



The Directors' Roundtable

Individual Accountability For Corporate Wrongdoing

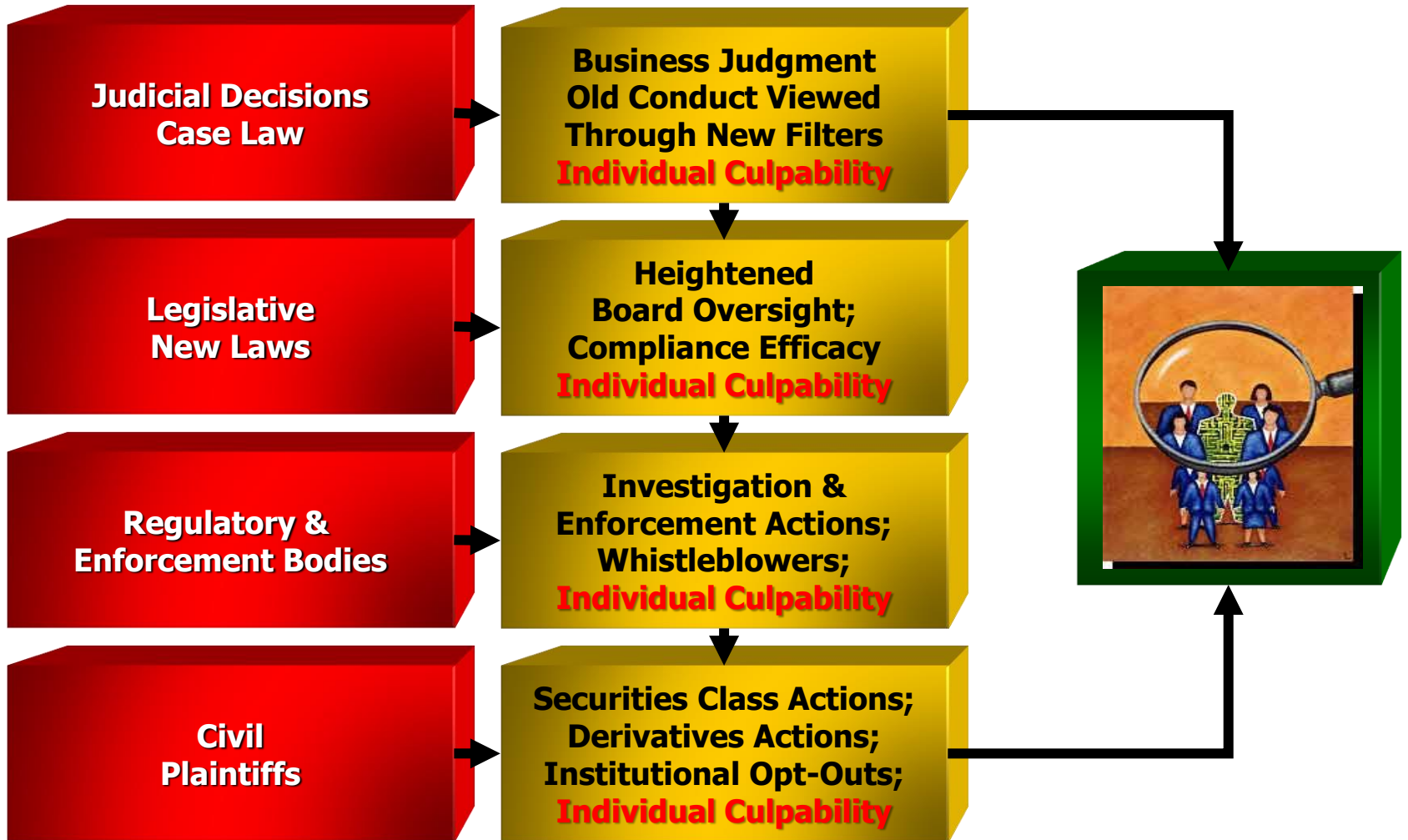
Director & Officer Liability Considerations

