

Directors Roundtable: A World Conference on the Global Reach of U.S. & Chinese Regulation & Enforcement

Tuesday, March 29, 2016, 8:30 a.m. – 10:30 a.m.

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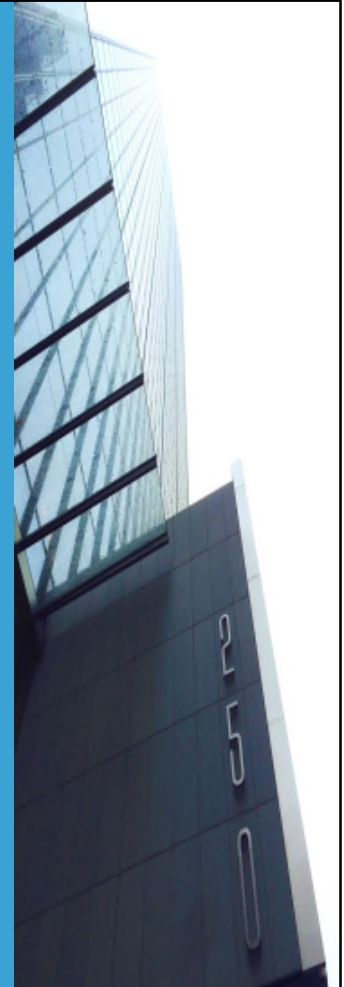
Antitrust Risk for Global Businesses

Saul P. Morgenstern

DIRECTORS ROUNDTABLE
A WORLD CONFERENCE ON THE GLOBAL REACH OF
U.S. AND CHINESE REGULATION AND ENFORCEMENT

KAYE SCHOLER LLP
250 West 55th Street
New York, New York 10019

March 29, 2016



Why are we discussing this?

- Antitrust/competition laws around the world focus on location of market effects rather than location of unlawful action.
 - Where you are matters less than where your actions have consequences.
 - Global businesses' actions have consequences in many markets.
- The US has been the market leader in extraterritorial antitrust law enforcement.
 - But others have jumped on the bandwagon.
 - Cross-border cooperation, at least as to cartel and other “hard core” violations, has become the norm, rather than the exception.
- Penalties have grown.
 - Corporate fines.
 - Focus on personal liability for involved executives.
- And then the private plaintiffs want their money back, and then some.

Agenda

- Core Antitrust Principles
- Who are the Enforcers and what to they want?
 - Priorities
 - Extraterritoriality/Extradition
 - Global cooperation
- Compliance & Prevention
- When Compliance & Prevention Fails
 - Dawn raids/Grand Jury Subpoenas/Civil Investigative Demands
 - First steps
 - Ameliorating the harm

Core Antitrust Principles

- Promote and preserve competition; Why?
 - Promote innovation
 - Provide more choices
 - Lower prices and greater *value* for consumers
- Protect “competition” not “competitors”
 - In any “competition” there are winners and losers among rivals
 - Law assumes that, in “fair” competition, the more efficient, innovative and effective competitors will win
 - Will deliver the best “value”
 - Will attract the most customers
- The law steps in when that process is disrupted

Who are the Enforcers and What Do They Want?

US Enforcement and Litigation

- U.S. Department of Justice
 - Criminal
 - Civil
- Federal Trade Commission
 - Civil
- Private parties injured by the violation
 - Treble damages available
- State governments
 - To recover for their own losses as customers
 - To recover on behalf of citizens *parens patriae*

Antitrust Enforcer Interests

- Government
 - Incentivizing and ensuring compliance with the core principles
 - Punishing violations/failures
 - Remediating violations/failures
- Private parties
 - Recovering damages suffered from violations/failures
 - Preventing violations/failures

Record Breaking Fines and Increased Focus on Individuals

- Record breaking *corporate* fines in the last two years
 - 2014 : \$1.3 billion
 - 2015: \$3.6 billion
- DOJ has always pursued individuals, but individual accountability has become a priority
 - “*Individuals* commit the crimes for which corporate offenders pay. Every corporate crime involves individual wrongdoing” Assistant Attorney General, Brent Snyder, *Individual Accountability for Antitrust Crimes* (Feb. 19, 2016)
- In the last five years, DOJ has prosecuted almost three times as many individuals as corporations (352 individuals and 123 corporations)
- Focus is on the highest-level culpable executives
 - *E.g.*, Auto parts – 9 Presidents, 7 Vice Presidents, 2 Executive Managing Directors, 1 CFO and 30 division directors and general managers

Increased Consequences for Individuals

- The number of individuals sent to prison has more than doubled
 - (1990-1999) – 13 individuals
 - (2010-2014) – 29 individuals
- The average length of prison sentence has more than tripled
 - (1990-1999) – 8 months
 - (2010-2014) – 25 months
- In 2015, a federal jury convicted the President and Executive Vice President of AU Optronics for their role in the LCD Panel price fixing conspiracy.
 - They are serving **36-month** jail terms
 - Longest ever imposed on foreign national defendants for antitrust offenses

Extradition

- DOJ will seek and has obtained the extradition of foreign nationals.
- In connection with an ongoing investigation into price-fixing, bid-rigging, and market allocation in the market for marine hoses
 - Five companies and nine individuals have pleaded guilty to date
 - First extradition by the US of an individual on antitrust charges
 - Romano Pisciotti, Italian citizen (Italy and the US do not have an extradition treaty for antitrust violations), declined to come to the US when indicted.
 - Was apprehended in 2014 while passing through Germany, which does have a treaty with the US, and ultimately sent to the US.
 - Pleaded guilty; sentenced to 2 years in prison and pay a \$50,000 fine.
 - He received credit for the 9 months he was held in Germany pending extradition.
 - Presents a business executive with a difficult choice: Appear and risk prison in US or severely restrict travel, limiting career and lifestyle options.

EC Enforcement

- The European Commission (EC) has the authority to impose fines up to 10% of a company's global annual revenue
 - There is a rebuttable presumption that the actions of a wholly owned subsidiary will be attributed to the parent, and therefore the parent will be subject to fines. *Akzo Nobel NV v. Comm'n of the Eur. Cmtys.*, (Sept. 10, 2009)
 - In order for this presumption to apply, however, the EC must state the reasons which led it to determine the parent was responsible for the alleged activity. *Koninklijke Grolsch NV v. Comm'n*, (Gen. Ct. Sept 15, 2011)
- The EC does not have authority to impose criminal sanctions
 - EU Member States have the option
 - Roughly half of the EU Members States impose criminal sanctions

EC Enforcement Developments 2015-2016

- January 2016: Commission fined Japanese car parts producers €137 million for participating in a cartel in the market for alternators and starters, two components of car engines
- June 2015: Commission fined manufacturers and distributors of retail food packaging trays €115 million for participating in at least one of five separate cartels
- June 2015: Commission fined two German auto parts producers €68 million for participating in a cartel in the market for automotive parking heaters and auxiliary heaters
- March 2015: Commission carried out an unannounced inspection in the bioethanol sector
- February 2015: Commission fined broker ICAP €14.9 million for participating in several cartels in the yen interest rate derivatives sector

Substantial EC Fines Over Five Years

- Automotive Bearings: In 2014, EC fined two European companies and four Japanese companies more than €953 million for operating a cartel in the market for car and truck bearings
- Interest Rate Derivatives: In 2013, EC fined banks €1.71 billion for participating in cartels in the interest rate derivatives industry
- Microsoft: In 2013, EC fined Microsoft €561 million for failing to provide customers meaningful choice between web browsers, as per the terms of a 2009 settlement agreement
- Cathode Ray Tubes: In 2012, EC fined seven groups of companies €1.4 billion for participation in two cartels which allocated customers and restricted production in cathode ray tubes

Multinational Enforcement Overview

- Effective and growing coordination among international enforcers
 - Mutual legal assistance treaties
 - Extradition
- U.S. investigations
 - Usually proceed by grand jury subpoena or by Civil Investigative Demand
 - FBI can conduct surveillance and obtain evidence by search warrant
- EC investigators and Member State competition authorities can conduct “dawn raids” – unannounced visits to obtain evidence – and do so with greater frequency than do US authorities
- Other developed countries have similar mechanisms
- Enforcers coordinate simultaneous raids

Multinational Enforcement Examples

- April 28 – May 1, 2015: Representatives from more than 70 jurisdictions, including the DOJ, attended the annual International Competition Network (ICN) conference in Sydney, Australia
- March 2014: EC authorities carried out unannounced inspections of unnamed companies in several members states that make automotive exhaust systems
- September 2012: Japanese antitrust regulators raided the offices of the five biggest car carrying shipping lines in coordination with inspections by the FTC and EC
- October 3, 2011: EC officials conducted simultaneous “dawn raids” and document seizures at Gazprom offices and affiliates across Europe
- March 1, 2011: EC officials conduct dawn raids at he premises of several European publishing houses
- May 3, 2007: Dawn raids on marine hose producers conducted simultaneously by DoJ, EC and UK Office of Fair Trading
 - The day before, eight executives from France, Italy, Japan and the UK were arrested in their hotel rooms in Houston, Texas, where they were attending an industry conference and cartel meeting

Private Civil Enforcement

- US
 - Direct purchasers (federal claims), usually in class actions
 - Indirect purchasers (state claims), usually in class actions
 - State Attorneys General, behalf of citizens (*parens patriae*) or for state as purchaser.
- EU Directive on Antitrust Damages Actions (Member States by 2016).
 - Removes obstacles to private damages actions
 - Easier access to evidence
 - Rebuttable presumption that cartels cause harm
 - Joint and several liability
 - Five year limitation period on damages claims
 - Final infringement decision of national competition authority constitutes:
 - Full proof of infringement in courts of the same Member State
 - Prima facie evidence of infringement in courts of other Member States

Compliance and Prevention

Culture, Compliance Policies and Enforcement

- Robust and clear policies outlining proper/improper conduct are essential.
- Must have “top-down” legitimacy.
 - Pressure for “results” should not undermine compliance.
 - Senior executives must “walk the walk” as well as “talk the talk”.
- Internal Reporting and Investigation
 - Safe reporting channels (“hot lines”, ombudsmen, “whistleblower” protection).
 - Confidential, but thorough, internal investigation process.
- Discipline – Failure to comply should carry real penalties.
 - Loss of bonuses, demotion, etc.
 - Termination in extreme or repeated cases

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When Compliance and Prevention Fail: A Practical Primer

Self-Reporting

- US DOJ Leniency Programs
 - Reporting an antitrust violation can yield significant benefits
 - Benefits depend on several factors (what, if anything DOJ already knew)
 - Corporations can avoid criminal conviction and fines.
 - Individuals can avoid fines and prison sentences.
 - Guidelines and policy statements outline the options.
 - See <https://www.justice.gov/atr/leniency-program>
 - Can reduce civil damages exposure from treble to single damages.
- EU Leniency Programs
 - Similar to US, encourages self reporting.
 - Offers benefits up to total immunity from fines.
 - See <http://ec.europa.eu/competition/cartels/leniency/leniency.html>

Investigations (Subpoenas, Dawn Raids)

- ***Be prepared.***
 - You may not have time to leisurely interview counsel – plan ahead.
 - Have a clear action plan in place to address the possibilities.
- If a subpoena is served, you will have a few weeks to respond.
- But a Dawn Raid requires immediate action by pre-designated responsible personnel at each location who have been trained to:
 - Cooperate and interact appropriately with authorities to avoid negative interactions.
 - Contact designated counsel (inside or outside) immediately.
 - Preserve access to records (electronic/physical) as much as possible.
 - Preserve attorney-client privilege as permitted by the jurisdiction.

