



The Directors' Roundtable

Individual Accountability For Corporate Wrongdoing

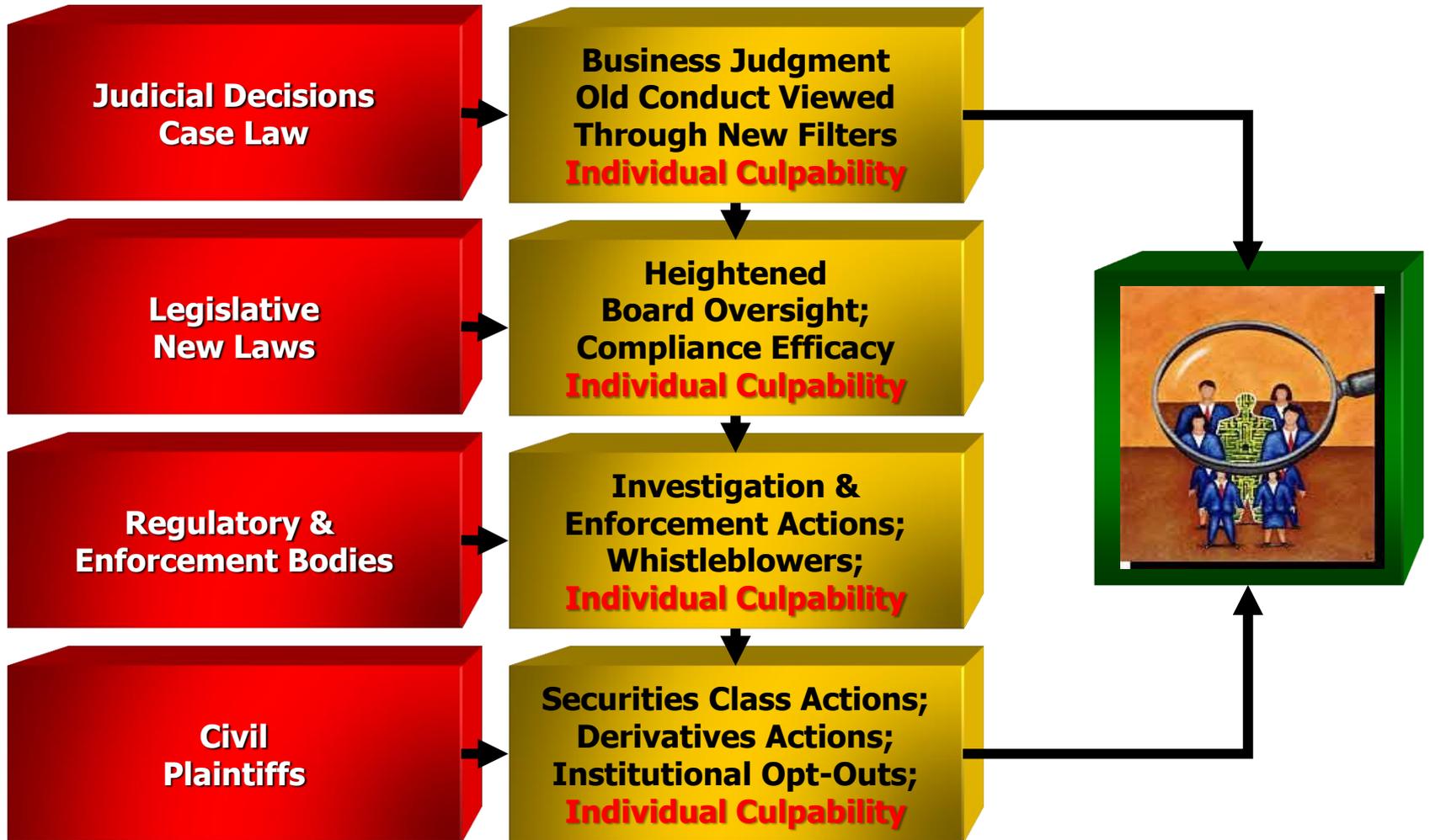
Director & Officer Liability Considerations

