanced indemnification is consistent with original intent of indemnification to encourage good faith risk-taking on the part of directors and officers.**

- Mandate indemnification
- Not prohibit indemnification for gross negligence, recklessness, etc. (standards of conduct)
- Mandate advancement of defense expenses "on demand"
- Terms to discourage wrongful refusals to indemnify; enhance enforcement rights
- Create individual contractual rights that cannot be unilaterally amended, or misinterpreted by successor organizations
- Expand expense definition to include federal, state, local, or foreign taxes based upon actual or deemed receipt of indemnity payments or advancements
- Specify outside directorships
- Provide right and prosecution costs to enforce rights
- Accelerate determination process
- Clarify lack of action to be deemed favorable determination
- Provide appropriate severability provisions
- Burden of proof on corporation to overcome indemnity presumptions; order or plea not determinative of good faith conduct
- Provide litigation appeal rights
- Strengthen binding effect provisions in change of control situations

D&O Liability Insurance Considerations

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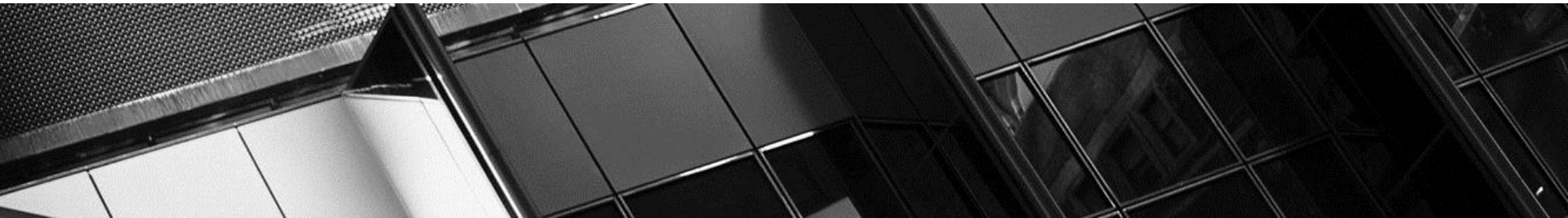
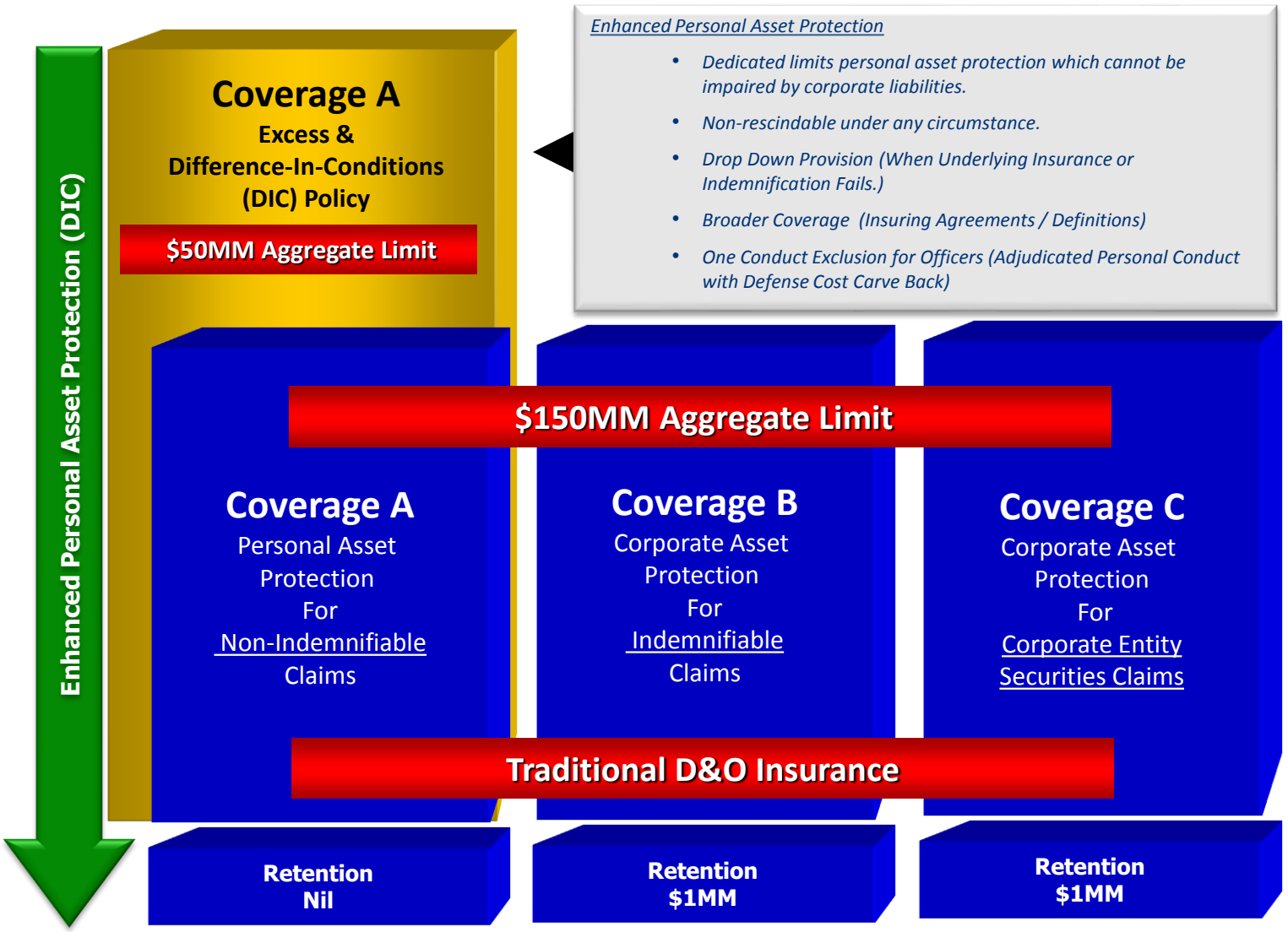


D&O Liability Insurance Coverage Part Overview

Including Enhanced Personal Asset Protection (DIC)

Important Note: Terms, conditions, limitations, exclusions, and exceptions apply.



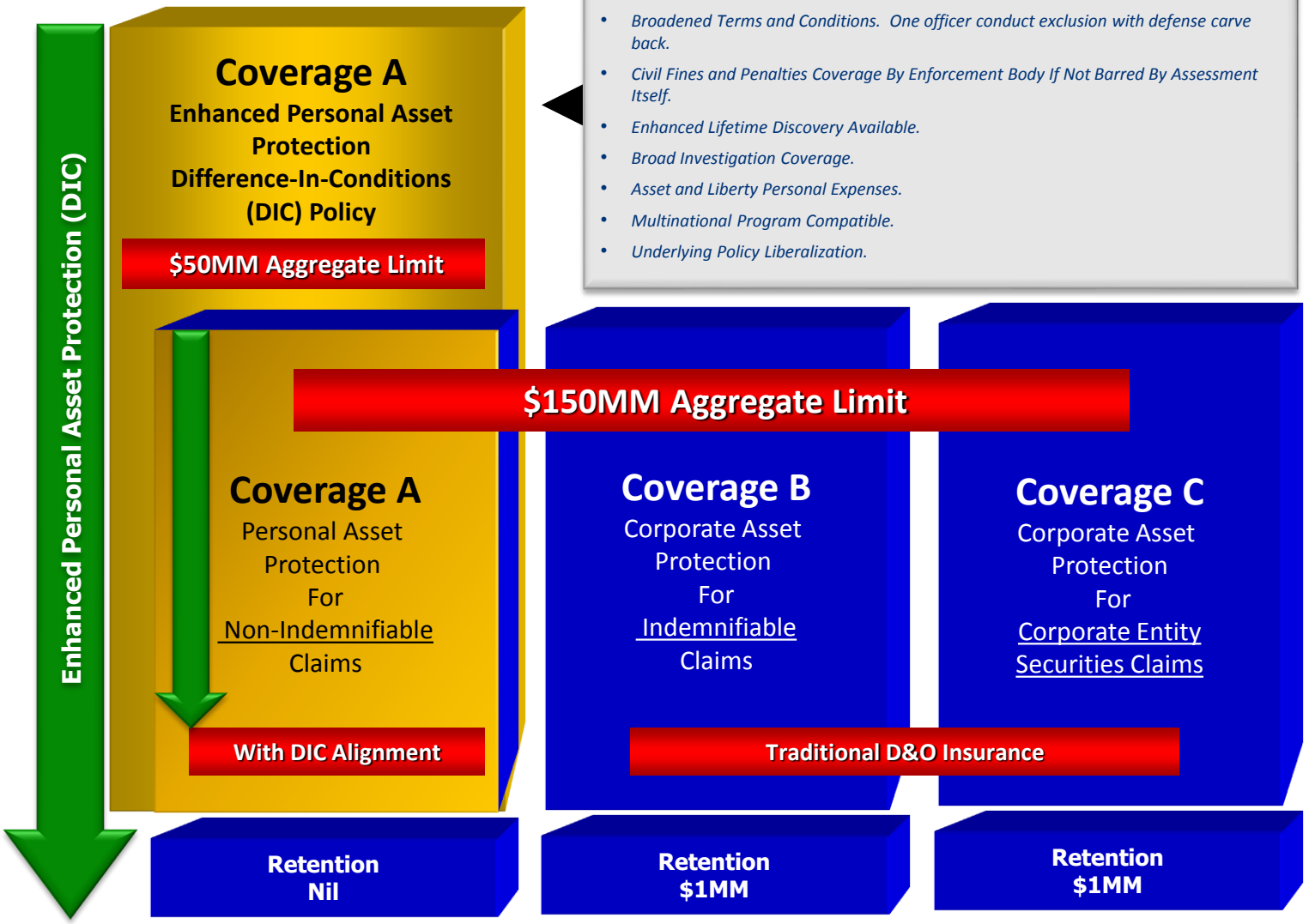
D&O Liability Insurance Coverage Part Overview

Full Tower Enhanced Personal Asset Protection (DIC)

Important Note: Terms, conditions, limitations, exclusions, and exceptions apply.

Enhanced Personal Asset Protection

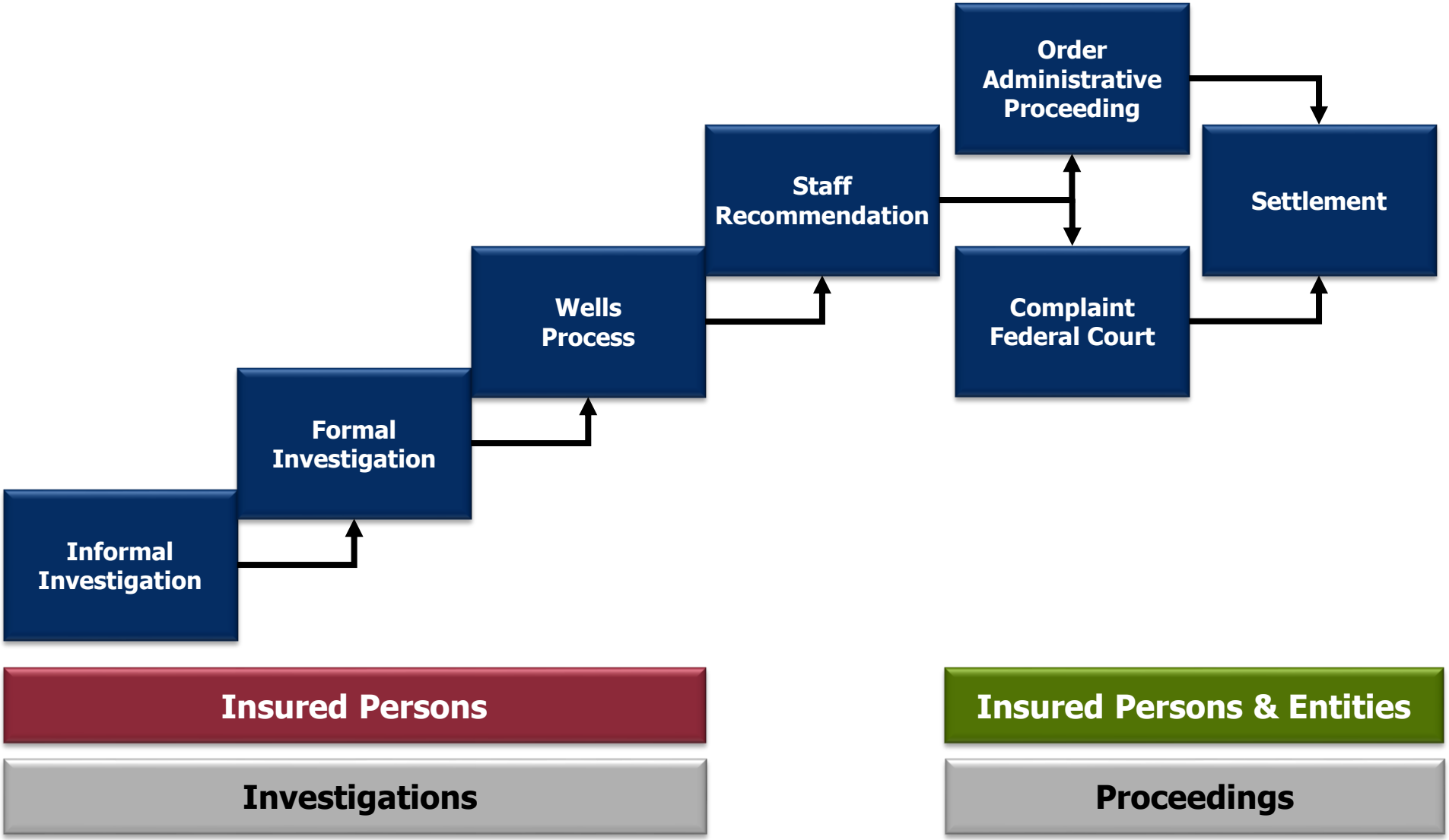
- *Dedicated personal asset protection limits which cannot be impaired by corporate liabilities. Non-rescindable under any circumstance.*
- *Broadened Terms and Conditions. One officer conduct exclusion with defense carve back.*
- *Civil Fines and Penalties Coverage By Enforcement Body If Not Barred By Assessment Itself.*
- *Enhanced Lifetime Discovery Available.*
- *Broad Investigation Coverage.*
- *Asset and Liberty Personal Expenses.*
- *Multinational Program Compatible.*
- *Underlying Policy Liberalization.*