Dana Kopper, Managing Director



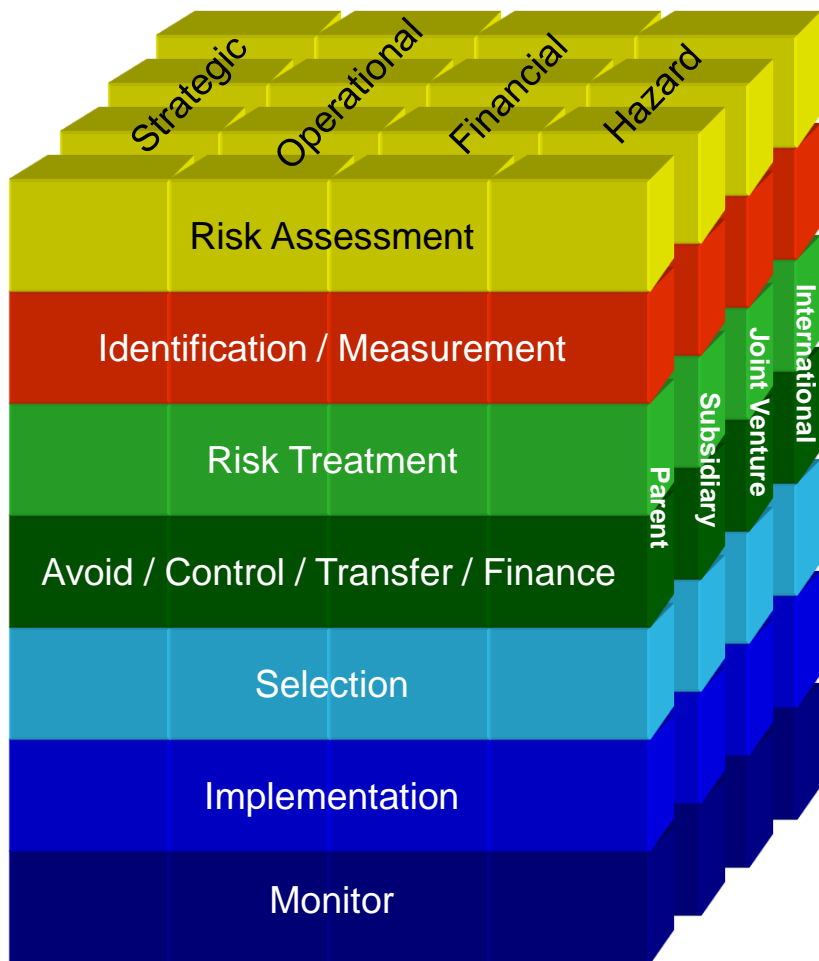
Domestic & International Environmental Scan...