Catching Up: What Should the Board, CEO and General Counsel Do?

- If a subpoena/raid surprises you, the government already knows more than you do.
- Rapid deep dive investigation is essential.
 - Learn the facts.
 - Identify as quickly as possible who is plainly not involved in wrongdoing.
 - Advise those at risk to obtain separate counsel.
 - Consider appropriate actions with respect to those involved in violations of law.
 - Determine whether this is a unique exception or part of a larger problem.
- What to do once you know?
 - Evaluate defense versus settlement options.
 - How did your compliance program fail and how can you fix it going forward?
 - Do you have something (another violation, enhanced compliance) to offer?

Digging Out: Critical Work Flows

- Managerial
 - Assure that response is managed by non-involved personnel.
 - Business and legal leadership must work closely in tandem.
 - Protect customer/business relationships that may have been affected.
- Legal
 - Micro: Focus on getting the facts and understanding the relevant law.
 - Macro: Big picture strategy – evaluate the endgame options.
 - Criminal.
 - Civil.
- Communications
 - Assure that public, internal and legal messaging are consistent (the government, judges and juries read the paper too).
 - Say only what you know to be true.
 - If need be, defer comment until you have the facts.

Digging Out: Treatment of Culpable Senior Executives

- The Division “will have serious doubts about [a] company’s commitment to implementing a new compliance program or invigorating an existing one,” if a company continues to employ such individuals, particularly when those individuals hold positions of “substantial authority,” or can engage in collusive conduct, or can supervise compliance programs or witnesses.

Assistant Attorney General Bill Baer,
Prosecuting Antitrust Crimes (Sept. 10, 2014)

- Serious compliance efforts “must include responsible action regarding culpable executives and employees who have not accepted responsibility for their conduct” .

Deputy Assistant Attorney General Brent Snyder,
Individual Accountability for Antitrust Crimes (Feb. 19, 2016)

Digging Out: Credit for Forward Looking Compliance Programs

- In 2015, for the first time, the Division acknowledged and credited two companies for their *forward-looking* compliance efforts



- In May 2015, Barclays, one of four financial institutions charged with conspiring to manipulate foreign exchange rates, was the first company to be credited and received a “**modest reduction** in its fine”



- In September 2015, KYA, a Japanese manufacturer of shock absorbers in the automotive industry, was the second company to be credited. In recognition for its complete cooperation in the DOJ's investigation and implementation of a “comprehensive and innovative compliance policy,” KYA received a **forty-percent reduction on the minimum fine applicable** under the Sentencing Guidelines

KYA Sentencing Memorandum: Attributes of Effective Compliance Policies (Not Exhaustive)

- Direction from top management, making compliance with antitrust laws a true corporate priority;
- Training of senior management and all sales personnel, including, one-on-one training for personnel where there is a high risk for antitrust violations;
- Testing of employees before and after training;
- Prior approval (where possible) for contacts with competitors and reporting of such contacts;
- Auditing by in-house counsel;
- Certification by sales personnel that prices are independently determined without exchanging information or conspiring with competitors; and
- An anonymous hotline for reporting possible violations.

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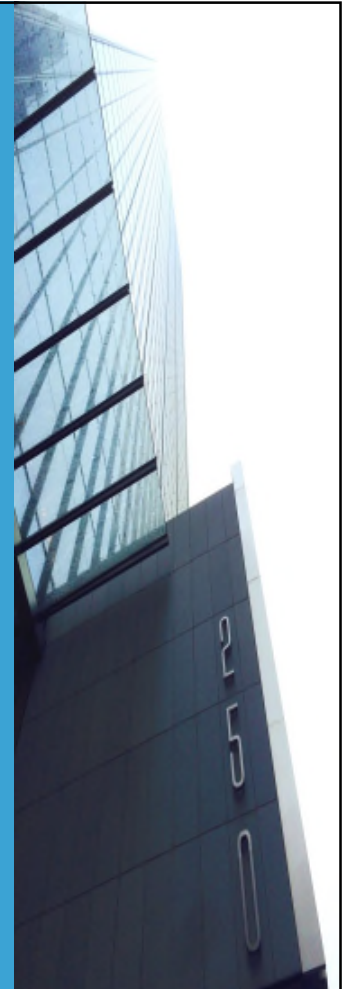
The Reach of U.S. Regulatory Enforcement against Global Financial Conduct

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Why are we discussing this?

- U.S. financial regulators, primarily the CFTC in concert with the Department of Justice, have asserted sweeping jurisdiction over conduct that occurs outside of the United States in non-U.S. markets.
 - The CFTC essentially takes the view that market misconduct in any place in the world affects U.S. markets because of global interrelationships and that it therefore has the jurisdiction to police that conduct.
 - This Pax American view of financial regulation has manifested itself both in rule making and enforcement activities.
- Penalties have been staggering – hundreds of millions of dollars.
- And then the private plaintiffs want their money back, and then some.

The U.S. Enforcement Environment

- The SEC
- The CFTC
- Department of Justice
- The three agencies increasingly work together, given the current government mindset to combine civil and criminal enforcement actions.
- The SEC has effectively limited itself to domestic conduct, *i.e.*, conduct that occurs in the United States or on domestic exchanges or with respect to domestically traded securities.
- The CFTC, however, has taken a global view towards its jurisdiction.

The Reach of the CFTC

- Under Section 2(a)(i) of the Commodity Exchange Act (the “CEA”), the CFTC has exclusive jurisdiction over all accounts, agreements and transactions involving swaps or contracts for sale of commodities for future delivery.
- A commodity is virtually anything except equity securities and options.
- The CFTC takes a very aggressive and broad view of its jurisdiction to police the trading of commodities and all derivatives, primarily relying on its right to police market manipulation.
- The CFTC asserts that it has jurisdiction over any trading of a commodity or a futures contract or derivative that affects the price or trading of the commodity or related futures contract in “interstate commerce” – *i.e.*, anything that takes place in or affects the United States.

Dodd-Frank's Expansion of the CFTC's Power

- Dodd-Frank meaningfully expanded the CFTC's enforcement powers.
- Prior to Dodd-Frank, in order to hold a party liable for manipulation in violation of the CEA, the CFTC had to establish that the party intended to manipulate the price of a commodity or the futures contract.
- Dodd-Frank added section 6(c)(1) to the CEA, pursuant to which the CFTC has promulgated Rule 180.1, which is modeled on Rule 10b-5 under the 1934 Securities and Exchange Act.
 - That rule prohibits (i) the use of any manipulative device, scheme or artifice to defraud, (ii) the making of any untrue or misleading statement of fact, (iii) engaging in an act or course of conduct that would operate as a fraud, or (iv) the delivery of false, misleading or inaccurate report on crop or market information or conditions.

- The rule imposes a reckless standard and not a specific intent requirement. The CFTC defines recklessness “as an act or omission that ‘departs so far from the standards of ordinary care that it is difficult to believe that the actor was not aware of what he or she was doing.’”
- Rule 180.2 still requires proof of specific intent, *i.e.*, the intent to create or effect a price or price trend that does not reflect legitimate forces of supply and demand.
- Rule 180.1, in contrast, requires proof of only false and misleading conduct, but does not require proof of an intent to manipulate prices.
- Rule 180.2 requires that artificial prices result from the manipulative conduct – in contrast, Rule 180.1 does not require proof of reliance or harm to market participants.

Global Cooperation

- To aid its enforcement activities, both the SEC and the CFTC have memoranda of understanding with financial regulators across the world, including with all countries that are financial centers.
- There are MOUs with Australia, Canada, Dubai, France, Germany, Hong Kong, Japan, Singapore and the United Kingdom, among others.
- There is also a joint MOU with the International Organization of Securities Commissions. According to the CFTC, “The IOSCO MOU provides for the exchange of essential information to investigate cross-border securities and derivatives violations, including the most serious offenses, such as manipulation, insider trading and customer fraud. The MOU enables regulators to share critical information, including bank, brokerage, and client identification records and to use that information in civil and criminal prosecutions.”

The LIBOR Enforcement Actions

- Starting with the first settlement against UBS, the CFTC has used its global view of the jurisdiction to take action against the manipulation of LIBOR, almost all of which conduct occurred outside of the U.S. and non-U.S. LIBOR fixings.
- The CFTC premised its assertion of jurisdiction on the grounds that the conduct affected U.S. markets and, in some instances, that the conduct involved communications with parties in the U.S.
- The settlement and consent decree with Barclays is illustrative of the extensive reach of the CFTC.

The Barclays LIBOR settlement

- Barclays entered into a consent order for manipulation and attempted manipulation.
- The charges are based on three courses of conduct. Only one of them had activity in the United States – the other two occurred only in London and Brussels.
 - Distortion of LIBOR to benefit positions held by the New York swap desk.
 - Distortion of Euribor to benefit positions held by the London swap desk.
 - Distortion of LIBOR to influence public perception of Barclays’s financial condition.
- The CFTC based its jurisdiction on the finding that LIBOR is the basis of settlement of interest rates futures and options contracts on the world’s major futures and options exchanges, including the CME, and that LIBOR has a widespread impact on the consumers and businesses for which LIBOR is a benchmark interest rate.

- “By basing its LIBOR and Euribor submissions on Barclays’ derivative traders’ requests, and thereby on Barclays derivative trading positions, Barclays’ LIBOR submissions were not consistent with the BBA’s definitions and criteria for LIBOR submissions. Instead, Barclays conveyed false, misleading or knowingly inaccurate reports that is submitted rates for LIBOR and Euribor that were based on and solely reflected the costs of borrowing unsecured funds in the relevant interbank markets. Accordingly, Barclays regularly attempted to manipulate and knowingly delivered, or caused to be delivered false, misleading or knowingly inaccurate reports concerning U.S. Dollar LIBOR and Euribor, and at times, Yen and Sterling LIBOR, which are all commodities in interstate commerce.” The CFTC found that the same with respect to the submissions based on reputational concerns and negative press and market concerns, as they are not legitimate factors on which to base the submissions.