SEC Investigations

How Do Most "Public" D&O Policies Respond?

Important Note: Terms, conditions, limitations, exclusions, and exceptions apply.



Entity Investigation Options
A Sampling

Important Note: Terms, conditions, limitations, exclusions, and exceptions apply.

- **Entity Investigation Coverage – Response Formats**
  - *Securities Violations / Regulatory & Enforcement Bodies*
  - *Internal Investigations & Derivative Investigations*
  - *FCPA / Foreign Equivalent / Investigations*
  - *No Wrongful Act Allegations*
- **Entity Investigation Coverage – Liability Formats (Older Style)**
  - *Concurrent with Securities Claims*
  - *Does Not Pre-Date Securities Claims*
  - *Formal Investigations Only*
  - *Wrongful Act Allegation*
- **Entity Investigation Coverage – Liability Formats (Newer Style)**
  - *Look-Back Provision*
  - *Circumstance Notice Date Becomes More Important*
  - *Triggered by Actual Claim (Securities Claim Only For Public Companies ; Broadened for Private)*
  - *Can Allow Investigation Expense Cover Back to Circumstance Notice Date*
  - *No Wrongful Act Allegation During Look-Back Period*

Other Claim & Coverage Types
A Sampling

Important Note: Terms, conditions, limitations, exclusions, and exceptions apply.

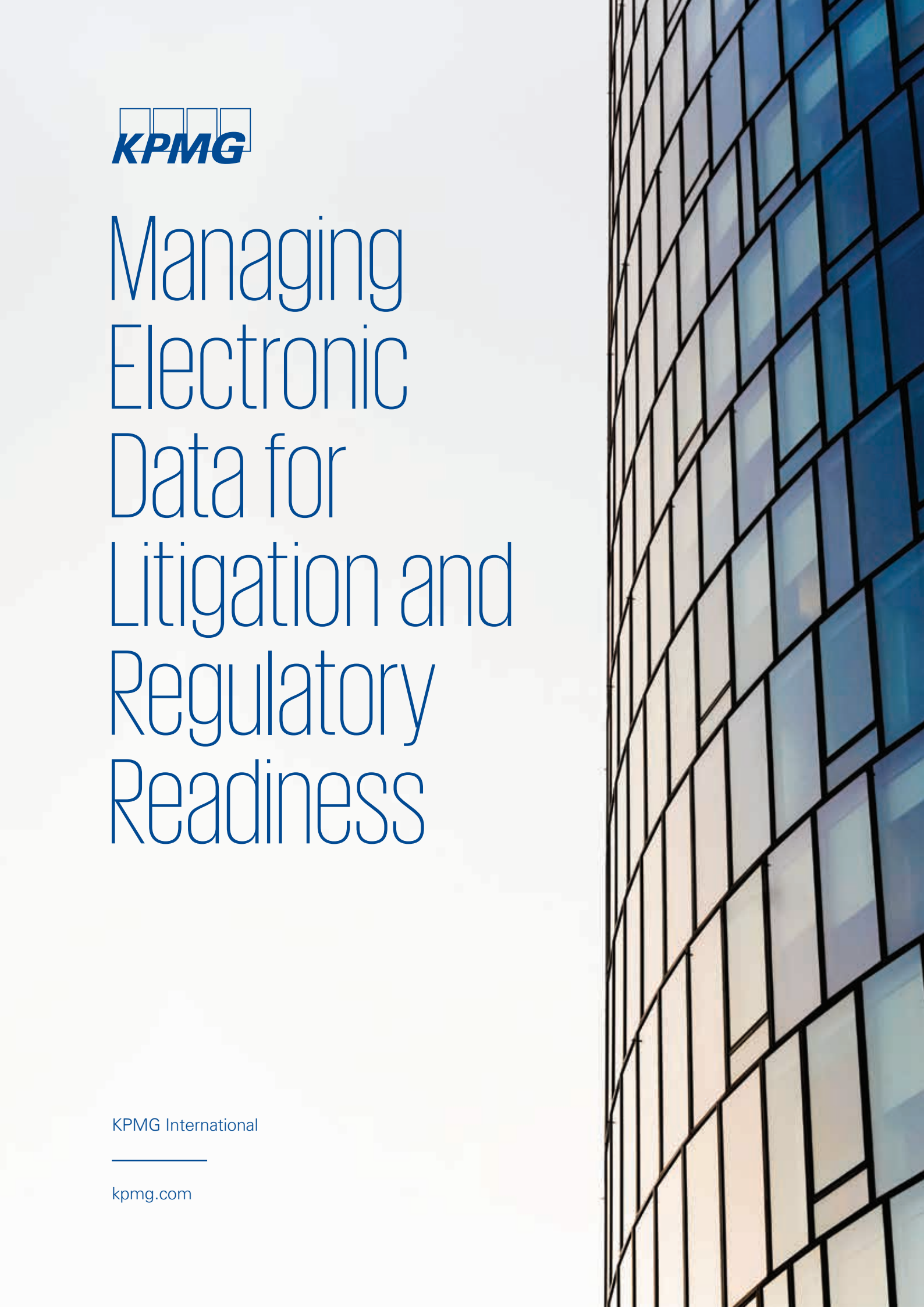
- **Pre-Claim Inquiry** *(Insured Persons)*
  - *Verifiable request to appear at a meeting or interview; or produce documents;*
  - *But, only at request of Enforcement or Legislative Body or Insured Organization; and*
  - *As respects Organization, only as part of Enforcement Body investigation; or*
  - *An Insured Organization's Derivative Demand Investigation.*
  - *No Wrongful Act requirement.*
  - *Does not include routine or regularly scheduled regulatory actions.*
- ***Books and Records Coverage (Delaware 220 Demands)***
- ***Plaintiff Fee With and Without Retention***
- **Whistleblower Actions** *(Insured Persons and Entities)*
- **SOX 304 and Dodd-Frank 954 Expenses** *(No Actual Clawback; However, Off Shore Options)*
- **FCPA & UK Bribery Act** *(Limited Fines and Penalties – Insured Persons and Entities)*
- **Foreign Liberalization** *(Insured Persons & Entities)*
- **Selling and/or Controlling Shareholders** *(Insured Persons)*

International D&O Notes…

- **Top 10 Countries With Mature D&O Liability Systems / Laws**
  1. Australia
  2. Canada
  3. England
  4. France
  5. Germany
  6. Hong Kong
  7. Italy
  8. Japan
  9. Korea
  10. The Netherlands

- **Up & Coming Jurisdictions – Economically Powerful**
  - ✓ **Brazil**
  - ✓ **China**
  - ✓ **India**

- ***Summary Notes***
  - Public & private company D&O litigation trending upward.
  - Mature D&O liability systems (Top 10) all include specific laws focused on right of civil and criminal remedies for class or mass tort actions.
  - Heightened awareness of individual culpability within corporate settings, especially amongst regulators.
  - Aggrieved overseas investors seek litigation alternatives outside of the U.S.
  - Anti-Corruption/Anti-Bribery Laws: FCPA; UK Bribery Act; OECD based; United Nations conventions far reaching.
  - Enforcement and follow-on civil actions increasing significantly and now converging with domestic enforcement actions in Asia.



Managing Electronic Data for Litigation and Regulatory Readiness

KPMG International

kpmg.com

Content

Introduction

In an environment of continuing growth in litigation worldwide, and the expansion of business regulation and enforcement actions globally, it is essential that companies are adequately prepared to respond to requests for the disclosure of electronic data. In the absence of appropriate systems, processes and controls, companies run the risk of fines, heavy litigation costs and damage to their reputation.

At the same time, managing eDiscovery is becoming ever more challenging due to the increasing volume and complexity of data and systems. Meeting obligations to respond to data requests is becoming increasingly difficult, representing greater risks and costs.

The 2015 KPMG Forensic global survey of general counsel, compliance and risk officers shows that, although more than 70 percent of respondents have processes and systems in place to manage litigation and regulatory requests, there remain several opportunities for improvement that would help companies execute eDiscovery in a more efficient and cost-effective manner.

The key findings of the latest survey highlight the need for proactive engagement by Legal, Compliance and Risk departments to shape their strategy early in order to achieve the best outcomes for their business.

The key themes/issues from our 2015 survey are:

01

Cost of eDiscovery: Although cost is a significant concern for the majority of respondents, there is no clear sign that many companies have a strategy in place to address the issue.

02

Manual document review and the application of technology assisted review: The review of documents remains one of the largest cost elements in any eDiscovery matter, yet the adoption and effective application of technology assisted review and other technology-based tools continues to lag. The use of technology assisted review is seen as an additional cost, rather than a means of cost saving.

03

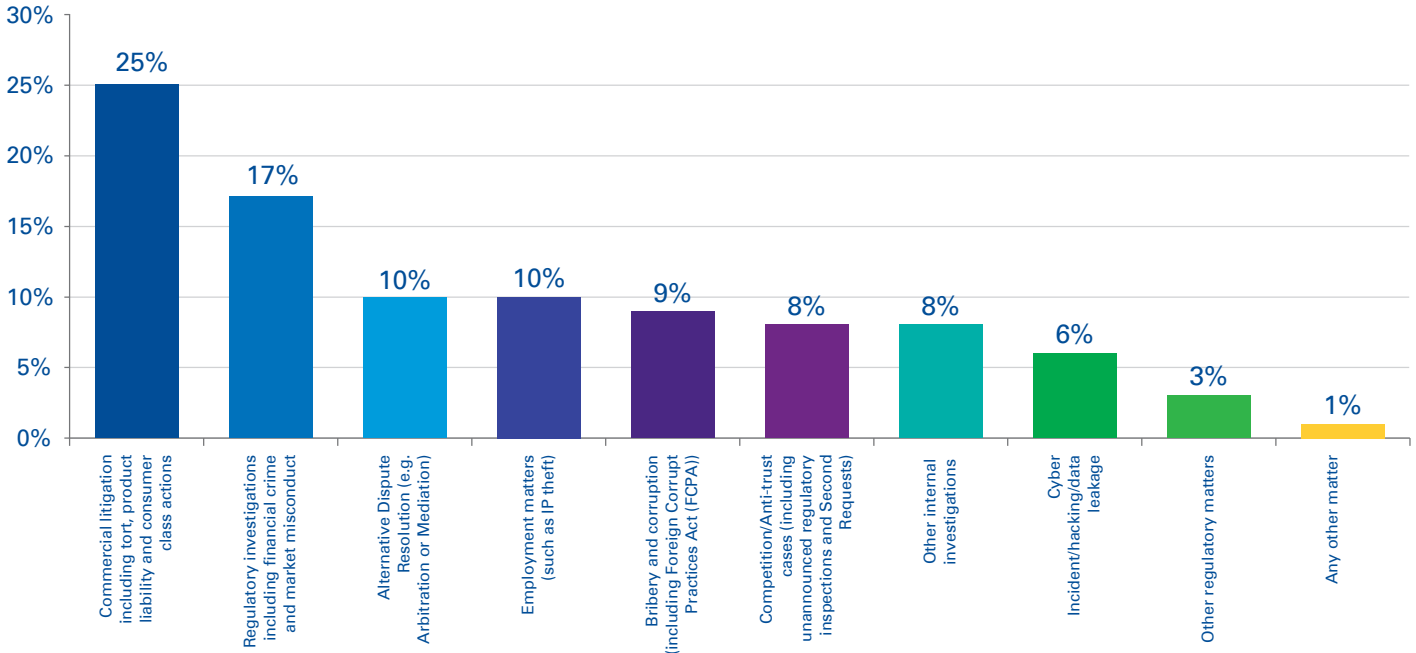
Internal versus external capability: Many services provided by external vendors are viewed as expensive, yet many corporations do not necessarily have the skills or tools internally to manage the eDiscovery cycle.