Dana Kopper, Managing Director



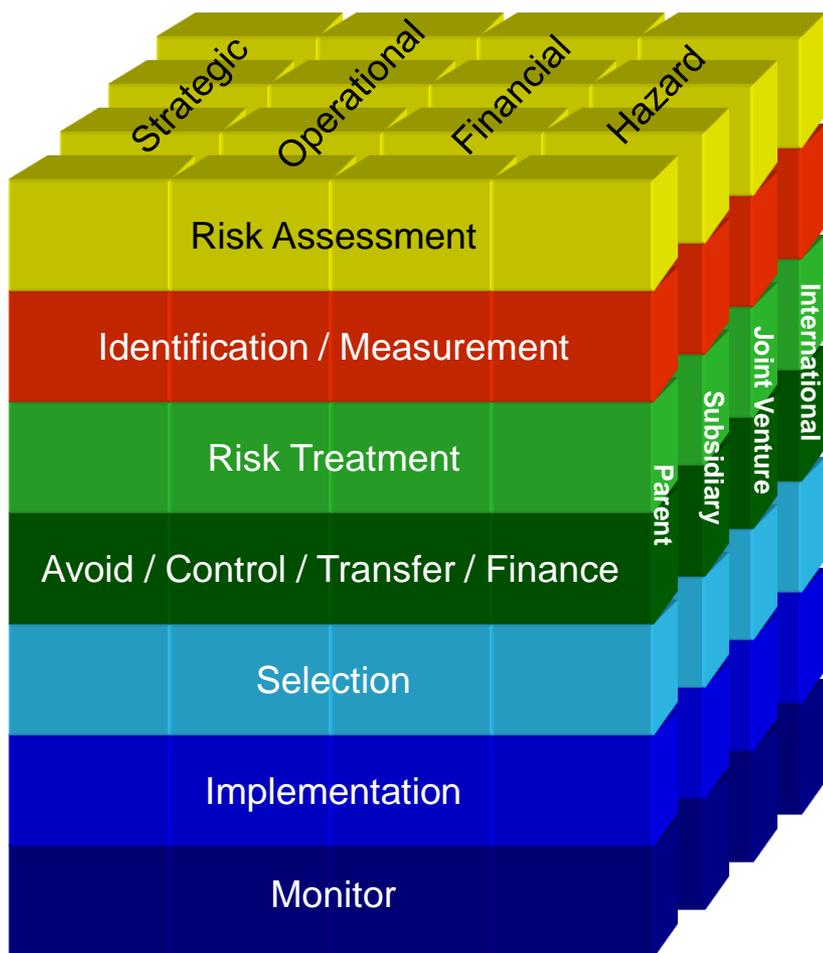
Domestic & International Environmental Scan...