- Barclays paid a \$200 million penalty.
- Barclays agreed to adopt a number of procedures and practices regarding its daily Benchmark Interest Rate Submissions.
- Barclays agreed to adopt a number of internal control, compliance, auditing and training procedures to monitor its submission practices and to ensure compliance.
- Barclays agreed to provide reports to the CFTC every four months regarding compliance with the consent decree and to provide documents and information to the CFTC without the need for subpoena, whether the materials are located in the U.S. or outside of the U.S.
- Barclays agreed to participate in efforts to reform the process for publishing Benchmark Interest Rates.

- *CFTC v. Parnon Energy Inc. et al.*, action filed in May 2011 for manipulation of the price of WTI crude oil prices. Judgment was entered last year.
 - Swiss and UK trading firms used a U.S.-based affiliate to purchase physical oil in the U.S. and futures on ICE Futures Europe.
- *Matter of Enskilda Futures Ltd.*, a consent order entered in 2011 for violation of the duty to supervise.
 - The Swedish-based parent of a London-based FCM was held liable for failure to maintain an adequate system of supervision and internal controls in connection with the FCM's acceptance and entering of matching buy and sell orders that had the appearance of being wash or fictitious sales.
- Consent decrees with banks in connection with the manipulation of foreign exchange rates in connection with daily London fixings – Barclays, Citibank, HSBC, JP Morgan, RBS and UBS.

- *CFTC v. Optiver US, LLC et al.*, an action filed in July 2008 and settled in April 2012 for manipulation of NYMEX oil futures contracts.
 - The CFTC held the Dutch parent of the U.S. subsidiary liable for the subsidiary’s manipulative conduct.
- *Matter of Australia and New Zealand Banking Group Ltd.*, a consent order entered in 2012 for failure to comply with position limits for wheat and cotton contracts traded on the CBOT and ICE Futures U.S.
 - ANZ held futures contracts to offset its derivative contracts with agricultural industries, but had not obtained a hedge exemption, and its futures positions exceeded speculative limits for those contracts.
- *Matter of J.P. Morgan Chase Bank, N.A.*, a 2013 consent decree regarding the “London Whale” trading losses under the CFTC’s broader deceptive practices rule.

Foreign Regulators' Actions

- The foreign regulators have focused their enforcement activity against parties and individuals who lived in and engaged in conduct in their respective countries.
 - For example, the U.K. Serious Fraud Office has brought numerous criminal proceedings against traders based in London, the most notable being the criminal prosecution of the former UBS trader Tom Hayes.
- This restraint contrast with the criminal prosecutions by the Department of Justice, which has brought indictments against foreign traders involved in the LIBOR manipulations and have obtained extradition in connection with those actions.

Other Liability Risks

- The CFTC's actions are not limited to financial institutions.
 - It will use its enforcement arm to reach any company that participates in any futures or derivative market.
 - Its action against Kraft and Mondelez for manipulation in connection with those companies' hedging activities is the most recent example.
- Civil litigation in the U.S. courts under the securities, commodity and antitrust laws.
 - Generally, those actions are limited to conduct in the United States.
 - The Second Circuit's 2015 *en banc* decision permitting the European Community to bring claims under RICO against RJR Nabisco for foreign conduct. The Supreme Court has granted cert and argument was heard on March 21. Unless the decision is reversed, it will open a Pandora's Box for RICO actions for conduct that occurs outside of the U.S.

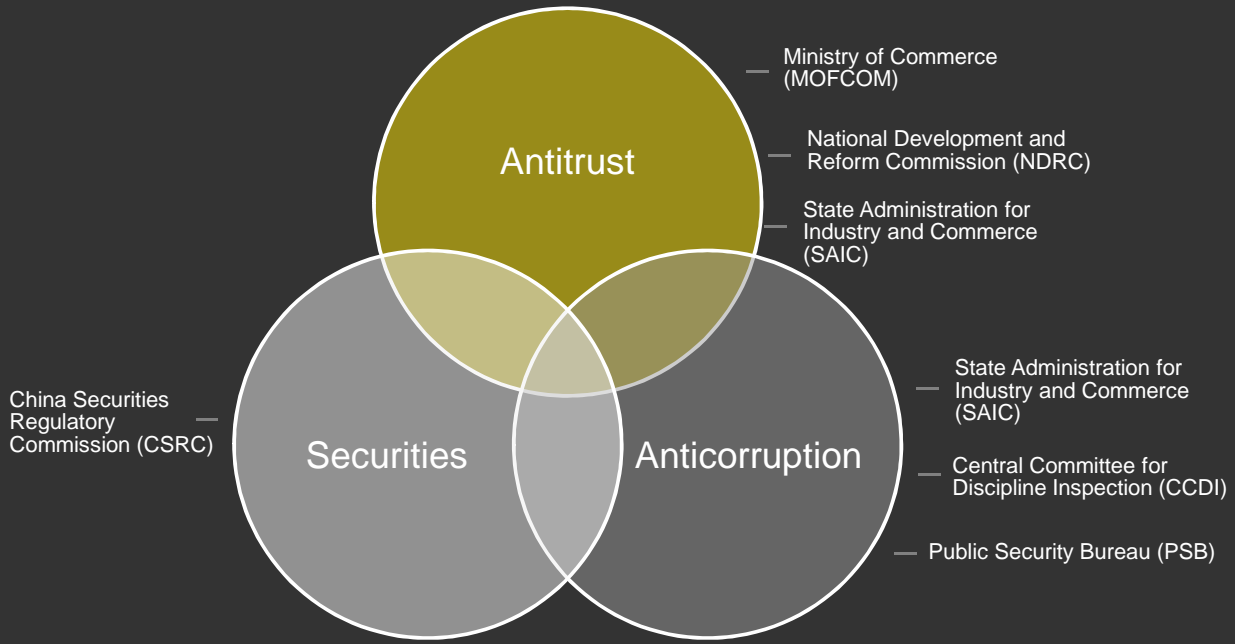
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International Impact of Chinese Regulatory Enforcement

Director's Roundtable
29 March 2016



Enforcement Spheres



Antitrust

- ▶ China's Anti-Monopoly Law (AML) passed in 2007, implemented in 2008
 - ▶ Steady increase in resources for 3 enforcement agencies
- ▶ Merger control
 - ▶ 2 rejections in 8 years (Coca Cola / Huiyan; P3 Network Shipping Alliance)
- ▶ NDRC Enforcement Actions
 - ▶ Between 2008-2012: 20 price related investigations. In 2013: 80. In 2014: 150.
 - ▶ Domestic & foreign targets
 - ▶ Banking, telecom, automotive, contact lenses / eyeglasses, pharma, express delivery
 - ▶ Inflation / anti-corruption / safety control aspects
 - ▶ US Treasury pressure: "Industrial policy vs. consumer welfare"

Antitrust, cont.

- ▶ Challenges with ensuring due process in enforcement / investigations:
 - ▶ Pressure to 'admit guilt'
 - ▶ Resistance to counsel's involvement (raids & negotiations)
 - ▶ Limited transparency of evidence
 - ▶ Unclear resolution of cases

Securities

Implications of listing abroad; evolving role of the CSRC

- ▶ 2011 RTO implosion →
- ▶ 2011 /2012 SEC investigative focus (Longtop, etc.) →
 - ▶ Big 4 JV production requirements →
 - ▶ SEC / CSRC 矛盾 dilemma→
- ▶ 2012 SEC / Big 4 lawsuit →
- ▶ 2013 PCAOB / CSRC MOU →
- ▶ 2015 SEC / Big 4 settlement →
- ▶ 'De-list / re-list'

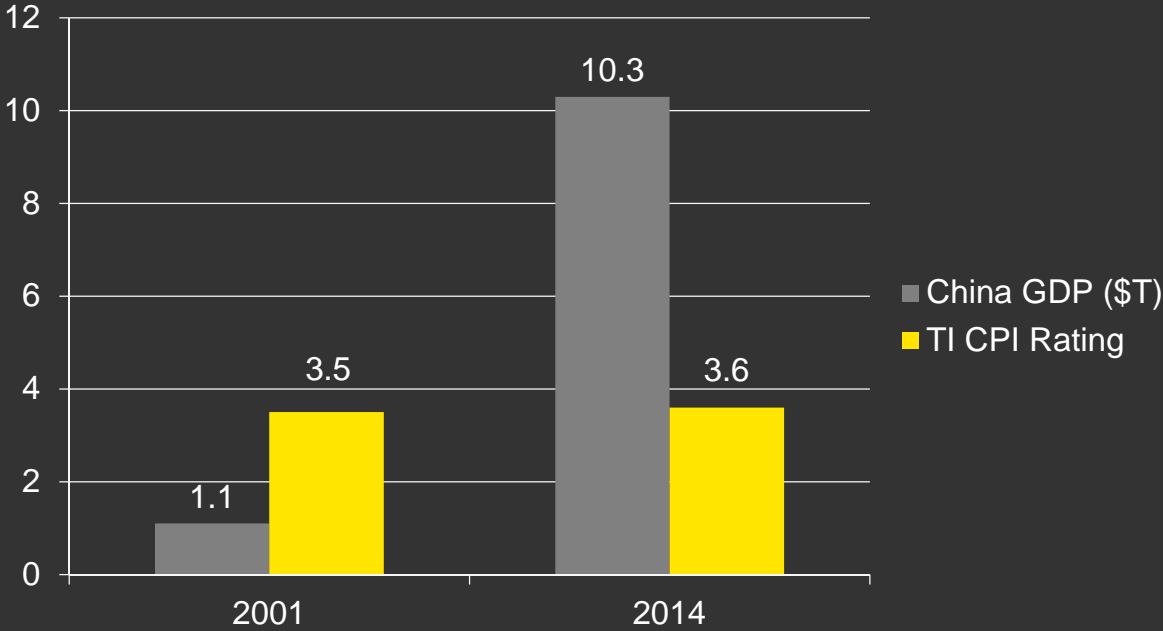
Implications of listing at home

- ▶ Shanghai Exchange volatility
- ▶ CSRC leadership changes

Anti-Corruption

- ▶ Patchwork of legislation, including but not limited to:
 - ▶ PRC Criminal Law
 - ▶ China Anti-Unfair Competition Law (commercial bribery)
 - ▶ Relevant interpretations issued by Supreme People's Court/ Supreme People's Procuratorate / State Administration for Industry and Commerce (SAIC)
 - ▶ Interim Regulations on Prohibition of Commercial Bribery (SAIC)
 - ▶ Regulations by Communist Party of China
- ▶ Eighth Amendment to China's Criminal Law (2011): For the first time under Chinese law, payments of bribes to foreign officials is criminalized