In addition, our analysis generated some interesting findings which point to the evolving nature of global eDiscovery, as compared to the results received in 2008, when KPMG ran our first survey on this subject. These include:

- Not surprisingly, litigation continues to represent the largest source of demand for eDiscovery services (as compared to regulatory, competition or investigation matters).
- There was, however, a 50 percent increase in regulatory/competition related requests since 2008.
- Employee misconduct is the prime driver of both internal investigations and regulatory matters.
- Cyber security is cited as an emerging issue, but one which companies feel the least prepared to tackle.

Figure 1:

In the last 12 months, which of the following types of regulatory, investigation and/or litigation matters has resulted in the need for collection, analysis, review and/or discovery of electronic data or records?



01. Cost of eDiscovery

Internal and external spend related to eDiscovery is a key theme for respondents, with just under a third of respondents (29 percent) stating it is their primary concern (see figure 3). This is hardly surprising given the high level of expenditure internally and externally on the collection, review and discovery of electronic data. In the 12 months prior to the survey, 36 percent spent more than $1 million and 15 percent spent more than $10 million (see figure 2). Based on our experience working with clients, these expenditure estimates are likely to underestimate by a significant margin the actual costs incurred.

> "...in the 12 months prior to the survey, **36 percent** spent more than **$1 million** internally and externally on the collection, processing and review of electronic data, and **15 percent** spent more than **$10 million**."

Figure 2:

Within the past 12 months, approximately how much would you say has been spent in USD (internally and externally) on the collection, review and discovery of electronic data in litigation or investigations across all of your organization's cases?

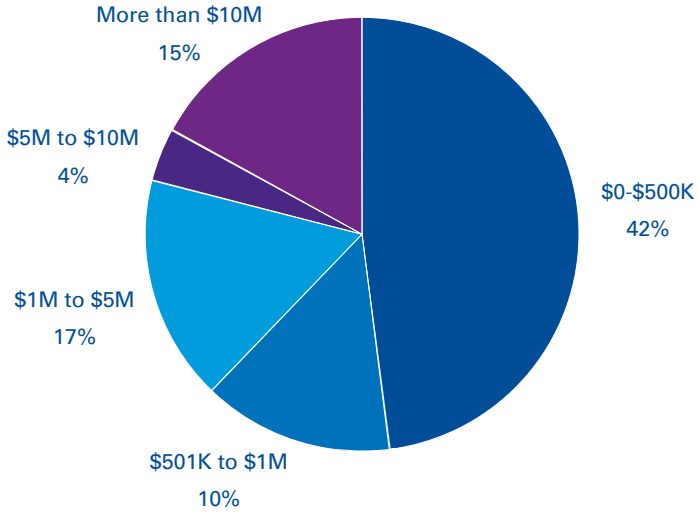
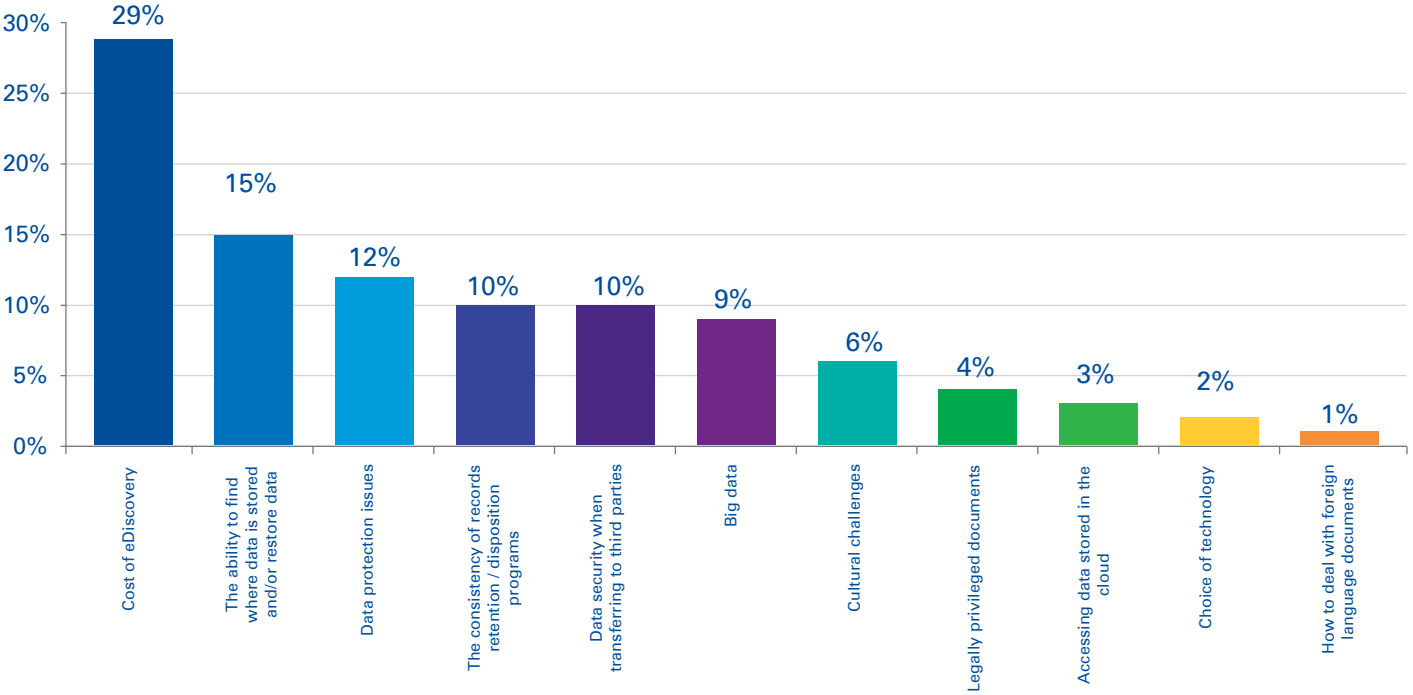


Figure 3:

How concerned are you about the following issues regarding the collection, review and disclosure of electronic data or documents in your organization?

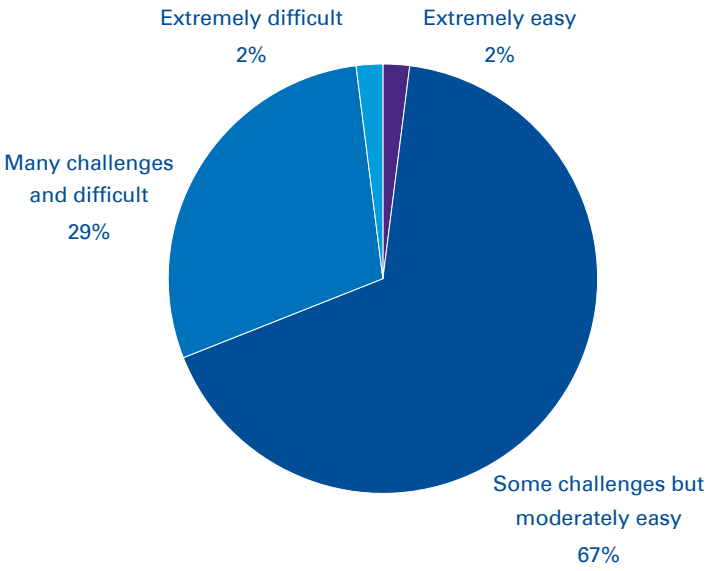


Twenty-nine percent of respondents say the cost of eDiscovery is a major issue and is of most concern to their organization. In addition, there were a variety of other concerns that also have a clear cost implication, such as the ability to comprehensively identify and access data, while keeping it consistent, secure and compliant (figure 3).

Thirty-one percent (see figure 4) of respondents say it is difficult to retrieve all relevant electronic data that would be subject to eDiscovery (compared with the 2008 survey when 38 percent said it was difficult). This suggests that the issue of data collection remains a significant challenge. Factors which contribute to the complexity and cost of data collections include dealing with data sources and volumes that are increasingly significant in size (big data), data privacy issues, and poor data quality.

Figure 4:

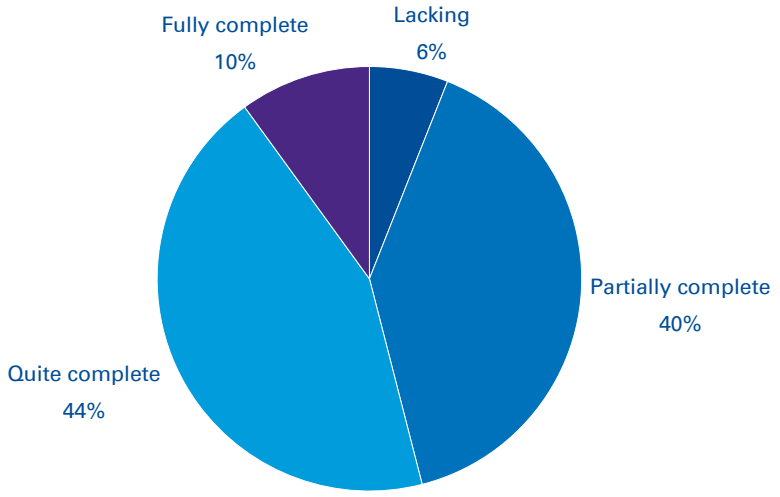
How easy is it for you to retrieve all relevant electronic data in your organization that would be subject to a request taking into account potential issues with collection from various systems, backup data, legacy systems and geographic differences in IT landscapes?



The vast majority of respondents (94 percent) have a policy of some sort to address the process of collecting and analyzing data (see figure 5). However, the survey suggests there is still ample room for meaningful improvements.

Figure 5:

How complete are your policies, processes or procedures for collecting and preserving such data?



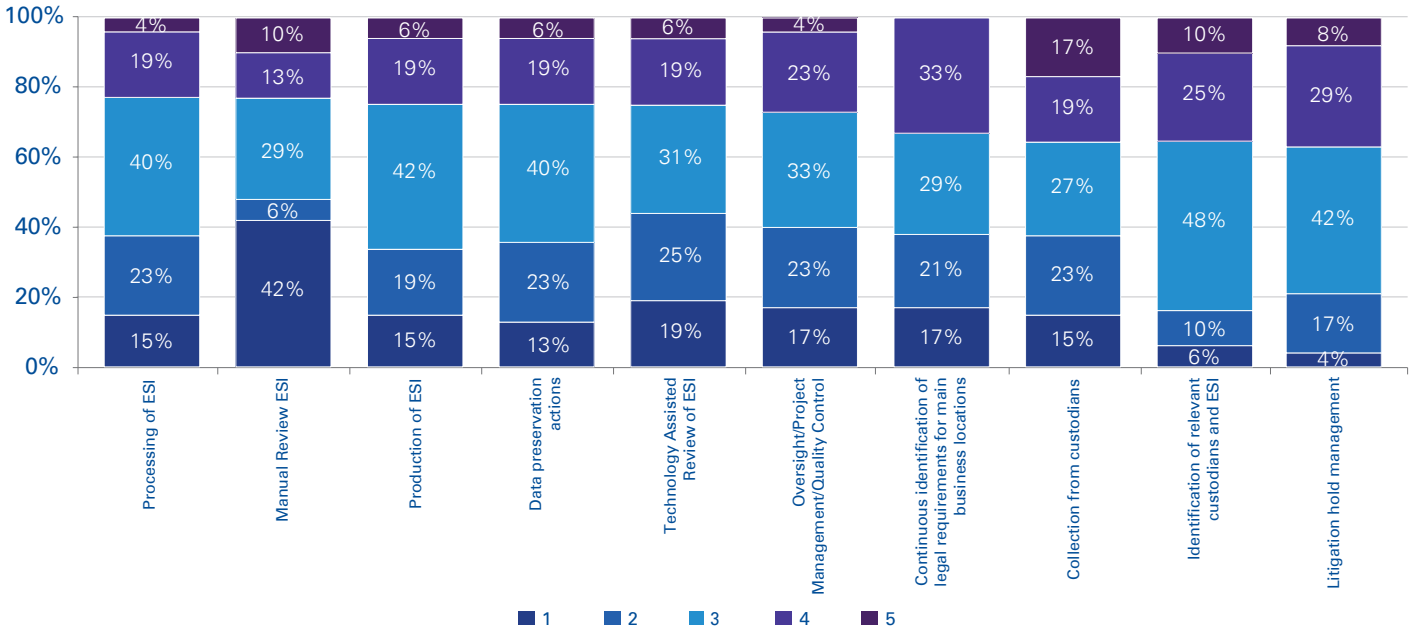
The manual review of electronic data was highlighted as a significant and ongoing expense to the business, with 42 percent saying it is extremely costly (see Figure 6). This area of considerable expense is to be expected in the current environment of ever-increasing litigation, regulatory interventions and data volumes. A 2012 report on litigation costs by the Rand Institute for Civil Justice[1] indicated that document review accounts for 73 percent of the total cost of eDiscovery. Although it is unlikely to have changed much since then, it is encouraging that 27 percent of respondents regarded data review services as extremely cost effective and a further 50 percent as somewhat cost effective (see figure 7).