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



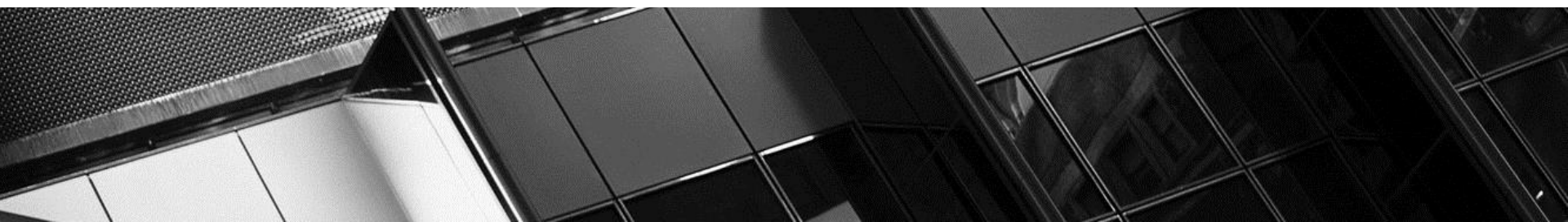
CORE BENEFITS

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



Governance Risk Management

Management & Professional Liability

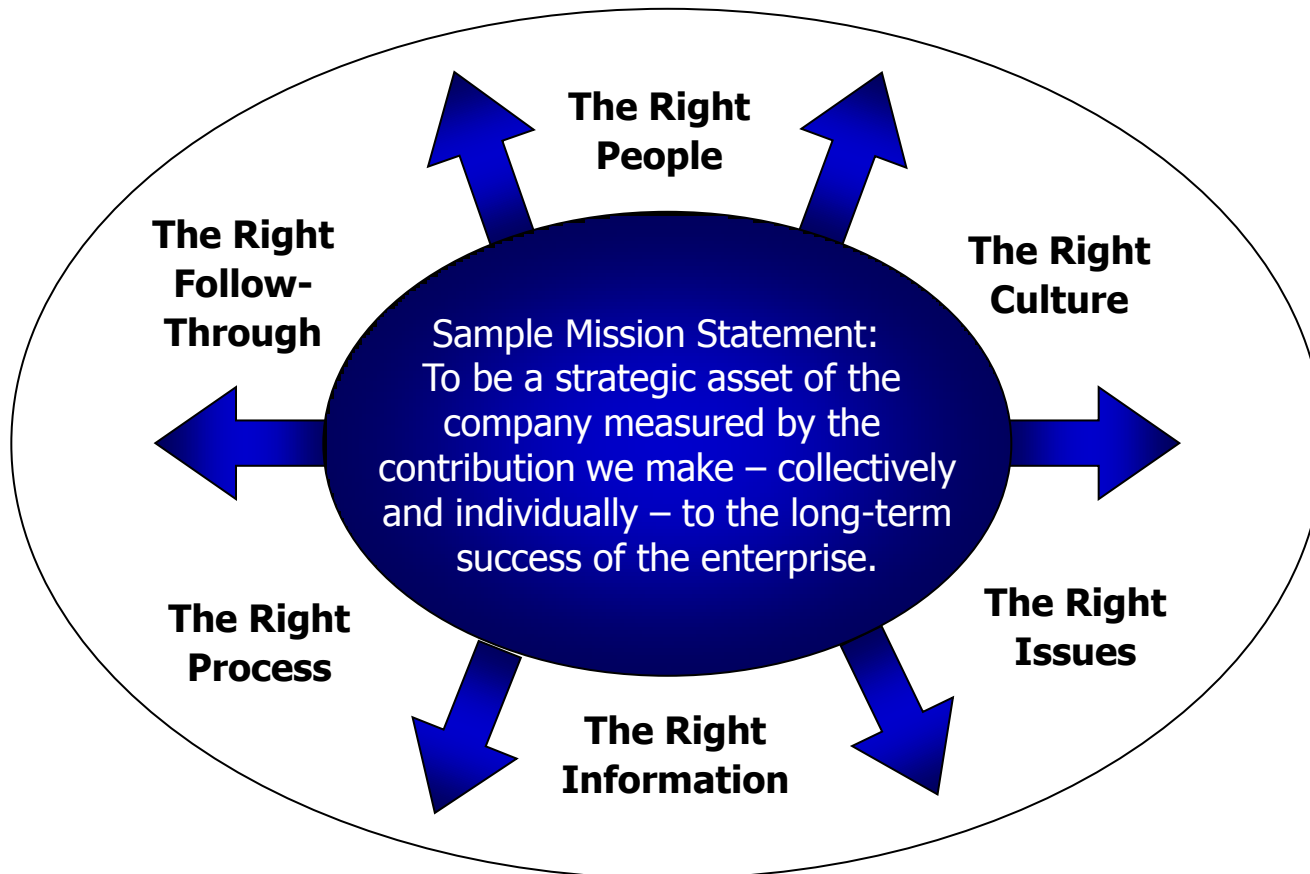


Board Dynamics...

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

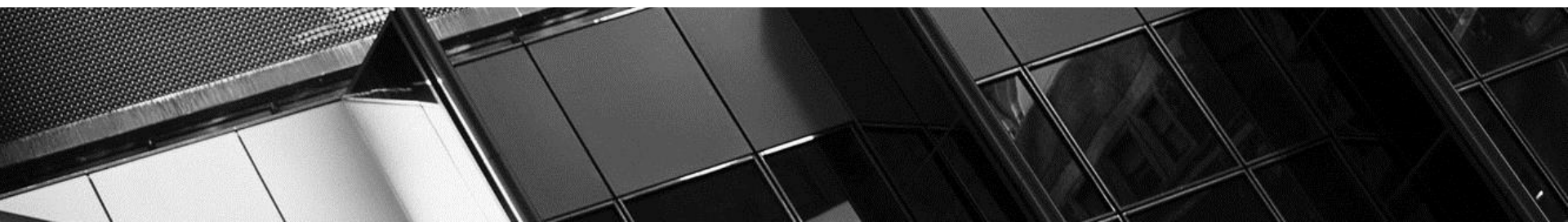
- Becomes intensely involved in decision making around key issues.
- Convenes frequent, intense meetings, often on short notice.