Growth vs. Risk – Managing the Gap



Enforcement headlines – ‘Tigers’ and ‘Flies’

“GSK Statement of apology to the people of China”
-GSK, September 9, 2014

Fined CNY 3 billion for bribing non-government personnel, largest in China

“Widening graft probe snares China Southern CFO”
-Financial Times, January 6, 2015

Result of the anti-graft campaign

“China Minsheng Banking chief quits post”
-China Economic Net, February 2, 2015

Most senior bank official detained

“China Corruption snares 115 SOE ‘tigers’”
-Financial Times, May 18, 2015

115 C-Suite officials from global giants

2016 and beyond; implications for enforcement

- ▶ Sub-7% growth the 'new normal'?
 - ▶ Increased government intervention pressure
- ▶ Sustained anti-corruption focus
 - ▶ Impact on economy
- ▶ The emerging Chinese consumer
 - ▶ Safety
 - ▶ Pricing
- ▶ Chinese MNCs 'going abroad'
 - ▶ ICBC Standard Bank Tanzania, UK Bribery Act DPA

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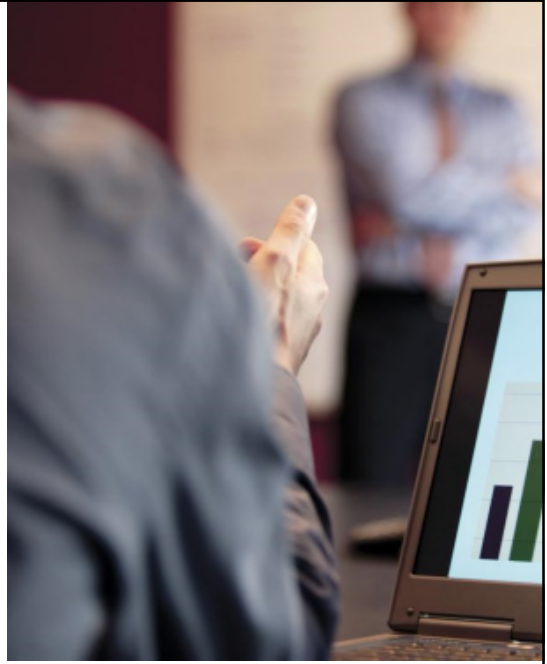
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The Directors' Roundtable

Global Reach – Cross Border Investigations & Enforcement Actions

Director & Officer Liability Considerations

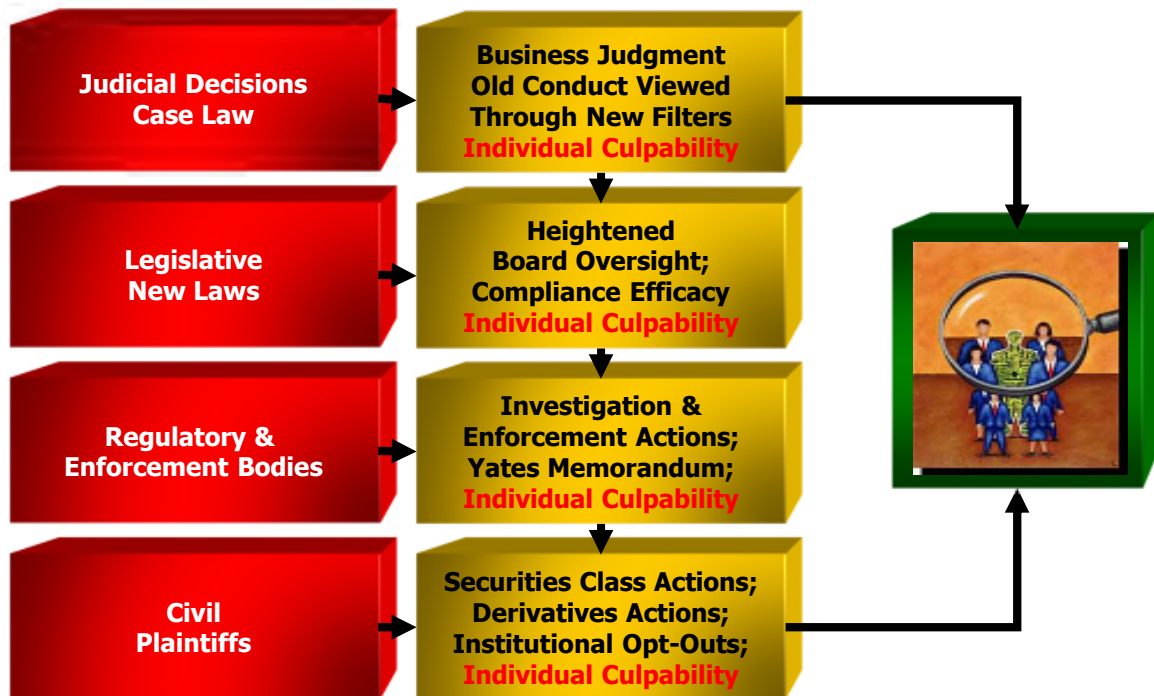
Dana Kopper, Managing Director



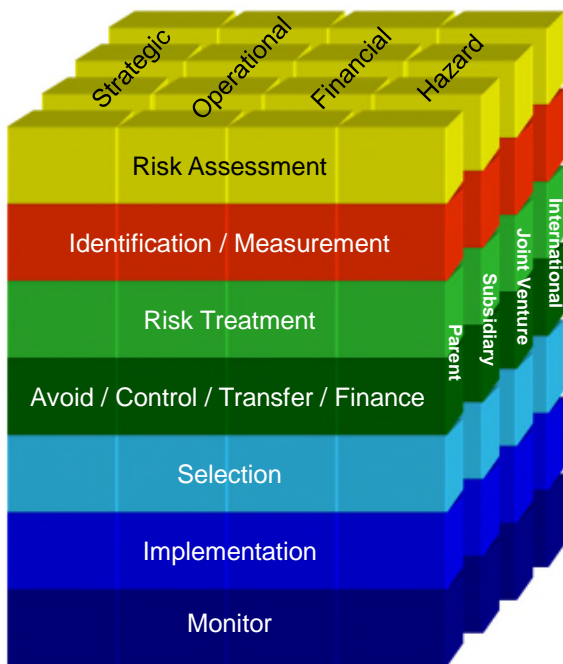
L O C K T O N C O M P A N I E S, L L C

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

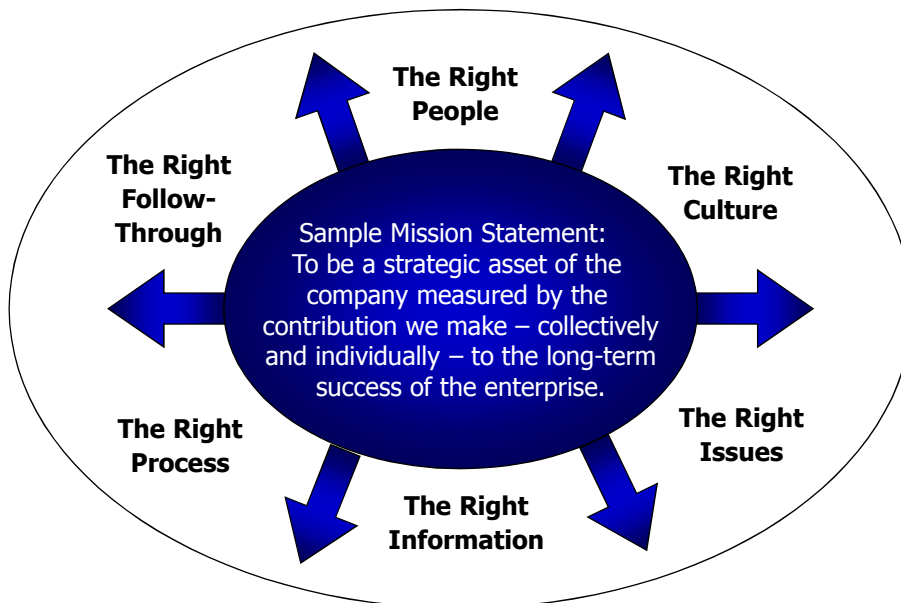
Management & Professional Liability



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**



Indemnification...Generally

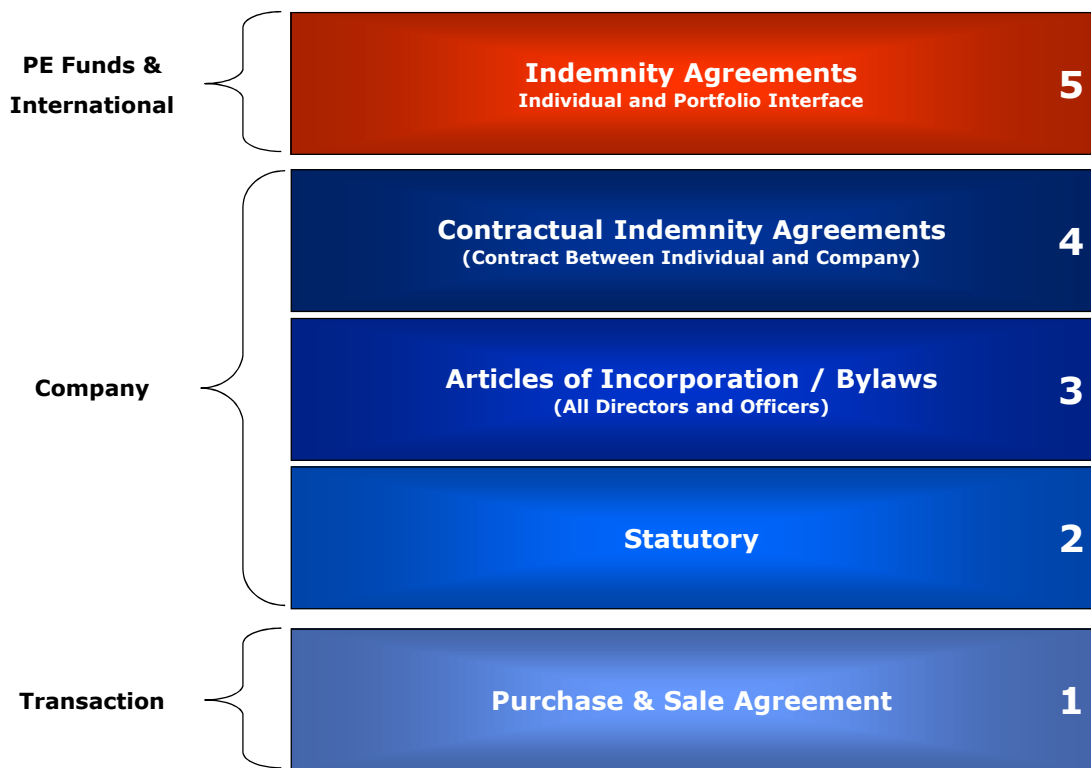
- 3

Contractual Indemnity Agreements
(Contract Between Individual and Company)
- 2

Articles of Incorporation/Association/Bylaws
(All Directors and Officers)
- 1

Statutory

Harmonized Indemnification



International Indemnity – Expanding Protections

A Sampling

- ❖ **Individual contractual agreements (domestic and foreign) 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