KPMG VIEW

It is critical to establish a consistent, repeatable and defensible process around the identification, collection and storage of data subject to eDiscovery requests. But insight and value do not come from the data alone; they must be supported by skilled staff with an understanding of what is required to comply with each specific request. By identifying and collecting the correct data at the outset, reducing the time required for collection, and re-using collected data where possible, companies can make significant efficiency gains by reducing data volumes at the 'source' and controlling downstream costs related to document review.

Figure 6:

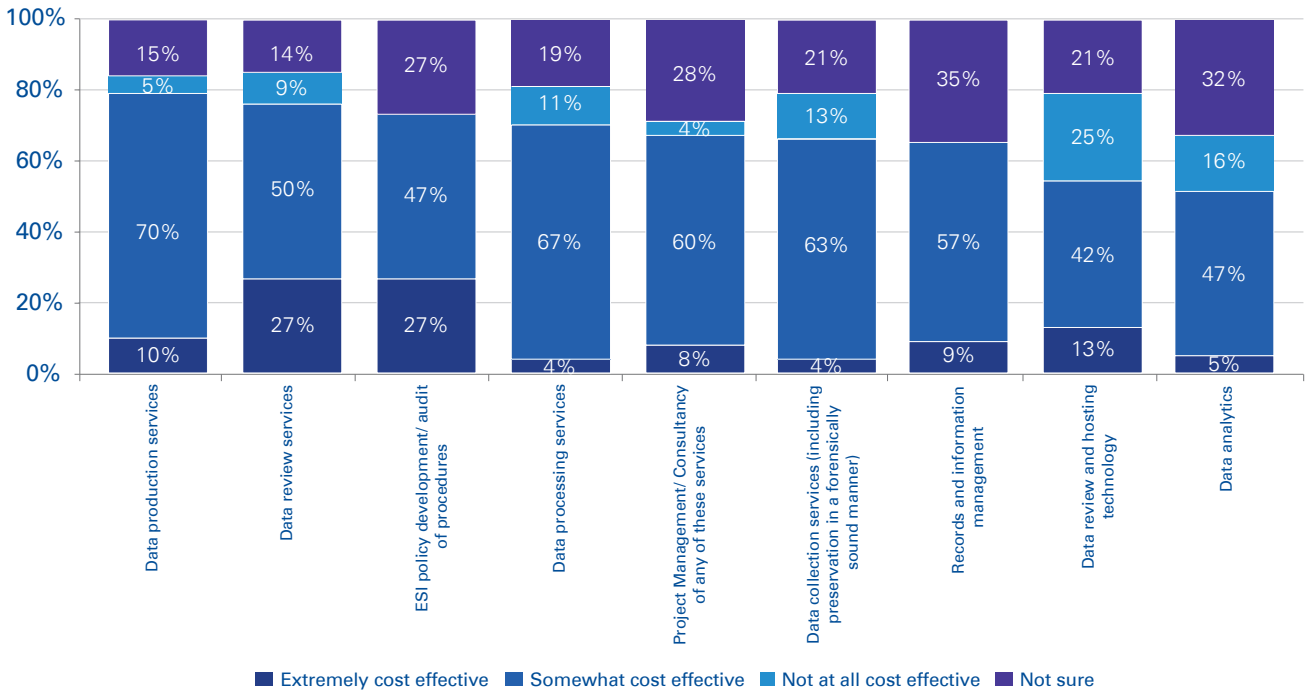
Thinking about the procedures that your organization might need to undertake with respect to electronic evidence in litigation, how costly do you regard the following? Please give your answer on a scale of 1 - 5 where 1 is extremely costly and 5 is an insignificant cost to your organization.



[1] Where the Money Goes, Understanding Litigant Expenditures for Producing Electronic Discovery, 2012, Nicholas M. Pace and Laura Zakaras

Figure 7:

Where you have used an external provider for eDiscovery services, have you found it to be cost-effective?



Technology assisted review and data analytics are also regarded as costly, which raises significant questions that we will address in more detail below. In short, technology assisted review and similar tools have yet to be viewed as generators of value and/or cost savings, and, instead, continue to be viewed as merely an additional cost.

While the cost of eDiscovery and management of data are a significant burden, respondents also identified data protection issues, consistency of records retention and data security in their top 5 concerns for their day-to-day operations (see figure 3).

KPMG VIEW

Initiatives to reduce the cost burden in eDiscovery cannot be taken in isolation. When considering how to effectively and efficiently respond to data requests; data protection/privacy, records retention and security must all be taken into consideration.

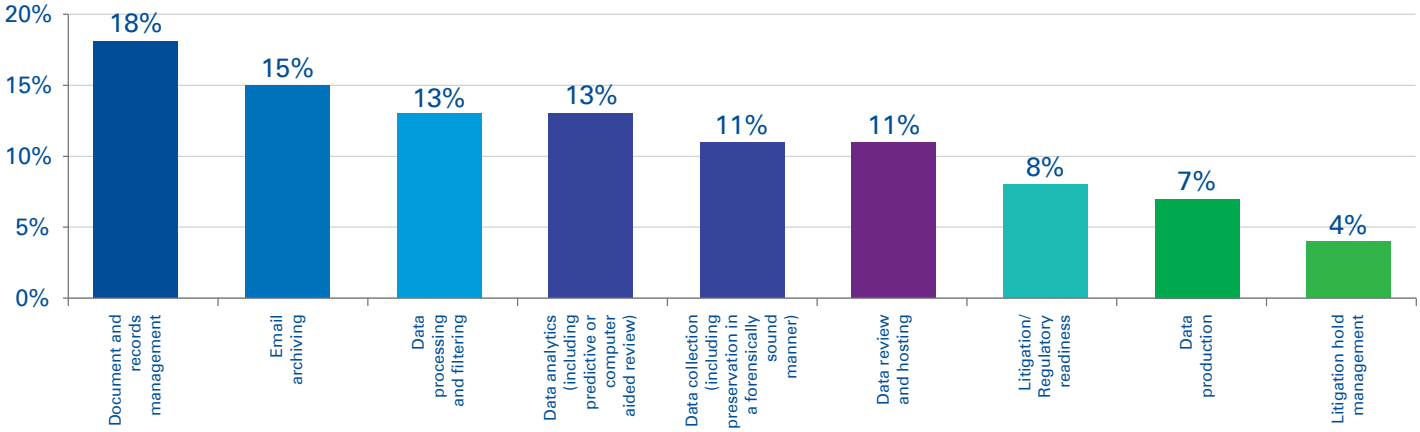
02. Manual document review and the application of technology assisted review

Whereas manual document review is a significant cost element, the survey results are striking in that technology assisted review and other technology-based tools continue to exhibit slow adoption. Furthermore, in the instances where they are applied, these technologies do not necessarily deliver the expected value or reduction in costs.

Our survey suggests that the development of analytics capability and technology assisted review tools will continue to be slow. Only 13 percent of respondents indicate that their organization has made technology investments in this area (see figure 8), and 38 percent do not intend to use external support to provide such tools to the business (see figure 9). It is difficult to identify the reason for this slow take-up in the use of technology assisted review, but clearly it has failed to live up to expectations and its value is questioned. The IT research and advisory firm Gartner refers to the "Hype Cycle Model" of adoption of various technologies and it appears that technology assisted review is currently sitting in the "trough of disillusionment" within this model.

Figure 8:

In which of the following areas has your organization invested in technology in the last three years?



KPMG VIEW

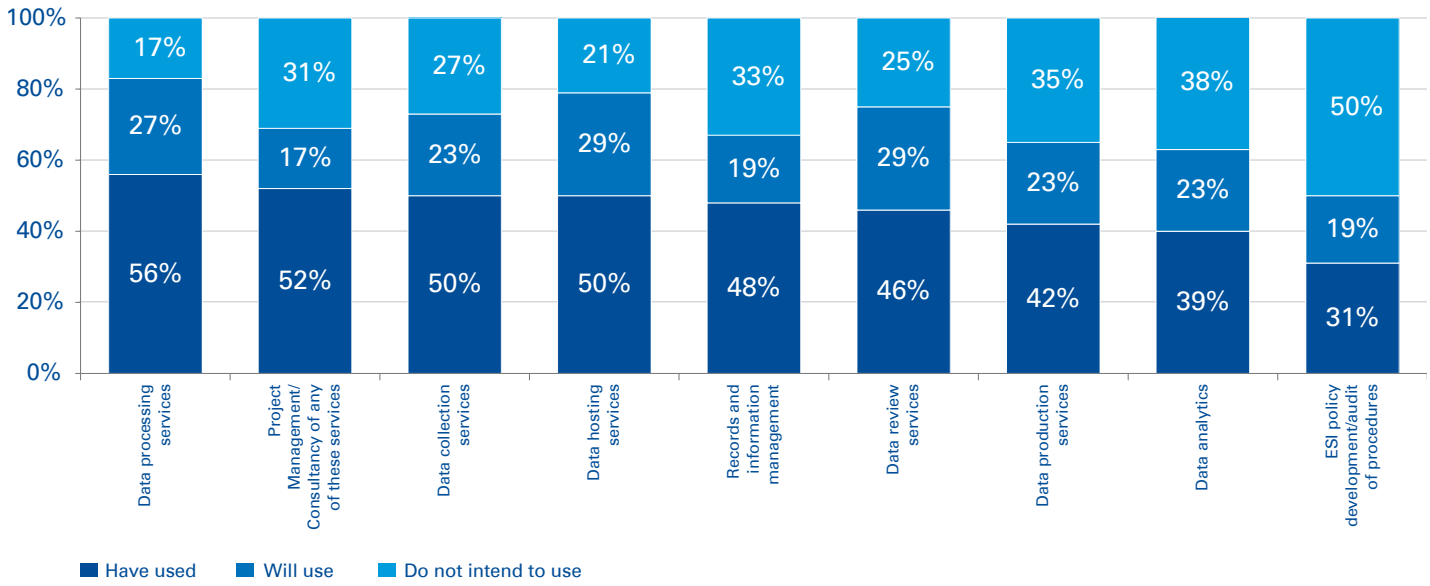
Unit costs for document review services are falling, but the decline is being outpaced by the overall increase in the volume and types of data under review. In order to make a significant impact on the cost of reviewing documents, data analytics and technology assisted review must be integrated as a standard, transparent and defensible workflow in eDiscovery matters. Although technology assisted review may not have been widely adopted so far, we still believe that it is an area that, in the medium term, will yield benefits in terms of efficiency and effectiveness.

03. In-house capability versus outsourcing

When assessing how eDiscovery tasks are performed, the majority of responses indicated that they have used, or intend to use, external service providers (see figure 9). The most common services were data processing (83 percent), the hosting of data (79 percent) and data review (75 percent). When assessing vendors, over half those surveyed deemed cost to be the most important decision criteria.

Figure 9:

In which of the following areas have you used a law firm, eDiscovery vendor or other external organization to provide any of the following services?