The Operating Board

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



Individual Contractual Indemnity A Critical Tool



Indemnification...Generally

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Contractual Indemnity Agreements
(Contract Between Individual and Company)

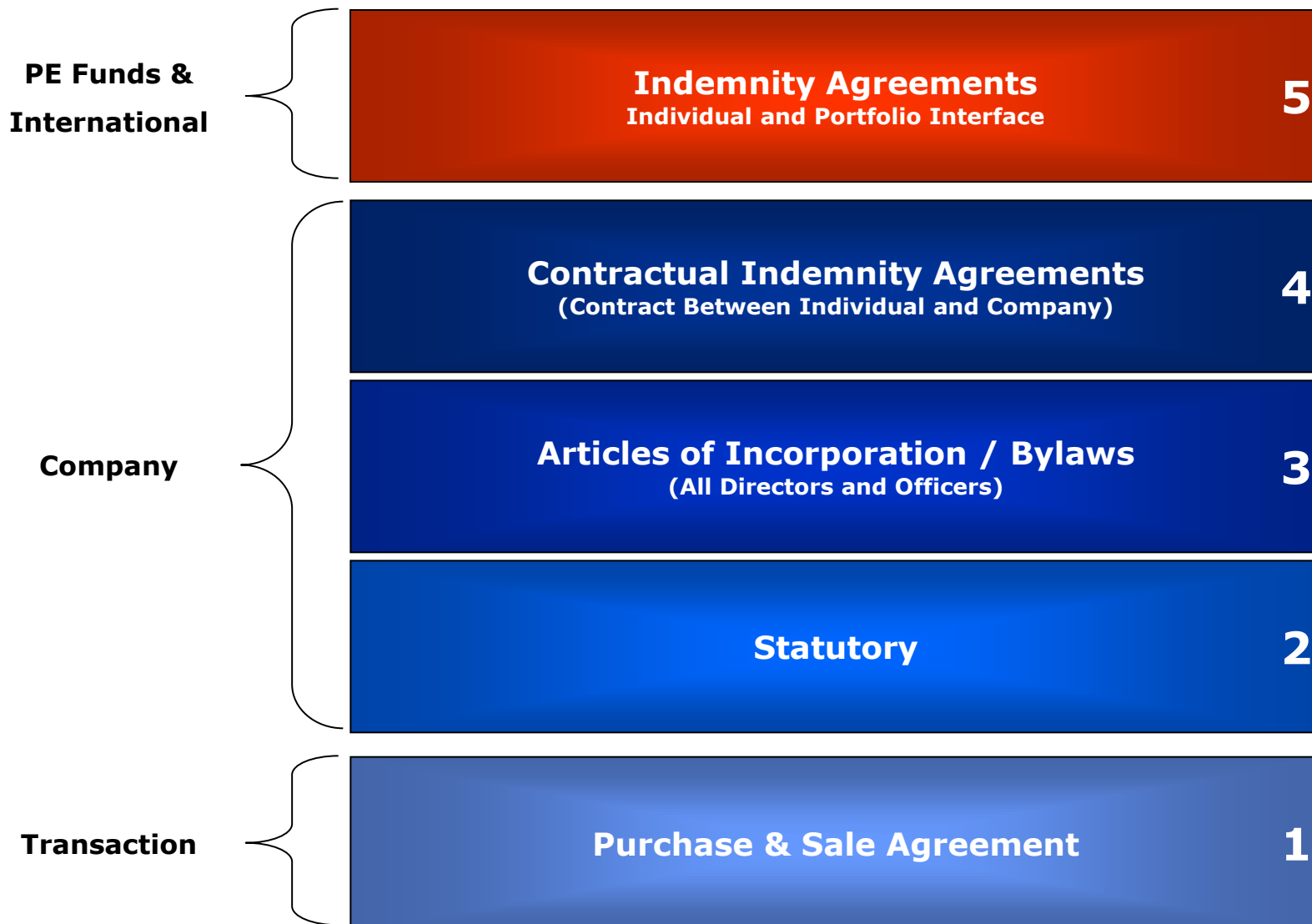
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Articles of Incorporation/Association/Bylaws
(All Directors and Officers)