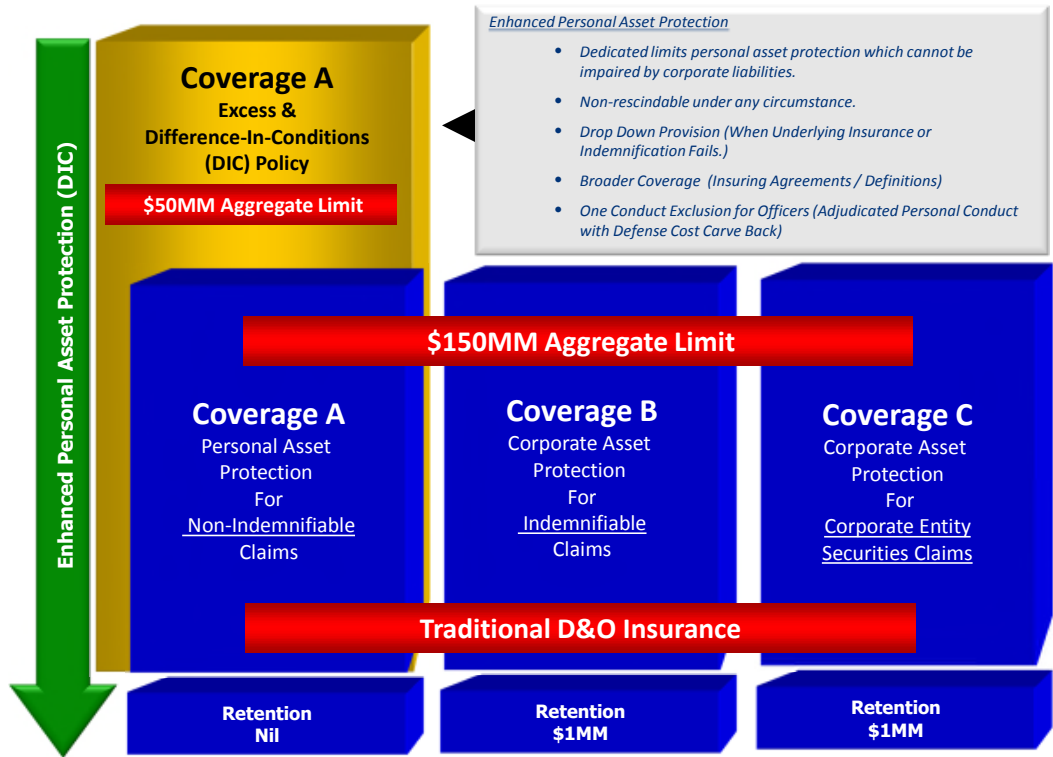
D&O Liability Insurance Considerations



D&O Liability Insurance Coverage Part Overview

Including Enhanced Personal Asset Protection (DIC)

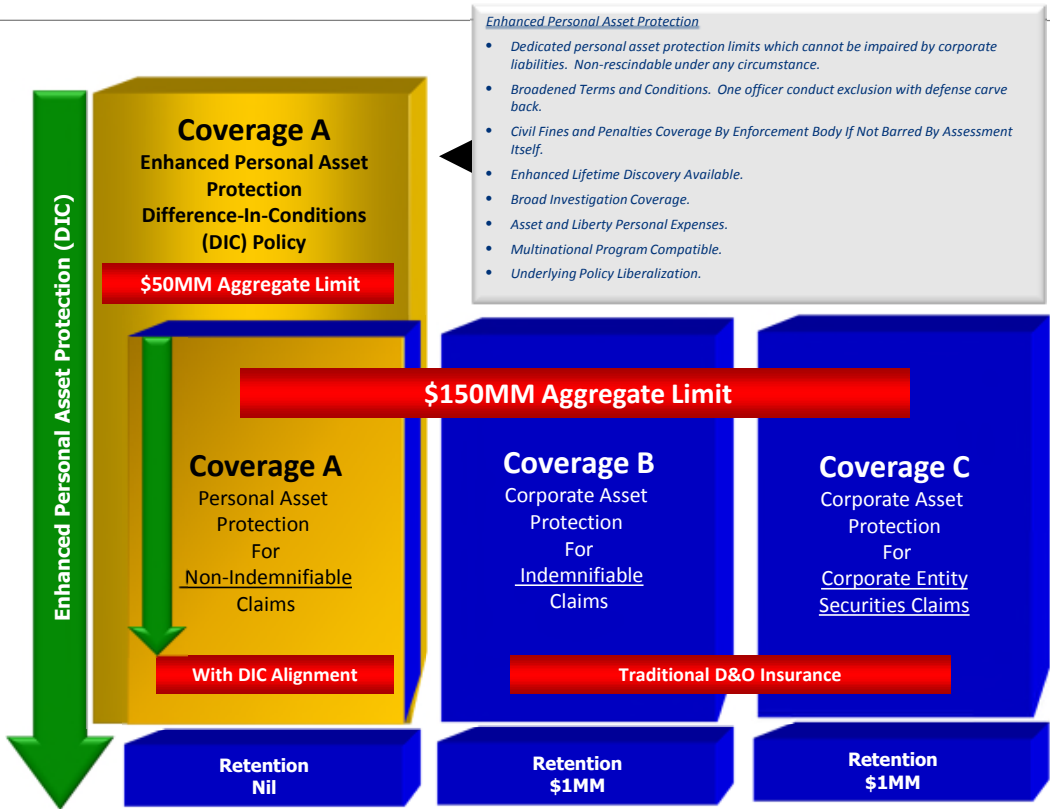
Important Note: Terms, conditions, limitations, exclusions, and exceptions apply.



D&O Liability Insurance Coverage Part Overview

Full Tower Enhanced Personal Asset Protection (DIC)

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

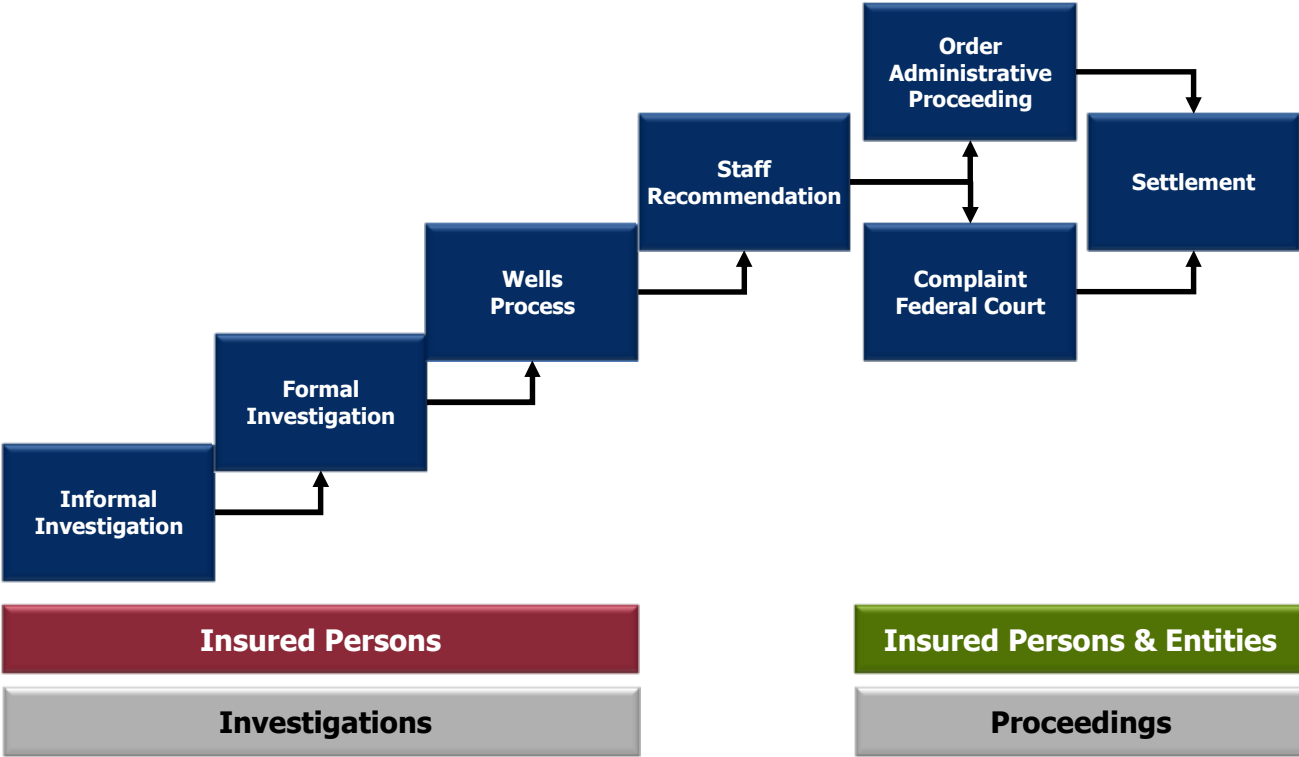


- Enhanced Personal Asset Protection*
- Dedicated personal asset protection limits which cannot be impaired by corporate liabilities. Non-rescindable under any circumstance.
 - Broadened Terms and Conditions. One officer conduct exclusion with defense carve back.
 - Civil Fines and Penalties Coverage 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.



Insured Persons

Insured Persons & Entities

Investigations

Proceedings

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**
- ❖ **SOX 304 and Dodd-Frank 954 Expenses** (No Actual Clawback; However, Off Shore Options)
- ❖ **FCPA & UK Bribery Act** (Limited Fines and Penalties – Derivative Civil Follow-On)
- ❖ **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.

INSERT TAB 5



John Auerbach



Background:

John is a Principal with the New York Fraud Investigation and Dispute Services (FIDS) practice and leader of the FIDS Integrity Diligence practice, the firm's third party risk management and investigative due diligence service.

He has over 17 years of forensic investigation and anti-fraud experience on engagements in the United States and around the world.

Until December 2013 John was managing partner of the FIDS Greater China practice, based in Shanghai. He has a decade of experience in the field conducting anti-fraud and corruption projects throughout Asia. He is a fluent Mandarin speaker.

John has a B.A. in Asian Studies and Political Science from Bowdoin College, and a Master's degree in Law and Diplomacy from the Fletcher School at Tufts University.