Many respondents regard external service providers as more expensive than internal resources, but it is a challenge to hire and retain the appropriate skills in-house. Yet despite the importance of cost and doubts about the cost-effectiveness of external resources, only a small minority of respondents consider in-sourcing to be a high priority in the next few years.

This contradiction can in part be explained by the unpredictable nature of litigation and investigations, as well as the reactive and piecemeal nature of the response to such matters.

> "The most common services were data processing (**83 percent**), data hosting (**79 percent**) and data review (**75 percent**)."

KPMG VIEW

By quantifying the nature and potential scale of eDiscovery needs, companies can develop baseline requirements and an operating model. This framework can be used to determine how best to deliver a particular project, balancing the use of in-house resources with external providers.

A view of the future

The burden related to litigation and regulatory compliance is set to continue increasing for the foreseeable future. In light of the trend of spiraling eDiscovery costs, organizations are likely to face continued pressure to improve the management and control of eDiscovery request. Indeed, the need has never been greater for a consistent, repeatable and defensible process around the identification, collection and storage of data subject to eDiscovery requests.

If these activities are to be done cost-effectively, organizations must take the initiative to develop an eDiscovery strategy rather than wait for cases to present themselves. This entails a comprehensive assessment of the risk of litigation and regulatory actions that the entire organization is likely to face in the future and develop priorities in terms of the types of risks and the optimal methods of tackling them. This will help to inform expenditure planning and projected manpower needs.

Once there is a plan, organizations will be able to understand better how to meet their objectives. There is no hard and fast rule as to the allocation of resources internally and externally; this will depend on the in-house talent strategy and what skills will be required of external counsel. These decisions will help to guide the organization's investment strategy: what new tools to buy, what to customize, and how best to integrate data analytics and technology assisted review into the eDiscovery strategy.

It is of paramount importance to develop an organization-wide approach to eDiscovery. By addressing each of the issues identified above individually, organizations are likely to generate some cost savings in the short- to medium-term. But only when organizations optimize all relevant areas together will they be able to achieve a transformational improvement in how they operate, and a sustainable impact on their eDiscovery risk and cost profiles.

Four actions to drive immediate results:

— Make an organization-wide assessment of the risks in litigation and regulatory compliance to develop a coherent sense of priorities.

— Establish a consistent, repeatable and defensible process around the identification, collection and storage of data subject to eDiscovery.

— Quantify the nature and potential scale of your eDiscovery needs to develop baseline requirements and an operating model with respect to in-house vs. external capability.

— Deploy data analytics and technology assisted review tools to reduce the risk and cost associated with eDiscovery.

About the survey

— The objective of the survey was to seek input about firms' litigation readiness and to gain an understanding of how various organizations and sectors are performing in regards to the litigation readiness. An online survey was designed to collect the responses and benchmark against all aggregate responses to provide the participants with unique and valuable insight.

— The survey gathered responses across 20 countries.

— Financial Services (22 percent), ENR (10 percent), Manufacturing (7 percent), and Construction and Real Estate (7 percent) constituted the top four sectors.

— Nearly half the responses were provided by General Counsel and Managers from Litigation, Finance, Administrator, Commercial and Compliance functions.

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Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

September 9, 2015

MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
THE ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION
THE ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION
THE ASSISTANT ATTORNEY GENERAL, TAX DIVISION
THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
THE DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES
ALL UNITED STATES ATTORNEYS

FROM: Sally Quillian Yates
Deputy Attorney General

SUBJECT: Individual Accountability for Corporate Wrongdoing

Fighting corporate fraud and other misconduct is a top priority of the Department of Justice. Our nation's economy depends on effective enforcement of the civil and criminal laws that protect our financial system and, by extension, all our citizens. These are principles that the Department lives and breathes—as evidenced by the many attorneys, agents, and support staff who have worked tirelessly on corporate investigations, particularly in the aftermath of the financial crisis.

One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system.

There are, however, many substantial challenges unique to pursuing individuals for corporate misdeeds. In large corporations, where responsibility can be diffuse and decisions are made at various levels, it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt. This is particularly true when determining the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs. As a result, investigators often must reconstruct what happened based on a painstaking review of corporate documents, which can number in the millions, and which may be difficult to collect due to legal restrictions.

These challenges make it all the more important that the Department fully leverage its resources to identify culpable individuals at all levels in corporate cases. To address these challenges, the Department convened a working group of senior attorneys from Department components and the United States Attorney community with significant experience in this area. The working group examined how the Department approaches corporate investigations, and identified areas in which it can amend its policies and practices in order to most effectively pursue the individuals responsible for corporate wrongs. This memo is a product of the working group's discussions.

The measures described in this memo are steps that should be taken in any investigation of corporate misconduct. Some of these measures are new, while others reflect best practices that are already employed by many federal prosecutors. Fundamentally, this memo is designed to ensure that all attorneys across the Department are consistent in our best efforts to hold to account the individuals responsible for illegal corporate conduct.

The guidance in this memo will also apply to civil corporate matters. In addition to recovering assets, civil enforcement actions serve to redress misconduct and deter future wrongdoing. Thus, civil attorneys investigating corporate wrongdoing should maintain a focus on the responsible individuals, recognizing that holding them to account is an important part of protecting the public fisc in the long term.

The guidance in this memo reflects six key steps to strengthen our pursuit of individual corporate wrongdoing, some of which reflect policy shifts and each of which is described in greater detail below: (1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should

memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.[1]

I have directed that certain criminal and civil provisions in the United States Attorney's Manual, more specifically the Principles of Federal Prosecution of Business Organizations (USAM 9-28.000 *et seq.*) and the commercial litigation provisions in Title 4 (USAM 4-4.000 *et seq.*), be revised to reflect these changes. The guidance in this memo will apply to all future investigations of corporate wrongdoing. It will also apply to those matters pending as of the date of this memo, to the extent it is practicable to do so.

1. To be eligible for <u>any</u> cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.

In order for a company to receive <u>any</u> consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct. Companies cannot pick and choose what facts to disclose. That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor pursuant to USAM 9-28.700 *et seq.*[2] Once a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible for consideration for cooperation credit. The extent of that cooperation credit will depend on all the various factors that have traditionally applied in making this assessment (*e.g.*, the timeliness of the cooperation, the diligence, thoroughness, and speed of the internal investigation, the proactive nature of the cooperation, etc.).

This condition of cooperation applies equally to corporations seeking to cooperate in civil matters; a company under civil investigation must provide to the Department all relevant facts about individual misconduct in order to receive any consideration in the negotiation. For

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[1] The measures laid out in this memo are intended solely to guide attorneys for the government in accordance with their statutory responsibilities and federal law. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.

[2] Nor, if a company is prosecuted, will it support a cooperation-related reduction at sentencing. *See* U.S.S.G. USSG § 8C2.5(g), Application Note 13 ("A prime test of whether the organization has disclosed all pertinent information" necessary to receive a cooperation-related reduction in its offense level calculation "is whether the information is sufficient ... to identify ... the individual(s) responsible for the criminal conduct").

example, the Department's position on "full cooperation" under the False Claims Act, 31 U.S.C. § 3729(a)(2), will be that, at a minimum, all relevant facts about responsible individuals must be provided.

The requirement that companies cooperate completely as to individuals, within the bounds of the law and legal privileges, *see* USAM 9-28.700 to 9-28.760, does not mean that Department attorneys should wait for the company to deliver the information about individual wrongdoers and then merely accept what companies provide. To the contrary, Department attorneys should be proactively investigating individuals at every step of the process – before, during, and after any corporate cooperation. Department attorneys should vigorously review any information provided by companies and compare it to the results of their own investigation, in order to best ensure that the information provided is indeed complete and does not seek to minimize the behavior or role of any individual or group of individuals.

Department attorneys should strive to obtain from the company as much information as possible about responsible individuals before resolving the corporate case. But there may be instances where the company's continued cooperation with respect to individuals will be necessary post-resolution. In these circumstances, the plea or settlement agreement should include a provision that requires the company to provide information about all culpable individuals and that is explicit enough so that a failure to provide the information results in specific consequences, such as stipulated penalties and/or a material breach.

2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.

Both criminal and civil attorneys should focus on individual wrongdoing from the very beginning of any investigation of corporate misconduct. By focusing on building cases against individual wrongdoers from the inception of an investigation, we accomplish multiple goals. First, we maximize our ability to ferret out the full extent of corporate misconduct. Because a corporation only acts through individuals, investigating the conduct of individuals is the most efficient and effective way to determine the facts and extent of any corporate misconduct. Second, by focusing our investigation on individuals, we can increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation and provide information against individuals higher up the corporate hierarchy. Third, by focusing on individuals from the very beginning of an investigation, we maximize the chances that the final resolution of an investigation uncovering the misconduct will include civil or criminal charges against not just the corporation but against culpable individuals as well.

3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.

Early and regular communication between civil attorneys and criminal prosecutors handling corporate investigations can be crucial to our ability to effectively pursue individuals in

these matters. Consultation between the Department's civil and criminal attorneys, together with agency attorneys, permits consideration of the full range of the government's potential remedies (including incarceration, fines, penalties, damages, restitution to victims, asset seizure, civil and criminal forfeiture, and exclusion, suspension and debarment) and promotes the most thorough and appropriate resolution in every case. That is why the Department has long recognized the importance of parallel development of civil and criminal proceedings. *See* USAM 1-12.000.

Criminal attorneys handling corporate investigations should notify civil attorneys as early as permissible of conduct that might give rise to potential individual civil liability, even if criminal liability continues to be sought. Further, if there is a decision not to pursue a criminal action against an individual – due to questions of intent or burden of proof, for example – criminal attorneys should confer with their civil counterparts so that they may make an assessment under applicable civil statutes and consistent with this guidance. Likewise, if civil attorneys believe that an individual identified in the course of their corporate investigation should be subject to a criminal inquiry, that matter should promptly be referred to criminal prosecutors, regardless of the current status of the civil corporate investigation.

Department attorneys should be alert for circumstances where concurrent criminal and civil investigations of individual misconduct should be pursued. Coordination in this regard should happen early, even if it is not certain that a civil or criminal disposition will be the end result for the individuals or the company.

4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.

There may be instances where the Department reaches a resolution with the company before resolving matters with responsible individuals. In these circumstances, Department attorneys should take care to preserve the ability to pursue these individuals. Because of the importance of holding responsible individuals to account, absent extraordinary circumstances or approved departmental policy such as the Antitrust Division's Corporate Leniency Policy, Department lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees. The same principle holds true in civil corporate matters; absent extraordinary circumstances, the United States should not release claims related to the liability of individuals based on corporate settlement releases. Any such release of criminal or civil liability due to extraordinary circumstances must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney.

5. **Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.**

If the investigation of individual misconduct has not concluded by the time authorization is sought to resolve the case against the corporation, the prosecution or corporate authorization memorandum should include a discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period. If a decision is made at the conclusion of the investigation not to bring civil claims or criminal charges against the individuals who committed the misconduct, the reasons for that determination must be memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees.

Delays in the corporate investigation should not affect the Department's ability to pursue potentially culpable individuals. While every effort should be made to resolve a corporate matter within the statutorily allotted time, and tolling agreements should be the rare exception, in situations where it is anticipated that a tolling agreement is nevertheless unavoidable and necessary, all efforts should be made either to resolve the matter against culpable individuals before the limitations period expires or to preserve the ability to charge individuals by tolling the limitations period by agreement or court order.

6. **Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.**

The Department's civil enforcement efforts are designed not only to return government money to the public fisc, but also to hold the wrongdoers accountable and to deter future wrongdoing. These twin aims – of recovering as much money as possible, on the one hand, and of accountability for and deterrence of individual misconduct, on the other – are equally important. In certain circumstances, though, these dual goals can be in apparent tension with one another, for example, when it comes to the question of whether to pursue civil actions against individual corporate wrongdoers who may not have the necessary financial resources to pay a significant judgment.

Pursuit of civil actions against culpable individuals should not be governed solely by those individuals' ability to pay. In other words, the fact that an individual may not have sufficient resources to satisfy a significant judgment should not control the decision on whether to bring suit. Rather, in deciding whether to file a civil action against an individual, Department attorneys should consider factors such as whether the person's misconduct was serious, whether

it is actionable, whether the admissible evidence will probably be sufficient to obtain and sustain a judgment, and whether pursuing the action reflects an important federal interest. Just as our prosecutors do when making charging decisions, civil attorneys should make individualized assessments in deciding whether to bring a case, taking into account numerous factors, such as the individual's misconduct and past history and the circumstances relating to the commission of the misconduct, the needs of the communities we serve, and federal resources and priorities.