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Statutory

Harmonized Indemnification



International Indemnity Topics

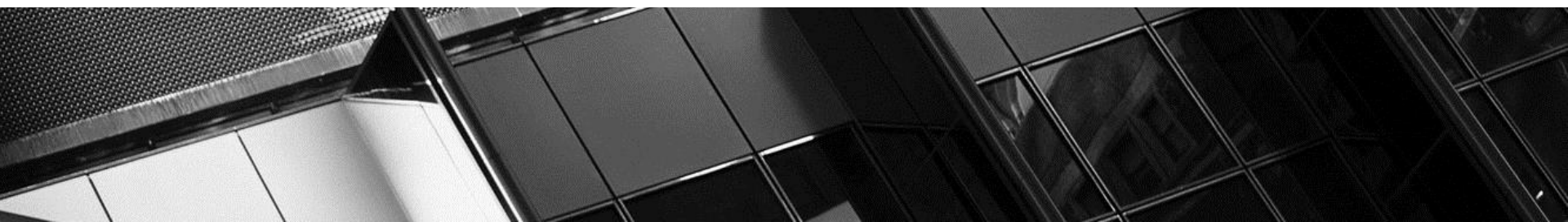
A Sampling

- ❖ **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



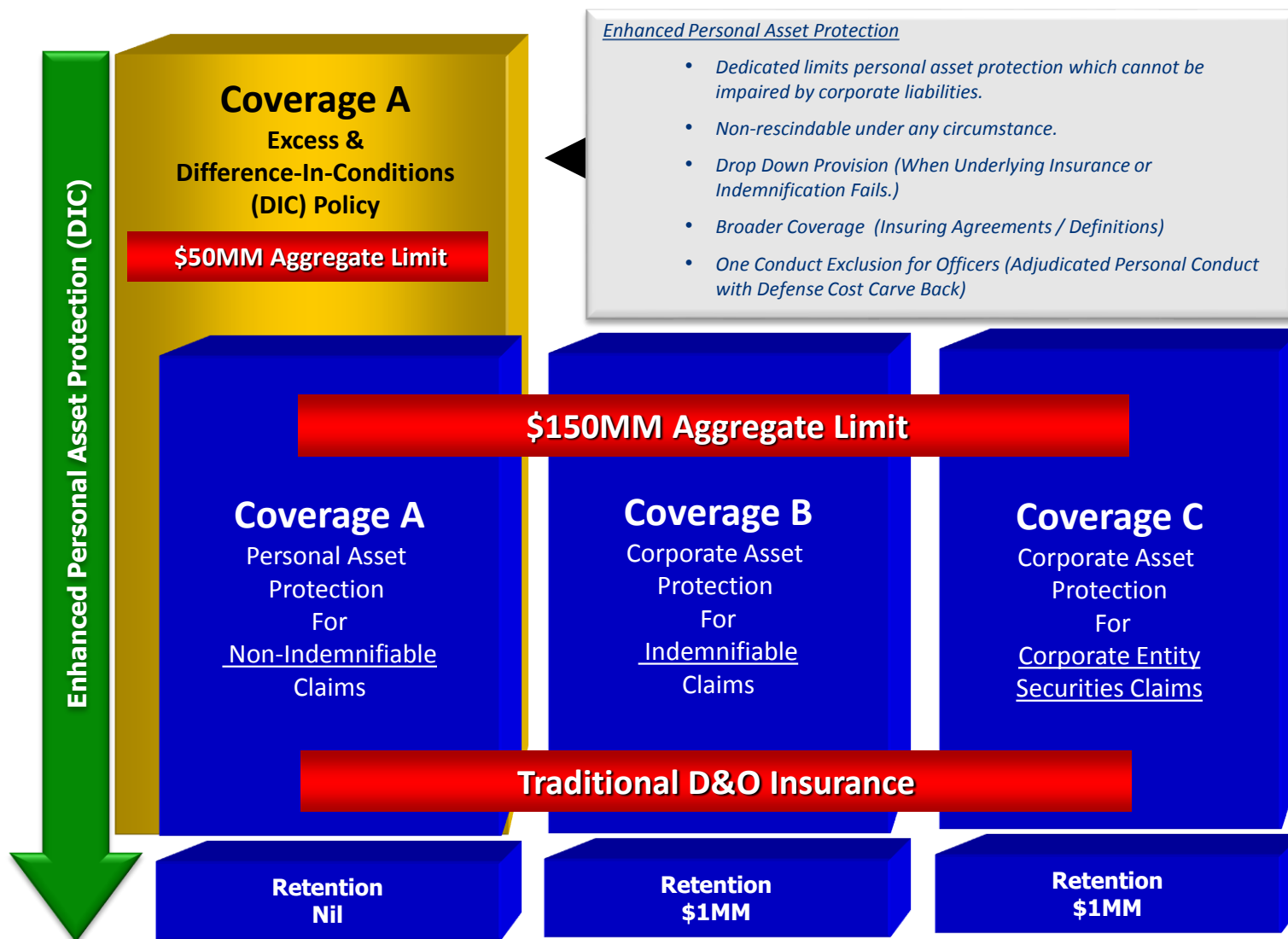
D&O Liability Insurance Considerations



D&O Liability Insurance Coverage Part Overview

Including Enhanced Personal Asset Protection (DIC)