Functional Expertise:

- Investigations
- Anti-Fraud
- Anti-Corruption
- Forensic Data Analytics
- E-Discovery
- Anti-Money Laundering
- Business Intelligence
- 3rd Party Risk Management
- Investigative Due Diligence

Industry Experience:

- Life Sciences
- Manufacturing
- Financial Services
- Real Estate
- Construction
- Consumer Products
- Media
- Telecom
- Technology

Selected Career Experience

- Conducted numerous investigations for the audit committees of SEC and HKSE - registered Chinese companies accused of financial reporting fraud. Investigated actual financial performance of the subject companies through forensic data analytics, accounting analysis and field inquiries / verification. Reported results to securities regulators with legal counsel.
- Investigated allegations of FCPA violations at the Asia Pacific operations of a leading global financial services firm. Worked with counsel to conduct data analytical review of transactions, computer forensic analysis, and interviews with key staff. Assisted counsel in preparing materials for self-reporting to the Securities and Exchange Commission.
- Assisted a global top 5 pharmaceutical company in performing forensic data analytics review of its China operations. Led the design and implementation of analytics models focused on interaction with hospitals and health care professionals.
- Investigated allegations of money laundering violations at a leading European financial clearing house. Led data analytics and qualitative review of large amounts of transactional activity. Provided a formal report to financial regulators and parliamentary investigators.
- Designed and led a regional 3rd party risk management program for a multinational pharmaceutical company. Helped the client design and execute a pilot program for conducting standardized risk scoring, background and compliance reviews of the company's network of vendors and partners in Asia Pacific.
- Performed a Know Your Customer (KYC) performance assessment for the New York operations of an foreign-owned bank. Analyzed customer files and transactional records to assess past performance, and provided guidance regarding potential improvements to the banks compliance regime. Reported findings to federal and state banking regulators.



H. Peter Haveles, Jr.

Partner, Complex Commercial Litigation Department

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ADMISSIONS

New York

Massachusetts

US District Courts for the Eastern, Northern and Southern Districts of New York

US Court of Appeals for the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth, Circuits

EDUCATION

JD, magna cum laude, Boston University School of Law, 1980

AB, cum laude, Harvard University, 1976

Peter Haveles, a Partner in the Complex Commercial Litigation Department, focuses his practice on complex disputes involving the financial markets and commercial transactions. Over the course of his career, Peter has developed an extensive understanding of his clients' business operations, the financial markets in which they operate and the risks that accompany them. Based on that knowledge and experience, he has advised clients with respect to litigation risks for numerous transactions and litigation arising from those transactions. In addition, Peter actively counsels clients of the firm in these areas to minimize the litigation risks associated with their businesses, and to resolve disputes as efficiently and effectively as possible. He has been recognized as a "Litigation Star" by *Benchmark Litigation* from 2012 through 2015. In 2015, Peter also won the Burton Award for distinguished legal writing. The Burton Awards is a non-profit program which is run in association with the Library of Congress.

Peter has represented numerous financial services institutions and other participants in the financial markets in connection with civil litigation and investigations and enforcement actions pursued by regulatory agencies, and major exchanges arising out of US and foreign securities, options, futures, derivatives, capital markets and asset-backed transactions. He has addressed disputes involving antitrust claims, unauthorized trading, front running, prearranged trading, improper and negligent execution of trades, market manipulation, failure to supervise, compliance with exchange rules, fraudulent representations and broken trades.

Peter has represented financial institutions, corporations, and individuals in a broad array of commercial and corporate litigation throughout the United States.

These disputes have involved breach of contract, lender liability claims, enforcement of indentures and intercreditor agreements, fraudulent conveyance claims, corporate governance, acquisition and shareholder disputes, preservation and restructuring of distressed assets, major real estate loan defaults and partnership disputes.

Peter has substantial trial experience before the federal district and bankruptcy courts, state courts (both in New York and across the United States), arbitration panels, administrative law judges and self-regulatory organizations. He also has extensive appellate experience before the United States Court of Appeals for numerous circuits and the California and New York State appellate courts.

Peter graduated *cum laude* from Harvard College in 1976 and *magna cum laude* from Boston University School of Law in 1980. Between college and law school, he was a Rotary Foundation Fellow, and pursued graduate studies in political science at the University College of Wales in Aberystwyth, Wales. At law school, he was an editor of the *Law Review*. He is a past president of the Boston University School of Law Alumni Association, where he also served on its Board of Visitors for 10 years. He is President of the Board of Trustees of the Parrish Art Museum and the former President of the Board of Directors of the Irish Georgian Society.

Representative Matters

- Represented one of the five arranger banks in the \$20 billion fraudulent conveyance action in the Lyondell Basell bankruptcy arising out of the Lyondell Chemical Company leveraged buyout in December 2007.
- Represented parent corporation in action asserting that \$150 million dividend from a bond offering by one of its subsidiaries that filed bankruptcy several years later was a fraudulent conveyance and in violation of Delaware law.
- Represented one of the largest mezzanine lenders in the Extended Stay Hotels (“ESH”) bankruptcy in connection with enforcing its rights under the intercreditor agreement and under the guarantee provided by ESH’s principal owner.
- Represented the largest options market maker in an antitrust action alleging a conspiracy to restrain the pricing of options contracts on various exchanges.
- Represented a physical commodities merchant in connection with international regulatory enforcement proceedings and numerous federal and state class actions alleging conspiracy to manipulate the price of copper.
- Represented a futures exchange in actions challenging its disciplinary procedures and rulings.
- Represented a subprime credit card issuer in the appeal from the judgment in an enforcement proceeding by a state attorney general alleging false and deceptive practices.
- Represented a hedge fund in an action alleging a conspiracy among a number of short sellers and analysts to drive down the price of a company’s stock.
- Represented investment manager inaction alleging unauthorized investments, ERISA violation and breach of fiduciary duties.
- Represented noteholders in actions to enforce their rights under the indentures against issuers, other noteholders and hedge counterparties.

- Represented preferred shareholders in an action to enforce their right to board representation.
- Represented the servicer and the bondholders for the mortgage on the World Trade Center in an action to enforce the collateral rights to the insurance proceeds, and to compel repayment of the mortgage and the bonds.
- Represented the servicer in actions by the indenture trustee and bondholders alleging breach of the servicing agreement for a pool of franchise loans.
- Represented lenders in action to enforce loan obligations and to foreclose on collateral.
- Represented an investment bank in connection with the investigation of trading of certain asset-backed securities by the TARP Inspector General.
- Represented an investment bank in connection with a dispute with a monoline insurer regarding the synthetic commutation of the credit insurance policy for certain student loan backed securities.
- Represented one of the banks that provided receivables financing for the Petters Company and Polaroid against claims that loan repayments were fraudulent conveyances.
- Represented lenders in enforcement of recourse and “bad boy” guarantees.
- Represented lender against claims by major commercial tenant in urban mixed-used mall seeking to impose liability for contract and tort claims against the foreclosed borrower.
- Represented lender against claims that formation of a new bank to hold the lender’s nonperforming loan portfolio in the midst of the 2008 financial crisis triggered the borrower’s right of first refusal.
- Represented a British private equity fund in connection with claims of misrepresentations and fraud regarding the financial statements against the seller of an automotive parts division.
- Represented a parent corporation in connection with Peruvian criminal fraud and libel claims with respect to promissory notes issued in connection with purchase of a mining business in Peru.
- Represented a biotechnology company in litigation against a town attempting to override the tax exemptions granted by an industrial development agency for the production and research facilities constructed by the company.
- Represented a trader in a dispute with its co-trader regarding allocation of certain Canadian taxes arising out of the trade of Canadian preferred securities.
- Represented an international luxury goods company in connection with claims against eBay for the sale of fraudulent and counterfeit jewelry.
- Represented the chief executive officer of a major industrial holding company in connection with defamation claims against New York and London newspapers.

Articles

- “The First Circuit’s *Flannery* Decision Leaves Unresolved the Validity of the SEC’s Attempt to Expand the Reach of Sections 10(b) AND 17(a),” *Securities Regulation and Law Report*, Bloomberg BNA, February 15, 2016.

- “The CFTC Overreaches in Its Interpretation of the Anti-Manipulation Provisions Adopted in Dodd-Frank,” *Securities Regulation and Law Report*, Bloomberg BNA, March 10, 2014.
- “In *SEC v. Apuzzo*, Second Circuit Clarifies ‘Substantial Assistance’ Standard for SEC Aiding and Abetting Claims,” *Client Alert*, Kaye Scholer, August 20, 2012.
- “A Recent District Court Decision Undermines the Supreme Court’s Ruling in *Janus*,” *Investment Funds Newsletter*, Kaye Scholer, Fall 2011.
- (Co-author with Timothy Spangler), “Supreme Court Limits 10b-5 Claims Against Mutual Fund Advisors,” *Investment Funds Newsletter*, Kaye Scholer, Summer 2011.
- “The Supreme Court Adopts a Bright Line Attribution Test for Liability Under Section 10(b) of the Securities Exchange Act,” *Client Alert*, Kaye Scholer, June 15, 2011.
- (Co-author with Aaron Rubinstein and Timothy Spangler) “Supreme Court Finds that Foreign Transactions of Non-US Securities Outside the Reach of US Securities Fraud Claims,” *Client Alert*, Kaye Scholer, June 30, 2010.
- “Fraud On The Market And Class Certification,” *Securities Law360*, November 10, 2008.
- “Banks, as Trustees, Face Increased Risk As Subprime Crisis Deepens,” *The Subprime Crisis: a Thomson West Special Report*. Also was published by *Andrew’s Bank & Lender Liability Litigation Reporter*, March 1, 2008.
- (Co-author with Scott B. Schreiber) “The US Supreme Court dramatically circumscribes the ability to sue for securities fraud,” *International Investment & Securities Review* (published by Euromoney Yearbooks) 2008.
- “‘Oscar’: Nearing the End of Fraud on Market Theory?” *New York Law Journal*, September 27, 2007.
- (Co-author with Scott B. Schreiber) “Rescuing Foreign Issuers — Courts Put The Brake on Class Actions,” *International Financial Law Review*, September 1, 2007.

Media

- “If SAC Loses in Court, Who Pays?” *Institutional Investor’s Alpha*, July 31, 2013.
- “RBS Libor Fine Confirms CFTC’s Intent To Police Global Markets,” *Hedge Funds Review*, February 13, 2013.
- “Court Clarifies Standard for SEC Aiding and Abetting,” *InsideCounsel*, October 30, 2012.
- “LA Building Owner Says UBS Owed It First Crack At Loan,” *Law360*, March 15, 2012.
- “HSBC Dropped from Silver Price Suppression Lawsuit,” *Financial Times*, September 14, 2011.
- “Supreme Court Ruling a Win for PE Professionals,” *PE Manager*, June 28, 2011.
- “Life in the Doldrums Continues for Civil Litigators,” *The National Law Journal*, March 15, 2010.
- “Valukas Smooths Way to Legal Action,” *Financial Times*, March 13, 2010.
- “Examiner Unveils Lehman Accounting Tricks,” *Associated Press*, March 12, 2010.
- “Proposed trading caps anger bankers,” *Financial Times*, January 22, 2010.