Although in the short term certain cases against individuals may not provide as robust a monetary return on the Department's investment, pursuing individual actions in civil corporate matters will result in significant long-term deterrence. Only by seeking to hold individuals accountable in view of all of the factors above can the Department ensure that it is doing everything in its power to minimize corporate fraud, and, over the course of time, minimize losses to the public fisc through fraud.

Conclusion

The Department makes these changes recognizing the challenges they may present. But we are making these changes because we believe they will maximize our ability to deter misconduct and to hold those who engage in it accountable.

In the months ahead, the Department will be working with components to turn these policies into everyday practice. On September 16, 2015, for example, the Department will be hosting a training conference in Washington, D.C., on this subject, and I look forward to further addressing the topic with some of you then.

DOJ's Back to School Message: "Companies, Turn in Your Employees; Individuals: We Are Coming After You."

V&E Government Investigations and White Collar Criminal Defense Update E-communication, September 10, 2015

On September 9, a senior U.S. Department of Justice (DOJ) official raised the bar for companies seeking cooperation credit by announcing new directives for DOJ to require cooperating companies to give up their employees and for DOJ to focus enforcement efforts on individuals who in the past may otherwise have escaped liability.[1] These directives are likely to work a sea change on how companies deal with individuals during internal investigations by putting them at odds with each other and disincentivizing individual cooperation.

The announcement came in a memorandum from Deputy Attorney General Sally Quillian Yates, who reports directly to Attorney General Loretta Lynch. The Yates memorandum discusses six steps aimed at strengthening the DOJ's "pursuit of individual corporate wrongdoing." Together, the steps instruct both criminal and civil DOJ attorneys to: conduct highly coordinated investigations where companies are not considered for *any* cooperation credit unless they completely disclose individual misconduct to the satisfaction of DOJ attorneys; communicate constantly with each other from inception of an investigation to maximize charges and claims against individuals; hold up corporate resolutions until individual actions can be resolved simultaneously or there is a plan for conclusion of the individual actions; and be increasingly aggressive in bringing civil claims against individuals. The most significant changes in DOJ policy are discussed below:

1. Corporations Must Provide Facts Regarding Involved Individuals to be Eligible for Any Cooperation Credit.

To even be *considered for any* cooperation credit in a criminal or civil matter, the company must identify for the DOJ all individuals involved in or responsible for the misconduct, regardless of their position, status or seniority, to the satisfaction of the DOJ. The DOJ also will proactively investigate individuals and compare its own findings to information provided by the company to ensure the company is not minimizing the involvement of any individual and has provided full

information. DOJ attorneys are instructed to obtain from a company all information about individuals before the corporate resolution. In the rare instances where a company is expected to continue to provide information post-resolution, the company's plea or settlement agreement should expressly require the company's continued cooperation.

2. Criminal and Civil DOJ Attorneys Should Coordinate Efforts From Inception of Investigation.

While criminal and civil DOJ attorneys worked together in the past, the directive for them to work together and to focus on maximizing individual liability is new. So too is the directive that if DOJ Criminal declines to pursue criminal charges, they should "report" this to their civil counterparts, so that DOJ Civil can consider whether civil claims are appropriate, and in the reverse, if DOJ Civil concludes that criminal charges are merited, that they "report" this to their criminal counterparts. The guidelines direct DOJ attorneys to consider conducting concurrent criminal and civil investigations, which means that it may no longer be possible for defense counsel to sequence their dealings with the criminal and civil attorneys, where in the past they may have tried to first eliminate potential criminal liability and then turned to addressing potential civil liability.

3. DOJ Attorneys Must Resolve Corporate and Individual Cases Simultaneously or Delay Corporate Resolution Until There is a Plan for Resolution of Individual Cases.

The DOJ's standard practice has been to focus its efforts on resolving cases against companies first, and then to focus on individuals. Instead, the DOJ must now look more broadly from the beginning, both at the company and individuals. When the DOJ decides not to take any action against an involved individual, the reasons for that determination must be memorialized and approved in a memorandum by a United States Attorney or Assistant Attorney General, thus holding the DOJ line attorneys accountable for their declination decisions. The guidelines also require the DOJ to be mindful of the statute of limitations by resolving matters before the limitations period runs or by obtaining tolling agreements, which will make it less likely that an individual could avoid liability through delay or even the simple passage of time and shifting of DOJ priorities.

4. DOJ Civil Attorneys Should Focus on Individuals and Consider the Deterrent Effect When Evaluating Whether to Bring Civil Claims.

Where DOJ Civil attorneys in the past may have declined to file a civil charge because the individual wrongdoer had no ability to pay a civil fine (and thus DOJ resources may have been put to better use elsewhere), they now must consider a number of other factors, such as the seriousness of the misconduct, the individual's past history, the weight of the evidence, and whether pursuing the action reflects an important federal interest. The guidelines instruct DOJ Civil attorneys to look beyond the single individual's case and consider whether the claim will further the DOJ's aspirational goal of achieving significant long-term deterrence through individual cases over time.

What This Means For You:

This new guidance surely will have ramifications for both individuals and companies that come under DOJ investigation, but they may be most pronounced for individuals involved in misconduct who now face a "Hobson's choice" of cooperating with their company's internal investigation, which could increase their own personal risk, or refusing to cooperate at all and risk losing their jobs. Putting individuals to this choice may drive a wedge between the company and the individual and significantly hamper the company's ability to conduct its internal investigation, which could then limit the company's ability to cooperate by sharing its findings with the government.

Individuals may be doubly impacted because of the strong directive to DOJ Civil to bring civil claims where they may not have before. While the DOJ has increased its focus on bringing criminal actions against individuals in recent years,[2] there has been no concerted effort to bring civil cases against individuals. For example, DOJ enforcement of the False Claims Act, Foreign Corrupt Practices Act, and antitrust laws is at an all-time high, but there has been little civil enforcement against individuals under these statutes. Indeed, the Yates memorandum expressly refers to the False Claims Act in its discussion of cooperation credit, signaling a potential ramp up of civil False Claims Act actions against individuals.

For more information, please contact Vinson & Elkins lawyers Matt Jacobs, Jeff Johnston, Bill Lawler, Tirzah Lollar, Craig Margolis, Amy Riella, Craig Seebald, Cliff Thau or John Wander. Visit our website to learn more about V&E's Government Investigations and White Collar Criminal Defense practice.

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[1] Memorandum from Deputy Att'y Gen. Sally Quillian Yates for All Assistant Att'ys Gen., et al., regarding Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015); https://assets.documentcloud.org/documents/2393039/justice-dept-memo-on-corporate-wrongdoing.pdf

[2] "As if FCA Treble Damages Weren't Trouble Enough: DOJ Intends to Mine FCA Cases for Criminal Investigations," *V&E False Claims Act Update E-communication* (Sept. 19, 2014); http://www.velaw.com/Insights/As-if-FCA-Treble-Damages-Weren-t-Trouble-Enough--DOJ-Intends-to-Mine-FCA-Cases-for-Criminal-Investigations/

GOVERNANCE RISK MANAGEMENT

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Professional Profile

Dana Kopper is a Managing Director, Directors & Officers and Governance Risk Management Group.

Lockton is the world's largest privately-held risk and insurance management services firm with almost 6,000 employees providing services to over 45,000 clients in a 100 countries.

Dana has provided a broad range of governance and risk management consulting and transactional services to public, private, for-profit, and not-for-profit organizations for the past 36 years.

He is one of the country's leading D&O and professional liability brokers – a noted expert (court qualified expert witness) in the areas of international directors' and officers' legal liability, investment management professional liability, governance infrastructure design, board effectiveness, director accountability, organizational compliance efficacy, and associated risk mitigation strategies. Dana was selected as the AIG 2012 Broker of the Year.

Dana has lived and worked throughout the U.S., Europe, the Middle East, and Asia. He is actively involved with international directors' and officers' liability and corporate governance issues with particular emphasis on U.S. exchange listed firms headquartered in foreign countries.

Prior to his career in risk and insurance management, Dana was a federal agent with the U.S. Air Force Office of Special Investigations (OSI) – criminal investigations, counterintelligence and counterterrorism.

Previous Positions

- Marsh, Inc.
  Senior Vice President
  National Practice Leader
  FINPRO Advisory Services;

  Chief Operating Officer
  MMC BoardWorks

- Corroon & Black Corporation
  Region Head – Public Entities National Company

Professional Affiliations & Designations

- Forum for Corporate Directors (FCD), Inc.
  Member, Board of Directors
- Corporate Directors Forum (CDF), Inc.
- Stanford University Directors College
- National Association of Corporate Directors
- The Directors Roundtable
- Professional Liability Underwriters Society
- University of California, Irvine
  Paul Mirage School of Business
  Governance Risk Management
- Lecturer
  World Trade Organization
  University of California, Los Angeles
  University of Texas
  Rice University
  Stanford University
  University of Delaware
  Directors Roundtable
  American Bar Association
  American Corporate Counsel
  Society of Corporate Secretaries
  Financial Executives International
  American Electronics Association
  California Biotechnology Summit
- Certified Insurance Counselor (CIC)
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Specialization

Dr. González specializes in statistical and economic analysis, regulatory and contract compliance analyses, investigations, and litigation support.

Professional Associations

- American Economic Association
- Phi Beta Kappa

Languages

English, French, Spanish

Education, Licenses & Certifications

- Ph.D., Economics, Massachusetts Institute of Technology
- Bachelor of Arts in Economics, Minors in Mathematics and French, *Summa Cum Laude*, University of Texas at Austin

Background

Based in KPMG's San Francisco office, Dr. González serves as the Electronics and Software global sector leader for Forensic Services. He brings over 20 years of professional experience using his financial and statistical background working with clients to analyze complex business issues commonly involving large volumes of data. His experience covers varied industries, commonly involving advanced technology areas such as semiconductors, software, biotechnology, medical devices, and pharmaceuticals. His client list includes many multinational organizations, including five on *Fortune* magazine's list of the 50 largest global companies.

Dr. González has testified as an expert witness in both trials and arbitrations. This experience covers matters venued in Federal District Court, State Court, and Federal Claims Court. In addition, Dr. Gonzalez and his team served as the neutral royalty auditor for a matter venued before the ICC in Paris.

Relevant Experience

His engagement experience covers a variety of industries and breadth of subject matters. His experience includes:

- Economic damages analysis in varied contexts including breach of contract, intellectual property ("IP"), tortious interference, and antitrust;
- Complex data analysis, including statistical and multiple regression analysis, in contexts such as class certification and fraud detection;
- Compliance assessments with respect to contract terms and regulatory provisions; and
- Investigation of fraud allegations ranging from assertions of misappropriation to claims of corruption.

Sample Litigation Engagements

- In a $2.4 billion power purchase agreement breach, Dr. González testified regarding the economic damages suffered by the plaintiff. He analyzed lost profits and unsalvageable costs, and prepared a variety of rebuttal analyses.
- In a class action matter for a computer company, Dr. González testified about a sales compensation model built by his team to evaluate claims of unpaid sales compensation.
- Dr. González worked with counsel on a billion dollar products liability case. His modeling efforts focused on estimating the extent of injury, forecasting the number of claims and predicting the manufacturer's damage exposure.
- On behalf of a semiconductor design firm, Dr. González offered expert testimony with respect to patent infringement damages. He analyzed both lost profit and reasonable royalty claims related to a cache memory patent.
- In a matter involving the nexus of airport leases, antitrust law, and allegations of professional negligence, Dr. González testified about damage causation and the econometric modeling offered by the plaintiff's damages expert.
- In a mining matter involving claims of contract breach and professional negligence, Dr. González analyzed causation and testified about economic damages.
- In a class action matter involving an insurance company and imposed limits on medical payments, Dr. Gonzalez was retained to analyze the economic implications of claims and payment data.