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



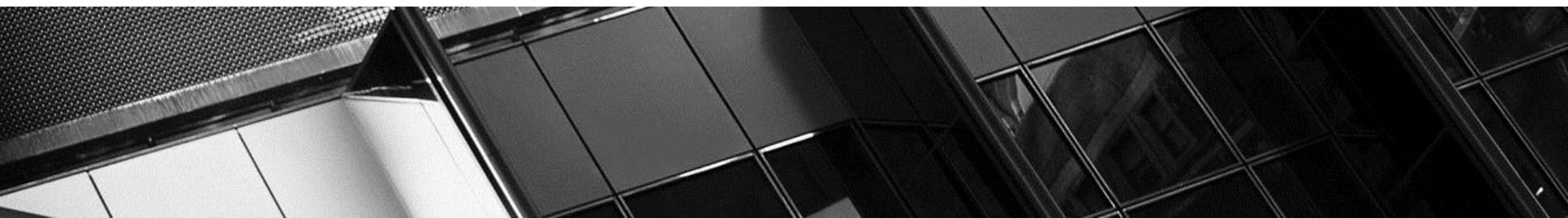
CORE BENEFITS

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



Governance Risk Management

Management & Professional Liability

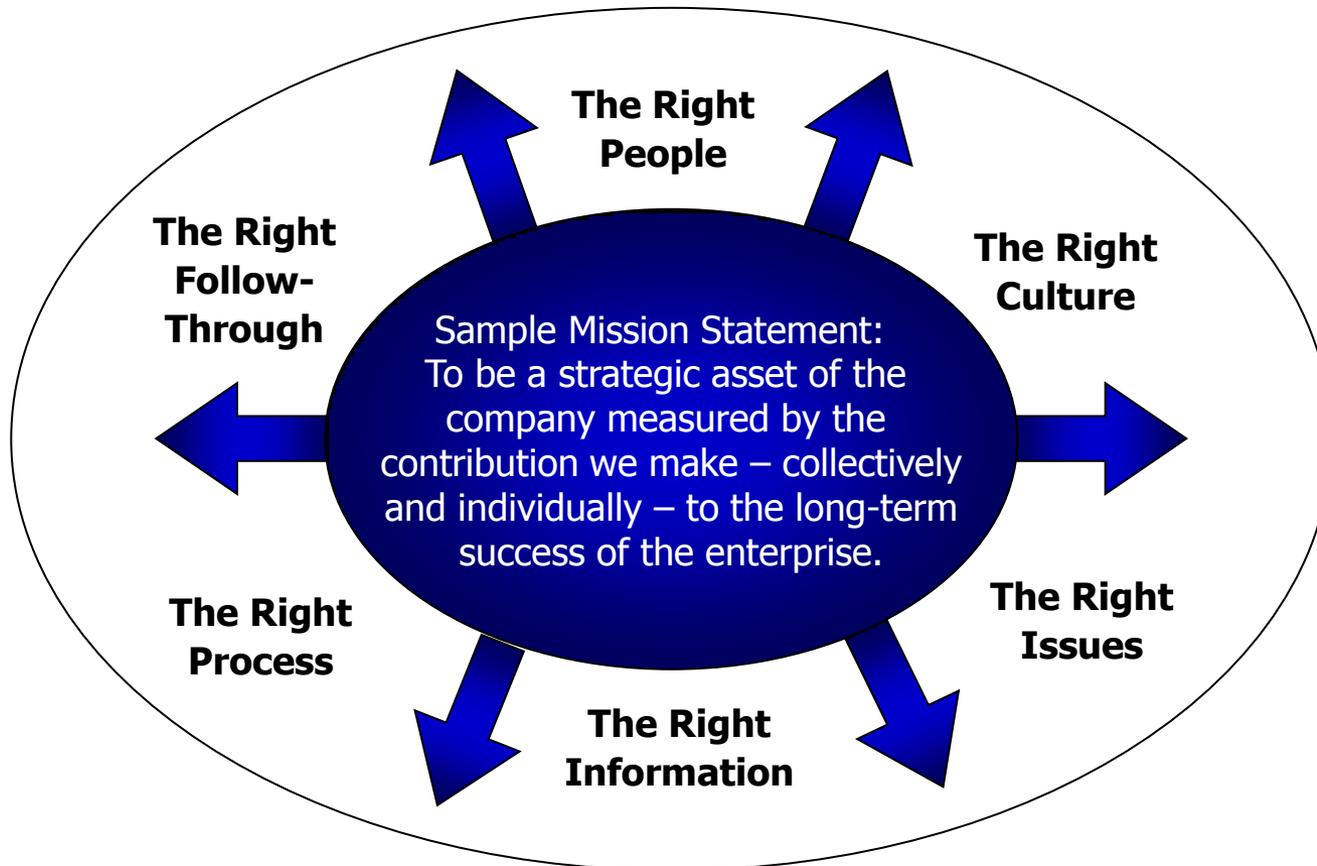


Board Dynamics...

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

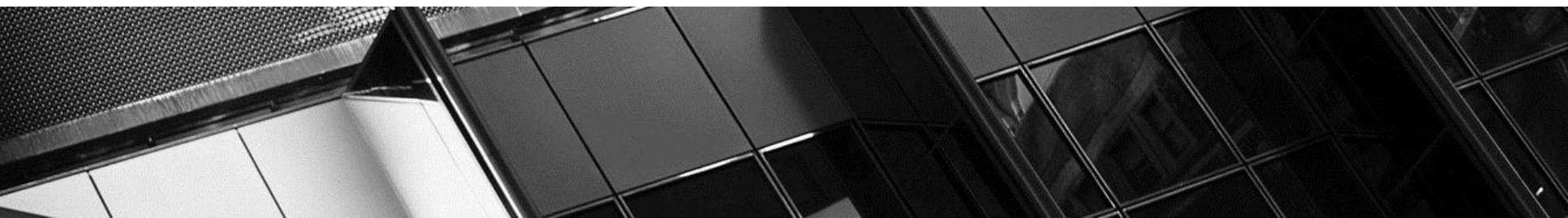
- Becomes intensely involved in decision making around key issues.
- Convenes frequent, intense meetings, often on short notice.