- “Charges dismissed against ex-BP traders,” *Financial Times*, September 18, 2009.
- “Regulatory action may see commods traders migrate,” *Financial Times*, August 4, 2009.
- “Calpers lawsuit tests rating agency liability in defaults,” *Risk*, July 27, 2009.
- “US ready to battle oil-price speculation — In change from ’08, CFTC weighs limits on trading positions,” *The Wall Street Journal Europe*, July 8, 2009.
- “Banks face trial in Texas on Clear Channel,” *Financial Times*, April 2, 2009.
- “Televisa and Univision in Hispanic Showdown,” *Financial Times*, April 28, 2008.
- “Banks, Raters Face Subprime Lawsuits, New Rules,” *Reuters*, November 20, 2008.
- “The odd couple’s messy ‘divorce’,” *Financial Times*, March 9, 2008.
- “Paulson’s Subprime Plan May Meet Legal Challenges,” *The New York Sun*, December 14, 2007.
- “Paulson Mortgage Plan Surfaces Too Late to Stem Housing Slide,” *Bloomberg*, December 7, 2007.
- “Some Investors Fault Plan to Aid Home Borrowers — Critics Say Rate Freeze May Prolong the Pain; Lenders’ Shares Rise,” *The Wall Street Journal*, December 1, 2007.
- “Supreme Court Rings Closing Bell on Antitrust IPO Suit,” *Andrews Derivatives Litigation Reporter*, July 23, 2007.
- “Supreme Court Heightens Pleading Standard,” *Securities Law360*, June 21, 2007.
- “Credit Suisse Sued Over Losses on Subprime Loan Bonds,” *Bloomberg*, April 27, 2007.

Events

- “Enforcement and Liability Risks for Hedge Funds Trading in the United States,” Kaye Scholer Investment Funds Group Breakfast Series, October 5, 2010.
- Panelist, “Global Impacts and What Lie Ahead,” Duff and Phelps Subprime Summit, November 20, 2008.
- “Trustee and Servicer Obligations and Liability,” Arnold and Porter’s The Subprime Crisis: Preparing For What’s Next, October 4, 2007.



Dana Kopper

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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 37 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
Adjunct Faculty
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)
- ❖ Associate in Risk Management (ARM)



Saul P. Morgenstern

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AREAS OF EXPERIENCE

Antitrust

Commercial Litigation

Intellectual Property

Alternative Dispute Resolution

Life Sciences

ADMISSIONS

New York

United States Supreme Court

United States Courts of Appeals for the Second, Third, Sixth, Seventh, Eleventh, DC and Federal Circuits

United States District Courts for the Southern, Eastern, Northern and Western Districts of New York

United States District Court for the Northern District of California

United States District Court for the Northern District of Illinois

EDUCATION

JD with Distinction, Hofstra University School of Law, 1981

BS, Boston University, 1974

Saul Morgenstern, Chair of the firm's Antitrust practice, has represented clients across a broad spectrum of industries in complex disputes, class actions and multi-jurisdictional litigation before US federal and state courts, international arbitral tribunals, and in US Government, State and foreign investigations. He also advises US and global companies with respect to the antitrust implications of mergers, acquisitions, joint ventures, trade association activities, distribution and pricing programs and other aspects of competitor and customer relations.

Saul has repeatedly been recognized in *Chambers USA: America's Leading Lawyers for Business*, which most recently quoted clients who describe him as "extremely knowledgeable and experienced," "superb" and as having the "ability to analyze problems and then explain them in as much or as little detail and complexity as is needed to address his audience" (2015). He recently received Euromoney's *LMG Life Sciences* 2015 Antitrust Litigator of the Year Award, was named a National Law Journal *M&A and Antitrust Trailblazer* in 2015, and has been recognized multiple times as a leading antitrust practitioner by *Global Competition Review* and a "Life Science Star" in Euromoney's *LMG Life Sciences Guide*.

Saul speaks and writes regularly on antitrust and compliance issues facing US and multi-national businesses, and most recently Co-Chaired the Practising Law Institute's two day program "Antitrust Law Institute 2015: Developments and Hot Topics", held in New York City on May 6 and 7, 2015.

Representative Matters

Antitrust

- *Abbey House Media, Inc. d/b/a BooksOnBoard v. Apple, Inc.; Diesel Ebooks, LLC v. Apple, Inc.; DNAML PTY, Limited v. Apple, Inc.* (US District Court, SDNY). Defending Penguin Group in actions brought by defunct electronic book resellers claiming to have been forced out of business as a result of an alleged conspiracy among Apple, Inc. and five major publishers to shift the sale of electronic books to an “agency model” distribution methodology. All three cases were dismissed on the defendants’ motions for summary judgment, and two of the plaintiffs – Abbey House Media and Diesel Books LLC, are appealing from those judgments.
- *United Food and Commercial Workers Unions and Employers Midwest Health Benefits Fund, et al. v. Novartis Pharmaceuticals Corporation, et al.* (US District Court, D. Mass.). Defending brand name pharmaceutical manufacturer against third party payor health plans claims that it brought so-called “sham” litigation to enforce patents in an effort to impede generic competition.
- *The Bookhouse of Stuyvesant Plaza, et al. v. Amazon.com et al.* (US District Court, SDNY). Successfully defended Penguin Random House LLC in class action complaint brought in the US District Court for the Southern District of New York by retail booksellers, alleging that Amazon.com and major publishers of electronic books conspired to prevent retail booksellers from selling electronic books by agreeing to use digital rights management software proprietary to Amazon, which prevents Kindle owners from purchasing electronic books from sources other than Amazon. On a motion to dismiss, obtained dismissal with prejudice of all claims against defendant publishers.
- *In Re Skelaxin (Metaxalone) Antitrust Litigation*, MDL No. 2343 (US District Court, ED Tenn.), and related cases. Defeated motions for class certification by plaintiffs seeking to represent classes of Indirect Purchasers for Resale (*e.g.*, pharmacies) and End Payor Indirect Purchasers (*e.g.*, health insurers, pharmacy benefit managers, consumers) in several federal and state class actions alleging that the manufacturer conspired with a potential generic entrant to delay or block generic entry in violation of Section 1 of the Sherman Act and certain state antitrust, unfair trade practices and related laws. Defending remaining “opt-out” plaintiffs cases.
- *In Re Rail Freight Fuel Surcharge Antitrust Litigation* (US District Court., DDC). Co-counsel defending major railroad in several nationwide class action antitrust law suits against major US railroads alleging collusion to fix fuel surcharges on freight shipments in violation of the Sherman Act.
- *In re Electronic Books Antitrust Litigation*. Representation of Random House, Inc. in connection with US Department of Justice investigation into the adoption of “agency” as a means of distributing electronic books (which culminated in actions filed in the US District Court for the Southern District of New York by the DOJ against Apple, Inc. and five publishers other than Random House); and defense of Random House in originally-filed consumer class actions (Random House dropped from the cases upon filing of a consolidated class action complaint).
- *Novartis Acquisition of Fougera Holdings, Inc.* Advised Novartis AG with respect to the competition law issues associated with its July 2012 \$1.5 billion acquisition of a competing

dermatologics company, Fougera Holdings, Inc., and represented the company before the Federal Trade Commission to obtain clearance for the acquisition.

- *Clayworth, et al. v. Pfizer Inc, et al.* (Superior Court of California, Alameda County). Obtained summary judgment dismissing on the merits an action by California retail pharmacies alleging a conspiracy among brand name prescription drug manufacturers to fix prices in violation of the Cartwright Act, California's state antitrust law. Summary judgment was affirmed by the California Court of Appeal and, on November 28, 2012, the California Supreme Court denied plaintiffs' Petition for Leave to Appeal. On June 3, 2013, the United States Supreme Court denied plaintiffs' Petition for a Writ of Certiorari.
- *Novartis Acquisition of Corthera, Inc.* Advised Novartis International AG in connection with competition and regulatory approval aspects of its February 2010 acquisition of Corthera, Inc., a privately-held biopharmaceutical company engaged in the research and development of Relaxin, for US\$120million, with Corthera's shareholders being eligible for additional payments of up to US\$500million contingent upon successful development and commercial milestones, and assisted the company in obtaining early termination of Federal Trade Commission review of the transaction.
- *Drug Mart Pharmacy Corp., et al. v. American Home Products Corp., et al.* (US District Court, EDNY). Obtained summary judgment for client Pfizer Inc and its codefendants dismissing all damages claims by representative plaintiffs in price discrimination actions brought by several thousand independent pharmacies against a group of major brand name prescription drug manufacturers.
- *In re Pharmaceutical Industry Average Wholesale Price Litigation* (US District Court, D. Mass). Obtained voluntary dismissal of horizontal antitrust claims asserted in private third-party payor and Medicare beneficiary class actions against Together Rx LLC and its founding members, as well as all consumer fraud and Medicaid fraud claims against the firm's client asserted by the same plaintiffs.
- *In re Stock Options Trading Antitrust Litigation* (US District Court, SDNY). Defended market maker in multi-district class actions alleging agreements restricting multiple listing of options, in violation of the Sherman Act.
- *In re Compensation of Managerial, Professional and Technical Employees Antitrust Litigation* (US District Court, DNJ). Defended Union Oil Company of California and its parent in multi-district class actions in which plaintiffs allege that information-sharing in the oil and petrochemical industries retarded salary growth in violation of the Sherman Act. The plaintiffs' two motions for class certification were denied in 2003 and 2006.
- *In re Magazine Antitrust Litigation* (US District Court, SDNY). Obtained a favorable resolution on behalf of major publishers of consumer magazines in multi-district class actions, in which plaintiffs claimed that the publishers, along with their trade association, fixed the prices at which subscriptions were sold.

International Arbitration and Alternative Dispute Resolution

- Obtained an award of approximately €60 million plus interest, attorneys' fees and costs on behalf of a group of minority shareholders in a Danish telecommunications company, in an international arbitration proceeding conducted in Brussels by the International Chamber of Commerce, International Court of Arbitration against a major European telecommunications

and internet services provider and certain of its affiliates in connection with their breach of an agreement to buy certain of the minority's interests.