- In a matter involving data storage technology, Dr. González evaluated the economic consequences of alleged patent infringement and trade secret misappropriation. He evaluated claims for lost profits, price erosion, and reasonable royalties. He also evaluated various counterclaims.
- On behalf of a large computer manufacturer, Dr. González testified about damages arising from an alleged misrepresentation involving bids to service computers at a large national research facility.
- For a software company alleging breach of a license agreement by a telecommunications company, Dr. González offered damages testimony related to software deployment and the frequency of the royalty bearing events.
- Dr. González worked with counsel for a global storage company facing False Claims Act litigation involving defective pricing and price reduction clause claims. He served as the statistical expert and evaluated diverse methodological approaches.
- Dr. González worked with counsel for a software storage company facing False Claims Act litigation involving defective pricing and price reduction clause claims. He served as a privileged damages and statistical expert.
- In a Silicon Valley trade secrets case, Dr. González identified the inappropriate and misleading nature of the opposing expert's probability analysis.
- On behalf of a large manufacturer of computer components, Dr. González analyzed the fraud and damages elements of claims and counterclaims associated with the shipment of millions of units by one of its distributors.
- For a computer chip manufacturer embroiled in copyright and patent infringement litigation, Dr. González assisted counsel by reviewing marketing studies and identifying factors influencing sales.
- In a licensing dispute involving filtration technology, Dr. González analyzed claims of inadequate development and marketing by the licensee, unpaid royalties, lost business opportunities, and economic viability.
- In a copyright infringement matter involving a computer peripheral component developer and manufacturer, Dr. González analyzed various damages issues including cost allocation, profit disgorgement, apportionment, and loss.
- On a patent infringement matter within the gaming industry, Dr. González managed the team analyzing economic damages. This included estimating a reasonable royalty, forecasting revenue, allocating costs, apportioning profits, and analyzing the discount rate.
- On behalf of a biotechnology company, Dr. González evaluated damages to the company arising from allegedly false patent filings undertaken by a former officer.
- For a patent infringement matter involving ultra-thin coatings for gas turbine components, Dr. González served as the economic damages expert. He also evaluated the alleged infringer's breach of contract counterclaims.
- For counsel of a transportation industry patent holder, Dr. González managed a team estimating damages, measuring lost profits, price degradation, lost repeat business, and lost spare parts sales.
- In a patent infringement matter involving DC electric motors, Dr. González offered damages testimony involving market structure, lost profits, and reasonable royalty analysis.

- When an allegation of falsified geotechnical data arose in a construction engagement, Dr. González led a team that identified statistically suspicious patterns in the geotechnical data.
- In a matter involving allegations of vitamin price fixing and market share allocation, Dr. González econometrically analyzed pricing information.
- In an antitrust matter involving the aerospace industry, Dr. González testified regarding the economic losses associated with allegedly exclusionary conduct. He also assisted counsel in the analysis of liability issues.
- Dr. González led work on an antitrust matter involving the chemical industry. His team collected and econometrically analyzed price, cost, and market definition data to estimate the magnitude of damages.
- In a retail fuel matter involving allegedly deceptive pricing practices, Dr. González worked with counsel to statistically analyze the claims raised by the government.
- In a retail fuel matter involving allegedly deceptive sales practices, Dr. González working with counsel to statistically analyze the claims raised by the plaintiff.
- In a California Code §17,200 case involving a large set of bank customers and forced placed insurance, Dr. González testified regarding the methodological and numerical weaknesses in the damages analyses offered by plaintiffs.
- When a nationally prominent law firm faced discrimination claims, it retained Dr. González to evaluate damages and discrimination allegations.
- In a federal matter involving a materials automation project gone awry, Dr. González developed a model to forecast system load, and compared projected cost savings to actual costs.
- On behalf of a plaintiff alleging mismanagement of an agricultural property, Dr. González directed the statistical analysis evaluating differences in the performance between the property in question and comparable properties.
- On behalf of a business facing allegations of discriminatory practices, Dr. González presented his analysis to the Department of Justice. The matter settled favorably.
- On a class certification matter involving the insurance claims for diminished value, Dr. González identified methodological flaws and data weaknesses in the analysis underlying the plaintiffs' expert's opinions.

Sample Advisory Engagements

- For multiple retailers, Dr. González led teams evaluating sampling strategies to evaluate historical or forecasting analyses of billions of dollars in inventory.
- Working with a California winery, Dr. González statistically evaluated product quality control issues. He developed a sampling protocol, analyzed the data, and forecasted the number of defective units.
- On behalf of numerous healthcare providers, Dr. González provided sampling and statistical analysis in support of IRO assignments or in response to government investigations.
- On numerous occasions, Dr. González led teams performing probability and statistical analyses on large data sets (millions of records) in the context of advisory work.
- On an IP due diligence project involving biotechnology, Dr. González reviewed analyses involving market positioning and pricing for the products protected by the company's patent portfolio.

- In the context of a potential licensing transaction or acquisition, Dr. González worked with the technology owner to value patents related to a medical device.

Contract Compliance Reviews

Dr. González has led approximately 200 contract compliance reviews, spanning the gamut of industries and geographic locations. A small sample of engagements include:

- Revenue sharing agreement involving online games;
- Royalty audits involving development, manufacture, and sale of video compression products;
- Collaboration and distribution agreement audits in the pharmaceutical and biotech industries;
- Litigation settlement compliance review with respect to technology incorporation;
- Royalty audit of a manufacturer on behalf of a Fortune 100 company that licenses both semiconductor and software related patents;
- Distributor and reseller audits for a Fortune 20 company;
- Revenue sharing agreement for a media company;
- Royalty audits involving imaging technology; and
- Royalty and cost allocation compliance audit under manufacturing and co-promotion agreements.

Sample Teaching Experience

- University of California, Berkeley. Lecturer in the Department of Economics. Dr. González taught "Government Regulation of Industry" during each of the 1994-1999 academic years. Superior student evaluations.
- University of California, Berkeley. Guest Lecturer at the Law School on the topic of patent infringement damages.
- University of California, Berkeley. Guest Lecturer on multiple occasions on varied accounting topics.
- University of San Francisco, Guest Lecturer on the topic of fraud detection and investigation.
- University of California, Berkeley Extension. Dr. González taught "Estimating Damages in Litigation" on two occasions.
- Massachusetts Institute of Technology. Instructor in the Department of Economics. Dr. González taught classes in applied microeconomic theory, covering topics such as competitive markets and monopolistic behavior. Superior student evaluations.
- Speaker on multiple occasions at conferences and professional education events.

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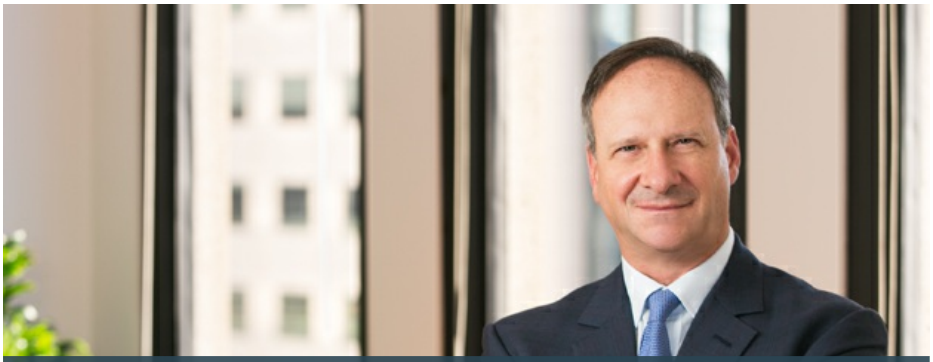

MATTHEW J. JACOBS

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June 3, 2015

Matt's Practices

- **Antitrust**
- **Antitrust Investigations**
- **Class Actions & Multi-District Litigation**
- **Cybersecurity & Data Privacy**
- **FCPA & Global Anti-Corruption**
- **Government Investigations & White Collar Criminal Defense**
- **Internal Investigations**
- **Technology**
- **Taiwan**

Education

- Stanford Law School, J.D. 1992 (Order of the Coif; Associate Editor, *Stanford Law Review*)
- Northwestern University Medill School of Journalism, M.S., with honors, 1985
- The American University, B.A., *cum laude*, 1983
- Admitted to practice: California; Illinois; Supreme Court of the United States, The U.S. Courts of Appeals for the Seventh and Ninth Circuits

Professional Background

- Appointed to federal Criminal Justice Act panel for the Northern District of California
- Appointed by Chief U.S. District Judge to serve on selection committee for bankruptcy judge

A former federal prosecutor in the Northern District of California with more than 20 years of experience, Matt is well recognized for his experience in internal investigations, government investigations, and white collar matters of all kinds, as well as complex commercial litigation.

Matt frequently advises Boards of Directors, Audit Committees, and General Counsels on critical issues. Matt is Co-Chair of the firm's Government Investigations & White Collar Criminal Defense practice, and is the Managing Partner of the San Francisco office of V&E. He is *Chambers*-rated, ranked by the *Legal 500*, and has been recognized as one of the leading lawyers in San Francisco by *San Francisco Magazine*.

Matt has a national and international practice representing U.S. and foreign-located companies and executives in high stakes matters involving FCPA, antitrust, trade secrets, health care, and commercial disputes including IP litigation and consumer class actions. Matt is a seasoned trial lawyer who has tried more than a dozen criminal and civil cases to verdict. As a federal prosecutor in San Francisco, Matt prosecuted many high profile cases involving securities, health care and energy. As a defense attorney, Matt has gained a track record of persuading prosecutors to limit or abandon cases before charges are filed, or fighting hard for his clients where no appropriate resolution can be found. Matt is particularly experienced in "bet-the-company" and high profile matters. He has extensive experience dealing with the press, first as an award winning journalist in Louisiana, and later as the federal prosecutor responsible for handling all media inquiries on behalf of U.S. Attorney (and former FBI Director) Robert S. Mueller III. As a prosecutor, Matt was the recipient of the Justice Department's Director's Award and the FBI's Director's Award.

Matt has tremendous skill in conducting internal investigations and providing business-focused advice to companies, audit committees, and boards of directors regarding appropriate company practice in the midst of alleged misconduct. Matt's background with the government, coupled with his depth of experience in both criminal and civil defense matters, enables him to deliver a unique, well-rounded approach to clients in need of innovative, yet practical and effective solutions.

Experience Highlights

- Represents the Audit Committee of a public technology company in connection with criminal and civil investigations being conducted by the U.S. Department of Justice (DOJ) and the Securities & Exchange Commission (SEC)
- Represents a major Japanese manufacturer in an internal investigation and government investigation regarding an alleged cartel to fix the prices of certain parts
- Represents a major Chinese wind power company in criminal charges brought by the Department of Justice for the alleged theft of trade secrets
- Represents a Silicon Valley company in a commercial dispute with a major drug wholesaler
- Represents a real estate developer in connection with bid rigging and mail fraud charges stemming from the purchase of properties through foreclosure auctions

Investigations (Criminal, Government, Internal)

- Currently representing a Japanese corporation in connection with a U.S. Department of Justice investigation based on alleged cartel activity concerning a consumer product
- Conducted an internal investigation of sales practices in the Middle East, involving cultural and regional legal sensitivities; conducted a forensic analysis of data, and

interviews of regional employees, supervisors, channel partners, and vendors; analyzed sales and marketing practices, and scope of internal and external FCPA compliance; worked closely with Internal Audit, making frequent reports to management and the company's outside auditors

- Has conducted internal investigations of potential Foreign Corrupt Practices Act (FCPA) violations around the world, including Russia, China, India, Angola, Nigeria, UAE, Hungary and Saudi Arabia
- Represents various entities in a nationwide class action alleging collusion in the pricing of various auto parts stemming from one of the largest federal criminal antitrust investigations ever conducted by the DOJ
- Leads an internal investigation into alleged bribery allegations regarding drilling technology in Africa
- Currently representing a major Chinese corporation in connection with a U.S. Department of Justice criminal investigation into the alleged theft of manufacturing processes
- Represents senior executives of pharmaceutical companies alleged to have engaged in improper off-label promotion of drugs
- Conducted an investigation on behalf of a Board of Directors for financial manipulation of the company's SEC filings which led to the forced resignation of the CEO of a public Silicon Valley company
- Represents an executive of a generic pharmaceutical company in connection with a federal price fixing investigation
- Currently representing a senior executive of a dialysis corporation in connection with alleged False Claims Act violations
- Currently advising the former CEO of a technology company in connection with antitrust implications of an acquisition and a Department of Justice merger review
- Represented several major international corporations in significant criminal investigations by the Antitrust Division of the U.S. Justice Department involving the consumer electronics business, which were resolved without criminal charges being filed against clients
- Represented a senior executive of a pharmaceutical company who was the target of a federal criminal investigation for five years, and successfully persuaded the Department of Justice to close the case without taking action against the client
- Represented a Special Committee of the Board of Directors of a publicly traded corporation in connection with a criminal investigation, and derivative and class action lawsuits stemming from the company's stock options practices
- Represented accountants from a Big Four accounting firm in connection with an international money laundering investigation
- Represented the former partner of a major New York law firm in connection with a tax investigation by the U.S. Department of Justice
- Represented various officers and directors of publicly traded companies in connection with investigations and derivative lawsuits of the stock options practices of those companies
- Represented a major metals company in connection with a criminal environmental investigation under the Clean Air Act
- Represented a former senior executive of an educational software company in connection with a federal bribery investigation regarding the supply of products to a public school district; the investigation was resolved without charges being brought against the client
- Represented a publicly traded company in negotiating privilege issues in connection with the criminal trial of a former Chief Executive Officer
- Conducted an internal investigation of alleged violations of the Foreign Corrupt Practices Act by a Chinese subsidiary of a U.S. company