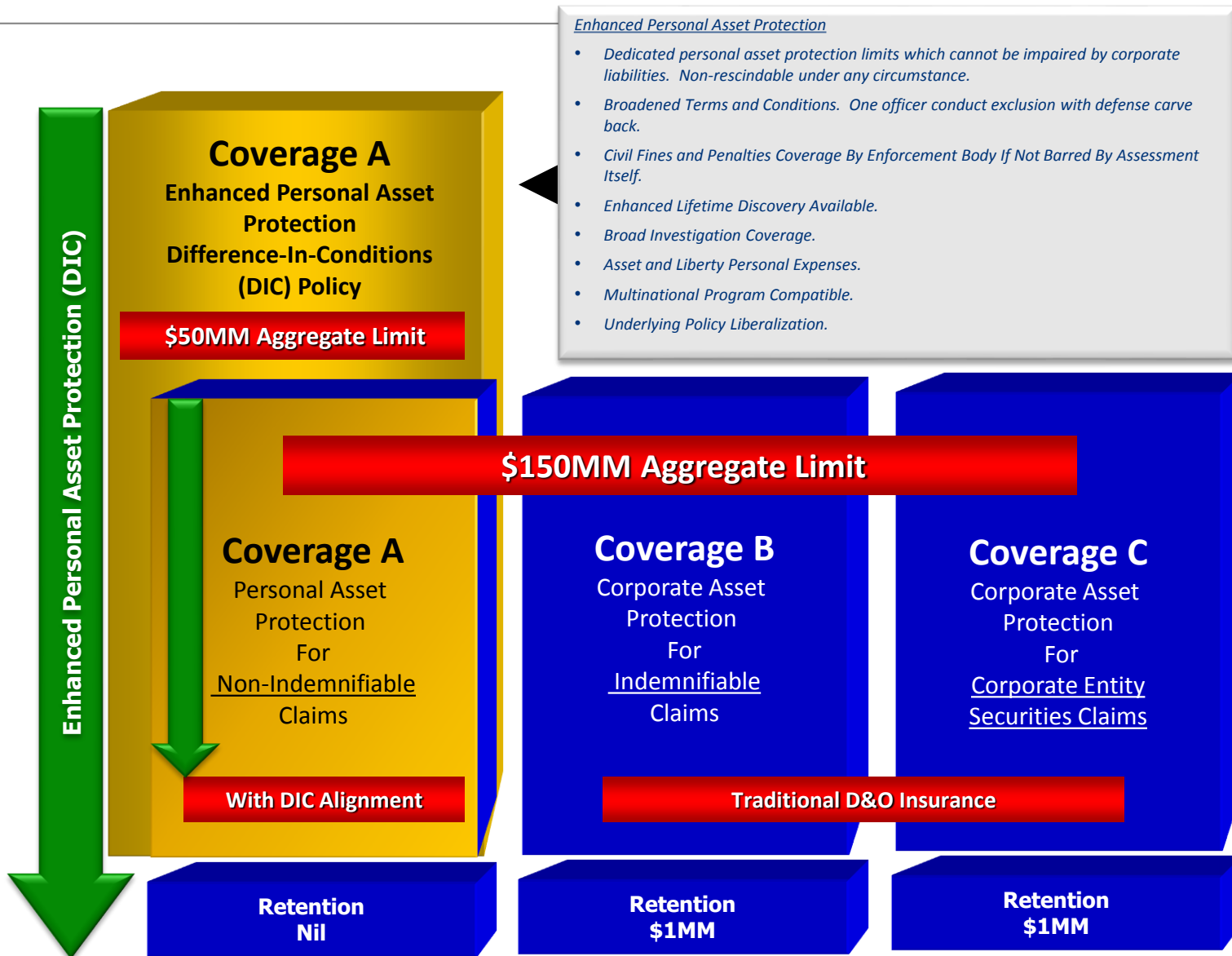
Important Note: Terms, conditions, limitations, exclusions, and exceptions apply.