- Represented Danish Finance Ministry and a consortium of investors in a Danish telecommunications company to enforce certain minority rights pursuant to corporate governance and shareholder agreements under Danish law, in an international arbitration proceeding conducted by the International Chamber of Commerce, International Court of Arbitration. Obtained favorable resolution prior to hearing.
- *Mindscape, Ltd. v. Riverdeep Group, plc* (International Centre for Dispute Resolution; US District Court, D. Mass.; N.Y. Supreme Court, N.Y. County). Successfully defended Irish software manufacturer against efforts to obtain injunctive relief in two courts and obtained a favorable resolution through international mediation of dispute regarding international licensing agreement.

Fraud, RICO, Securities and Commercial Litigation

- *Novartis Pharmaceuticals Corporation v. State of Alabama* (Supreme Court of Alabama). Led a team of national and Alabama counsel to obtain the reversal of \$33 million jury verdict and judgment in a Medicaid fraud action brought by the State of Alabama against a major multi-national pharmaceutical manufacturer. The Alabama Supreme Court reversed, finding that the case should never have been put to the jury in light of the documentary record presented at trial, and ordered judgment entered on behalf of the defendant-appellant.
- *State of Alaska v. Alparma, Inc., et al.*; *State of Idaho v. Aventis Pharmaceuticals Inc., et al.*; *State of Illinois v. Abbott Labs, Inc., et al.*; *Commonwealth of Kentucky v. Alparma, Inc., et al.*; *State of Louisiana v. Abbott Labs, Inc., et al.*; *State of Mississippi v. Abbott Labs, Inc., et al.*; *State of Oklahoma v. Abbott Labs, Inc., et al.*; *State of Wisconsin v. Amgen, Inc., et al.* Defending pharmaceutical manufacturer in actions brought by or on behalf of state Medicaid agencies asserting that prescription drug manufacturers reported inaccurate pricing benchmarks, allegedly violating various of their individual state fraud, consumer protection and other laws.
- *SR International Business Insurance Co. Ltd. v. World Trade Center Properties LLC, et al.* (US Court of Appeals for the Second Circuit). Successfully defended property and casualty insurer, which provided property insurance on the World Trade Center complex, against a summary judgment motion and interlocutory appeal to the Second Circuit by the lessees, lenders and owners seeking a ruling that, as a matter of law, the attack and destruction of the complex on September 11, 2001 constituted two occurrences for insurance coverage purposes.

Bar Associations, Memberships and Activities

American Bar Association

- Section of Antitrust
 - Editorial Board, Antitrust Law Developments (2009 Update)
 - Price Discrimination Committee, Vice Chair (2006–2009)
 - Trade Associations Committee, Vice Chair (2002–2005)
- Section of Intellectual Property
- Section of Litigation

New York State Bar Association

- Antitrust Law Section (Chair, 2007; Executive Committee, 2001–present)
- Special Committee on Sarbanes-Oxley Issues (2005–2006)

Association of the Bar of the City of New York

- Committee on Lawyers' Quality of Life (1997–2000)
- Committee on Federal Legislation (1991–1993)
- Committee on Professional Responsibility (1988–1991)

Federal Bar Council (Second Circuit)

- Public Service Committee (2002–2007)

International Trademark Association

- The Trademark Reporter Editorial Board (1994–2000)
- Publications Committee (1992–1994)

Board Memberships

Martin Luther King, Jr. High School Community Advisory Board (Chairman 1998–2003)

National Center on Addiction and Substance Abuse at Columbia University Institutional Review Board (1999–2002)

Publications

“Pharmaceutical Aspects of US Merger Control,” with Claudia R. Higgins, *The Merger Control Review*, Ilene Knable Gotts, Ed. (Law and Business Research Ltd., United Kingdom, 2015).

“Second Circuit Holds That Coercive ‘Product Hopping’ Likely Violates Antitrust Law,” with Laura Shores and Matthew Gibbs, Kaye Scholer LLP Client Alert (June 1, 2015).

“Out of the Tunnel and Into the Light: Emerging From A Compliance Failure,” with Z. Scott and Laura Shores, InsideCounsel (May 26, 2015).

“State Boards Are Vulnerable to Antitrust Attack Under US Supreme Court Ruling,” with Philip Giordano, Kaye Scholer LLP Client Alert (February 26, 2015).

“Avoiding the Uncommon but Expensive Customer-Induced ‘Conspiracy,’” with Amanda Croushore, InsideCounsel (September 10, 2014).

“Another District Court Holds That ‘Reverse Payment’ Means Cash Under *FTC v. Actavis*,” with Laura Shores, Karin Garvey and Paul Andrews, Kaye Scholer LLP Client Alert (September 8, 2014).

“District Court Precludes Defense Based on Strength of Patent in *FTC v. Cephalon* ‘Reverse Payment’ Litigation,” with Laura Shores and Karin Garvey, Kaye Scholer LLP Client Alert (July 31, 2014).

“Foreign Nationals May Face Increased Risk of Extradition to US for Antitrust Violations,” with Philip Giordano, David Hibey, Jennifer Patterson, Laura Shores and Gregory Wallance, Kaye Scholer LLP Client Alert (April 7, 2014).

“Trends in State Attorney General Litigation,” with Sam Lonergan and Danelco Moxey, *Today’s General Counsel* (June/July 2013).

“Supreme Court Requires Full Rule of Reason Analysis in So-Called ‘Reverse Payment’ Settlements of Patent Litigation,” with David Barr, Sean Boyle, Claudia Higgins and Benjamin Hsing, Kaye Scholer LLP Client Alert (June 19, 2013).

“Supreme Court Makes Certification of Damages Classes More Difficult,” with Richard De Sevo and Kerry Scanlon, Kaye Scholer LLP Client Alert (March 29, 2013).

“Competition and Antitrust Law,” with Margaret A. Prystowsky Rogers, Nigel Parr and Joanna Christoforou, *International Corporate Practice: A Practitioner’s Guide to Global Success* (Practising Law Institute 2013) (First Edition, 2008).

Price Discrimination Handbook (ABA Section of Antitrust Law 2012), Project Co-Chair and Co-Editor, with Scott P. Perlman.

“Resale Price Maintenance After ‘Leegin’,” with Brett Dockwell, *New York Law Journal* (March 8, 2010).

Antitrust and Associations Handbook (ABA Section of Antitrust Law 2009), Co-Editor, with Christopher J. MacAvoy.

“Court Holds Price-Fixing in Corporate Control Context Not *Per Se* Illegal and Dismisses Unsupported Complaint,” with Karin Garvey, Kaye Scholer LLP Client Alert (February 27, 2008).

“Supreme Court Allows Manufacturers to Fix Resale Prices, Subject to Rule of Reason, Overruling *Dr. Miles*,” with Aton Arbisser, Kaye Scholer LLP Client Alert (June 29, 2007).

“Supreme Court Injects New Vitality Into Motions to Dismiss in Complex Litigation,” with Aton Arbisser and Robert Grass, Kaye Scholer LLP Client Alert (May 2007).

“Antitrust Enforcement in High Technology Industries: Keeping Cyberspace Safe for Innovators or Just Another Speed Trap on the Information Superhighway,” with Eamon O’Kelly, 19th Annual Institute on Computer Law (Practising Law Institute (547) 1999).

“Antitrust Issues Affecting the Publishing Industry,” *Print and Electronic Publishing* (Practising Law Institute (516) 1998 and (480) 1997).

“Directors’ Duties in Connection With Securities and Exchange Commission Investigations,” *Securities Litigation and Regulatory Practice* (Institute of Continuing Legal Education in Georgia, October 9, 1997).

“Practical Considerations for Counsel in Securities and Exchange Commission Enforcement Proceedings,” *Representing Clients in Securities Litigation and Regulatory Matters* (Institute of Continuing Legal Education in Georgia, October 6, 1995).

Principal Editor: “Advertising of Private Certification after *Peel v. Illinois Attorney Registration and Disciplinary Commission*,” 46 *Record of The Association of The Bar of The City of New York* 390 (1991).

Speeches and Programs

“Evolving Standards on Resale Price Maintenance, Tying and Other Vertical Restraints: Do We Still Have to Treat Vertical Restraints As A Serious Issue?” Antitrust Law Institute 2015 (Practising Law Institute, New York City, May 6,-7, 2015) (Program Co-Chair 2015).

“Cartels and Other Horizontal Relationships,” Antitrust Institute 2015/2014/2013/2012/2011: Developments & Hot Topics (Practising Law Institute, New York City, May 6-7, 2015/May 5-6, 2014/May 6-7, 2013, May 7-8, 2012/January 20, 2011) (Program Co-Chair 2015).

Panelist, “Is the Robinson-Patman Act the Right Rx for the Pharmaceutical Industry?” (American Bar Association, Section of Antitrust Law Teleseminar, December 8, 2009).

American Bar Association Antitrust Litigation Program — “Preparing and Trying an Antitrust Case Against the Government,” Panelist and Planning Committee Member (American Bar Association Section of Antitrust Law, Washington, DC, October 16, 2009).

“Relationships Among Competitors,” 47th Annual Antitrust Law Institute (Practising Law Institute, New York City, May 8, 2006).

Moderator, “Trade and Professional Associations, Weighing The Risks and Benefits” (American Bar Association (ABA) Antitrust Section Spring Meeting, Washington, DC, March 30, 2005).

“Relationships Among Competitors,” 45th Annual Antitrust Law Institute (Practising Law Institute, New York City, May 13, 2004).

Moderator, “Emerging Roles for Trade Associations as Plaintiffs: Policy Issues and Legal Strategies” (ABA Antitrust Section Spring Meeting, Washington, DC, March 31, 2004).

“Antitrust-Based Challenges To Registration Eligibility Requirements,” 18th Annual Equine Law Conference (University of Kentucky Continuing Legal Education, Lexington, KY, April 30, 2003).

“Antitrust: The Significance of Microsoft and Intel and Competition in Cyberspace,” 19th Annual Institute on Computer Law (Practising Law Institute, New York City, March 1999).

Moderator, “Janet Reno in Cyberspace: Can Antitrust Enforcement Work in the Computer Industry?” (ABA Annual Meeting, Toronto, Ontario, August 4, 1998).

“Antitrust Issues Affecting the Publishing Industry,” Print and Electronic Publishing, Legal and Business Issues in Book and Magazine Publishing (Practising Law Institute, New York City, May 1998 and 1997).

Panelist, Third Annual Securities Litigation and Regulatory Practice seminar (Institute of Continuing Legal Education in Georgia, Atlanta, GA, October 9, 1997).

“Discovery and Expert Discovery in Federal Court,” Advanced Litigation Technologies seminar (Institute for Continuing Education, New York City, May 16, 1997).

Panelist, “Representing Clients in Securities Litigation and Regulatory Matters” seminar
(Institute of Continuing Legal Education in Georgia, Atlanta, GA, October 6, 1995).