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)

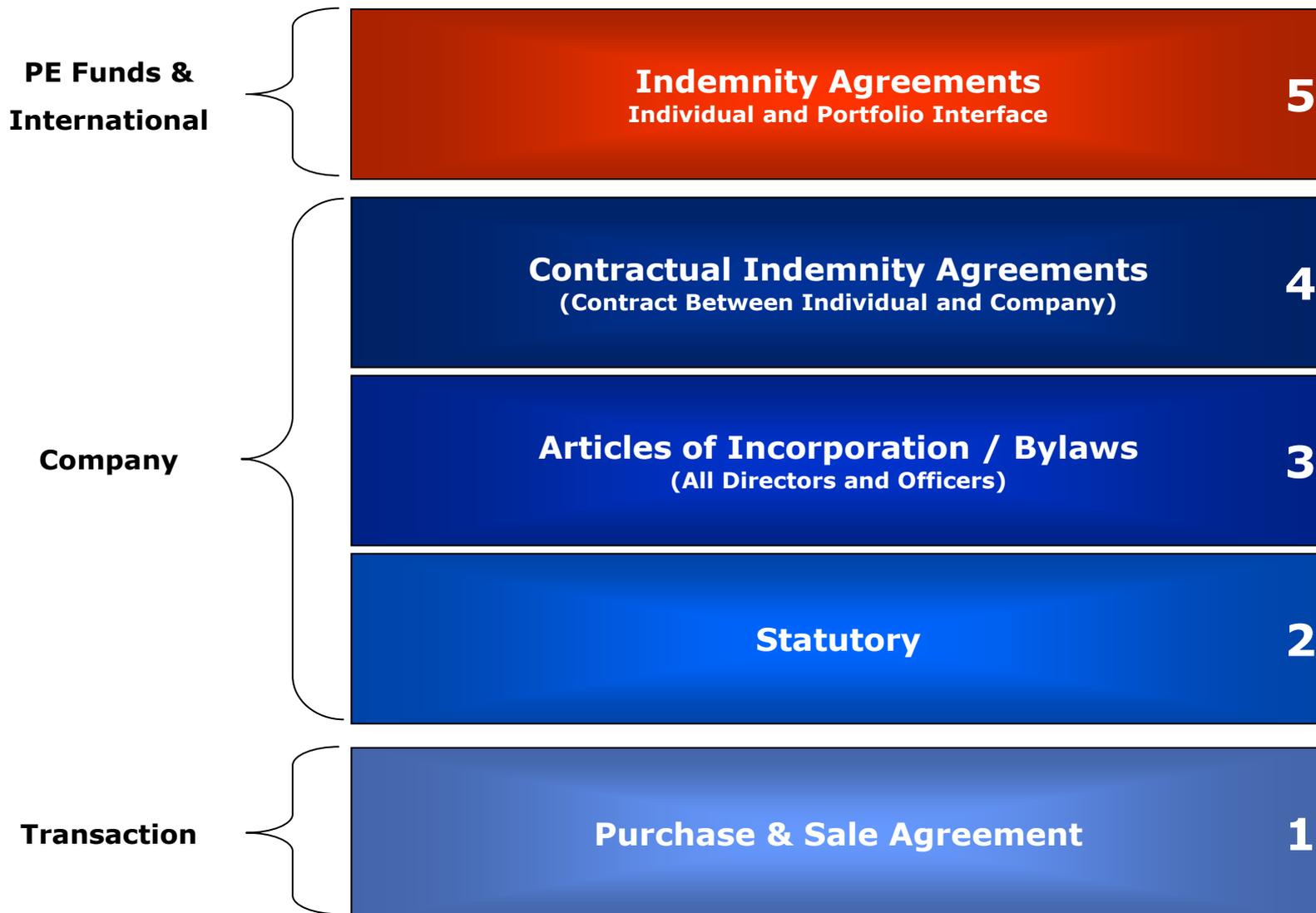
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Articles of Incorporation/Association/Bylaws
(All Directors and Officers)