D&O Liability Insurance Coverage Part Overview

Full Tower Enhanced Personal Asset Protection (DIC)

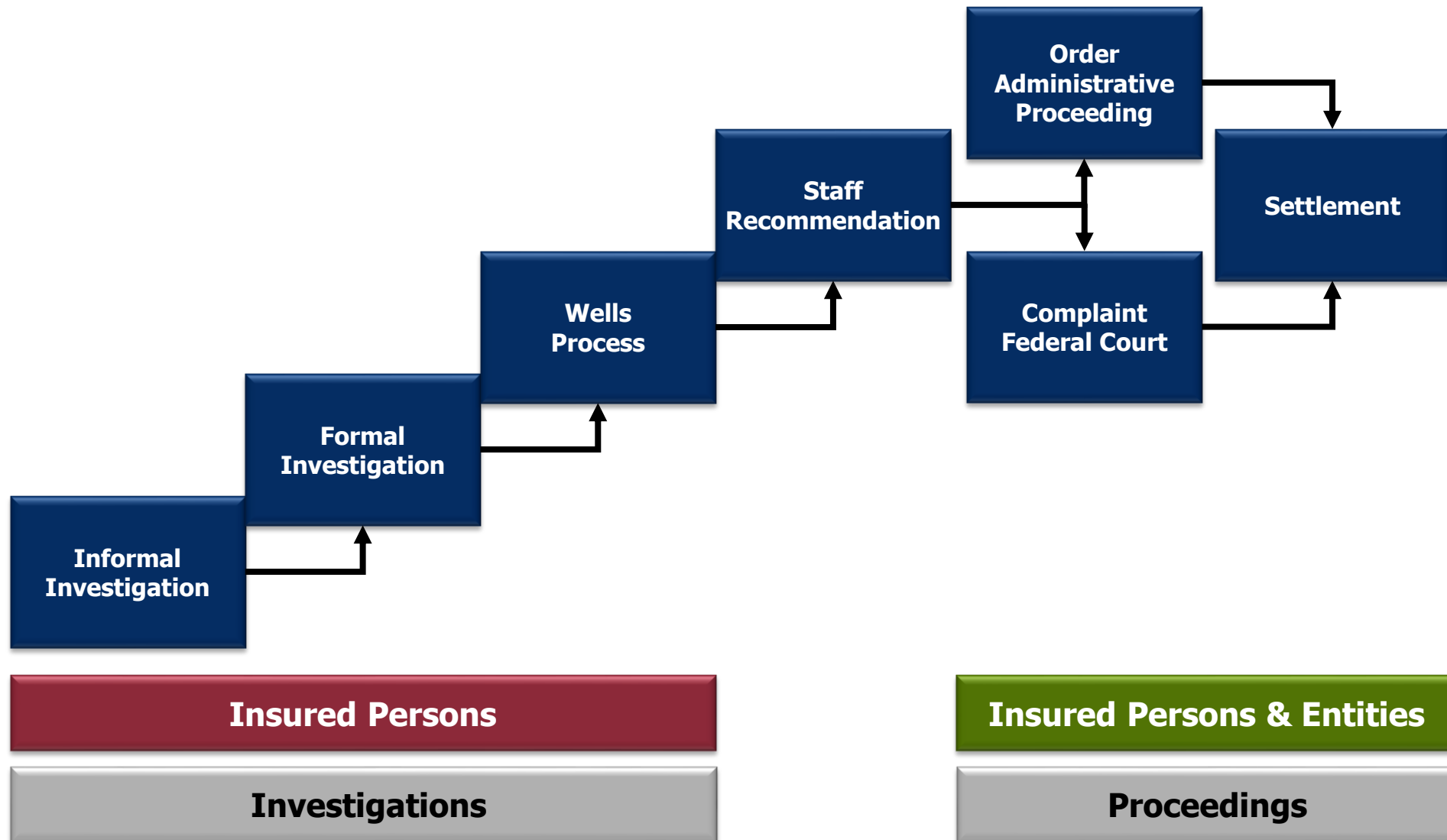
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SEC Investigations

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

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



Entity Investigation Options

A Sampling

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❖ **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.