Commercial Litigation

- Represents a major foreign manufacturer in a major class action that alleges collusion in direct and indirect sales of optical disk drives
- Represents a Japanese corporation in a major class action that alleges price fixing in cellphone batteries
- Currently representing a technology company in a lawsuit concerning the use of health care data
- Represented officers and directors in several derivative and class actions regarding the handling of compensation issues
- Represented major consumer electronic companies in class actions by direct and indirect purchases, where the class members alleged that they paid higher prices due to internal cartel activity
- Represented a pharmaceutical company in connection with class action lawsuits based

- Assistant United States Attorney for the Northern District of California, 1998-2004
- Judicial clerk to The Honorable Walter J. Cummings, U.S. Court of Appeals for the Seventh Circuit, Chicago

Recognition

- *Chambers USA*, White-Collar Crime & Government Investigations (California), 2015
- *Legal 500 U.S.*, Antitrust, 2012–2015; White-Collar Criminal Defense, 2015
- Selected to the Northern California Super Lawyers list, *Super Lawyers*® (Thomson Reuters), 2006–2015
- Finalist for appointment as U.S. Attorney, 2008

Activities

- Former Adjunct Professor: University of California at Berkeley (Boalt Hall) (Prosecution and Defense of White Collar Crime)
- Member and Former Chairman: Steering Committee of the Criminal Justice Panel, San Francisco Bar Association
- Vice President: San Jose Steering Committee of Federal Bar Association
- Barrister of McFettridge Inn of Court
- Appointed to federal Criminal Justice Act panel for the Northern District of California
- Appointed by Chief U.S. District Judge to serve on selection committee for bankruptcy judge
- Former chair of Communications Committee and member of Standards Committee of Olympic Club, nation's oldest athletic club

on alleged securities fraud

- Represented a former officer of a health care company in the successful dismissal of a securities fraud lawsuit
- Represented a cloud computing company in litigation with a competitor and customer in a copyright infringement lawsuit
- Advised a Chinese company in connection with product liability cases alleging the misuse of their products resulted in deaths and injuries

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MICHAEL L. CHARLSON

PARTNER, SHAREHOLDER LITIGATION & ENFORCEMENT

Michael's practice involves complex business litigation, with an emphasis on securities class actions, corporate governance (including shareholder derivative) litigation, SEC and other regulatory and exchange proceedings, and related counseling. Over more than 25 years, Michael has represented corporations, officers, directors, investors, auditors, and underwriters in dozens of securities class actions involving companies that operate across a wide range of industry sectors, including many technology and life sciences companies. Michael has also litigated and counseled clients on fiduciary duty and disclosure issues relating to proposed M&A transactions. In addition, he has represented major accounting firms and auditors in accounting malpractice and securities lawsuits, and before the SEC.

In the corporate governance realm, Michael's clients have included special board committees, nominal defendant corporations, and officer and director defendants in numerous shareholder derivative lawsuits and internal investigations. His regulatory and enforcement matters have included SEC investigations and enforcement proceedings involving allegations of insider trading (including tipper and tippee allegations), improper accounting, inadequate disclosure, improper supervision and books-and-records violations. He has prepared Wells or pre-Wells submissions to the SEC on behalf of 17 different people; none was charged. Michael led the team that secured a jury verdict for defendants (including his client, the former Chief Executive Officer) in *In re JDS Uniphase Securities Litigation,* one of a handful of securities class actions that have gone to trial.

Experience Highlights

- Currently representing the Auditing Committee of a public multinational technology company involved in an ongoing investigation before the SEC and DOJ to conduct an independent investigation into the company's compliance with the FCPA in Russia and other countries
- (9th Cir.); (N.D. Cal.); (Cal. Super. – Santa Clara Cnty.) – Secured on appeal affirmance of dismissal of a securities class action complaint against VIVUS, Inc. and two senior officers, arising from disappointing FDA action on a drug approval application; represented defendant officers and directors also in related shareholder derivative litigations in federal and state courts in California
- (Del. Ch.); (W.D. Wash.); (Wash. Super. – King Cnty.) — Representing a biotechnology company, and various officers and directors, in a consolidated securities class action in federal court in Washington State, and in related individual securities litigation and shareholder derivative litigations in state and federal court in Washington State and in Delaware, relating generally to missed revenue guidance, the withdrawal of financial guidance and alleged insider trading; this matter also included a formal investigation by the SEC
- (Tax) – Represented taxpayers in U.S. Tax Court and other IRS proceedings over allegations that the individuals and their entities engaged in improper tax shelter transactions
- (D. Md.) – Defended officers and directors of a biopharmaceutical company in connection with allegedly improper grants of equity incentive compensation

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June 3, 2015

Michael's Practices

- **Corporate Governance**
- **FCPA & Global Anti-Corruption**
- **Government Investigations & White Collar Criminal Defense**
- **Internal Investigations**
- **Life Sciences**
- **Shareholder Litigation & Enforcement**
- **Technology**

Education

- University of California, Berkeley Boalt Hall School of Law, J.D., 1985 (Order of the Coif; Articles Editor, *California Law Review*)
- Stanford University, M.S., Biological Sciences, 1981
- Stanford University, B.S., Biological Sciences, 1981
- Admitted to practice: California; New York; District of Columbia

Professional Background

- Judicial clerk to Honorable William C. Canby, Jr., of the U.S. Court of Appeals for the Ninth Circuit, 1985–1986
- Michael served as the managing partner of the San Francisco Bay Area offices of an *AmLaw100* law firm and was a shareholder at Heller Ehrman LLP, serving for a time as the managing

Recent Securities Litigation & Enforcement Experience

- (Cal. Super. – Santa Clara Cnty.) — Represented directors and officers of biotechnology company in shareholder litigation alleging mismanagement of a new drug launch; case dismissed
- (D. Md.) — Secured dismissal on a first motions of a securities class action against a biotechnology company, and certain officers and directors, related to a failed drug trial
- (N.D. Cal.); (Cal. Super. – Santa Clara Cnty.) – Represented company, directors, and officers in private securities fraud litigation arising from stock price decline following disappointing sales of a drug product
- (N.D. Cal.); (Cal. Super. – Santa Clara Cnty.) – Tried to defense verdict a securities class action on behalf of the former chief executive officer of the issuer defendant; the plaintiff class had sought $20 billion in damages; represented the officer in related opt-out and shareholder derivative actions as well
- (D.N.J. and various other jurisdictions) – Represented a major accounting firm in accounting malpractice and fraud claims brought against it by a public company after accounting irregularities were discovered at a company that the plaintiff had purchased, and where the plaintiff had paid more than $3 billion to settle securities and other litigation relating to those irregularities; also represented the accounting firm in related counterclaims, in related litigation matters around the country, and before the SEC
- (N.D. Cal.); (Cal. Super. – San Francisco Cnty.) – Represented the Chief Executive Officer of a medical software company sued in class and derivative litigations, following his company's acquisition by a large life sciences company, over accounting irregularities discovered post-acquisition
- (N.D. Cal.) – Represented a pharmaceutical company and its senior officers in a securities class action arising out of a failed drug trial
- (N.D. Cal.) – Represented underwriters in securities class action litigation filed against a company that had two public offerings during the class period, but then announced disappointing earnings
- (S.D.N.Y.) – Represented a venture investor in securities class action litigation filed against a specialty clothing manufacturer after it announced disappointing earnings
- Acted on behalf of a security software company in various SEC inquiries, including alleged front-running insider trades or tips associated with certain corporate announcements
- (N.D. Cal.) – Represented a systems software company, its former CEO and former CFO, in a securities class action arising from a missed revenue forecast
- Represented the accounting firm partner in charge of the audit of a producer and distributor of pasta food products in an SEC investigation following that company's revelation of accounting irregularities
- Represented board committees, companies, directors, and officers in various internal investigations, shareholder litigations, and SEC investigations into potential stock option backdating
- Represented a company CEO in an SEC investigation into insider trading related to an M&A transaction involving his company
- Represented an investor relations professional in an SEC investigation into possible tipping and front-running
- (N.D. Cal.) – Represented a security software company and its directors and officers in securities class action litigation alleging improper revenue recognition as a result of channel stuffing
- (Cal. Super. – Santa Clara Cnty.) – Defended a life sciences company, which was a major investor in a company that developed ophthalmic lasers, in breach of fiduciary duty litigation brought by another shareholder
- (Cal. Super. – Los Angeles Cnty.) – Represented a security and utilities software company in a private securities action related to a company in which client held an equity interest

Recent M&A Litigation Experience

- (Del.) – Represented a special board committee, including in litigation in Delaware, over fiduciary issues surrounding the committee's consideration of, and recommendation with respect to, a tender offer issued by a majority shareholder in a public company for the balance of the company's stock; the case resulted in a published decision of the Delaware Supreme Court that established the fiduciary standards for handling such transactions, affirming the steps we had recommended
- (Del. Ch.); (Ind. Super.) – Defended marine transportation services company and its board in M&A litigation brought on behalf of individual stockholders as a result of a going-private transaction
- (Del. Ch. and Mass.) – Defended a software company and its board in M&A litigation

partner of its Silicon Valley office and as co-chair of the Securities and Corporate Governance Litigation Practice Group.

Recognition

- *Legal 500 U.S.*, Shareholder Litigation, 2014 and 2015; Energy Litigation, 2015
- Selected to the Northern California Super Lawyers list, *Super Lawyers*® (Thomson Reuters), 2006 and 2010–2015

Activities

- Member: American Bar Association, Litigation and Business Law Sections
- Member: State Bar of California, Litigation Section
- Member: Santa Clara County Bar Association
- Member: Bar Association of San Francisco

involving a going-private transaction

- (S.D.N.Y.) – Defended a video compression software company and its board in M&A litigation after a technology giant purchased the company
- (N.D. Ill.) – Defended a drug delivery technology company and its board in M&A litigation brought by shareholders, and involving the buyer, after the buyer, a large pharmaceutical company, was sanctioned by the Food and Drug Administration, resulting in a large decline in the value of the stock being used for the purchase

Internal Investigations

- Represented a public company in an internal investigation into a whistleblower complaint of improper accounting and control weaknesses where the whistleblower was the former head of Internal Audit
- Represented the Audit Committee of a clean technology solar products and solutions company in an internal investigation into accounting irregularities in the company's Philippines operations
- Represented companies, Audit Committees, Compensation Committee members, and individual officers and directors in various roles in roughly a dozen stock-option backdating cases; the representations included internal and SEC investigations, and related shareholder litigations
- Represented the Chief Executive Officer of a technology company in connection with an Audit Committee and SEC investigation into whistleblower allegations of accounting improprieties
- Represented the Controller of a technology company in connection with an Audit Committee and SEC investigation into allegations of accounting improprieties
- Represented the Special Litigation Committee of a public technology company in connection with allegations of improper accounting in response to a shareholder derivative lawsuit
- Represented the Special Litigation Committee of a public technology company in connection with allegations of insider trading by senior executives in advance of disappointing sales, in response to a shareholder derivative lawsuit
- Represented the Special Litigation Committee of a public utility relating to cost overruns in its construction of a major power plant, in response to a shareholder derivative lawsuit

Other Complex Commercial Litigation

- (N.D. Cal.); (Cal. Super. – San Francisco Cnty.) – Represented a debt collection company in a consumer class action alleging violations of the various consumer protection laws
- Represented a private equity investment fund and its founder in an individual action brought by an investor for fraud and other torts
- (N.D. Cal.) – Represented a leading IT products/services company in an IP licensing dispute
- (N.D. Cal. (MDL)) – Represented a major technology company in a consumer class action over privacy issues associated with the company's device and terms of the customer agreement
- (N.D. Cal.) – Represented a major bank in a series of class actions alleging breaches of fiduciary duty in connection with the operations of the bank's personal trust operations
- (C.D. Cal.) – Represented a major bank in connection with alleged breaches of contract, breaches of duty, and other torts associated with the collapse of a secondary market maker in student loans

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