1

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



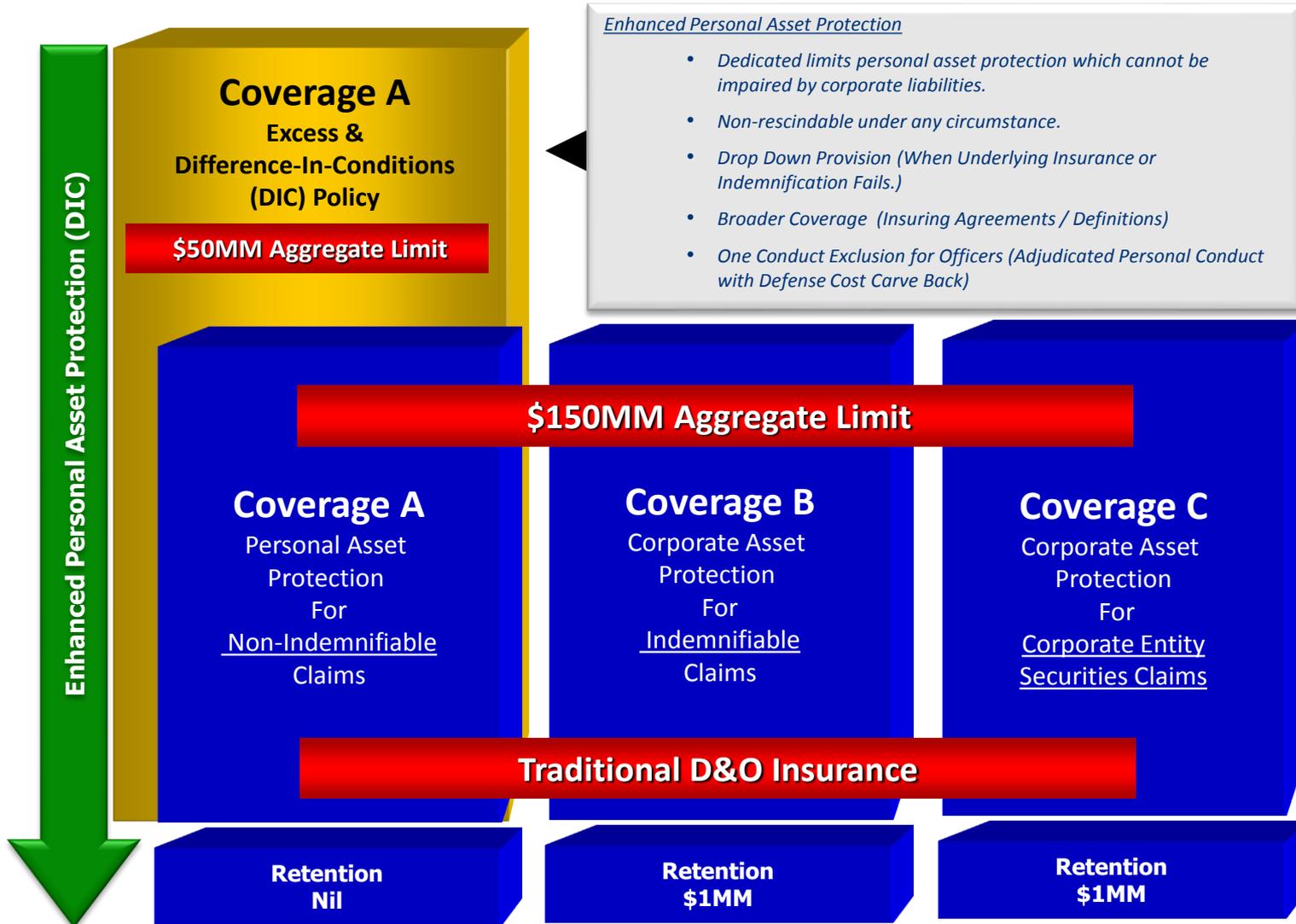
D&O Liability Insurance Considerations



D&O Liability Insurance Coverage Part Overview

Including Enhanced Personal Asset Protection (DIC)

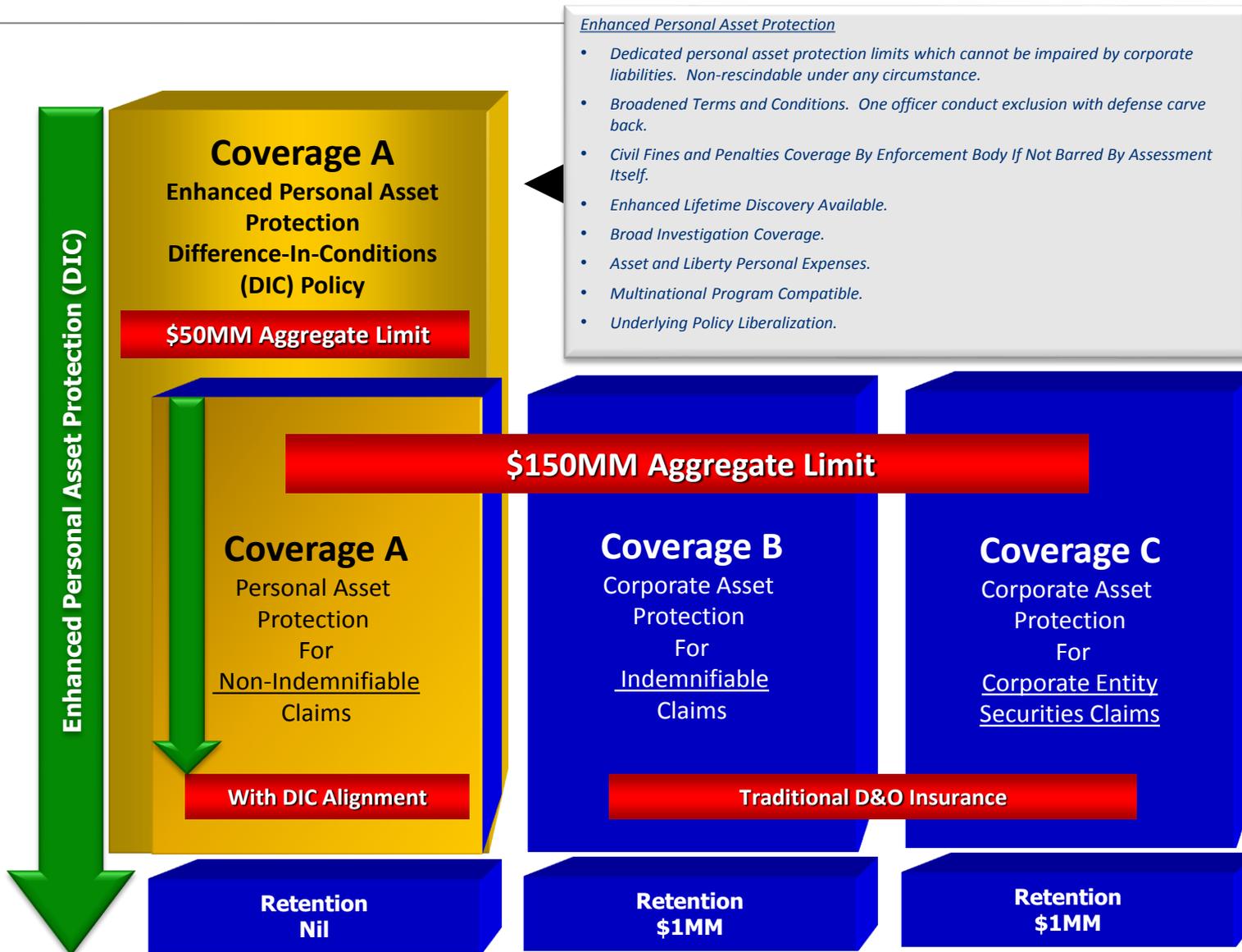
Important Note: Terms, conditions, limitations, exclusions, and exceptions apply.



D&O Liability Insurance Coverage Part Overview

Full Tower Enhanced Personal Asset Protection (DIC)

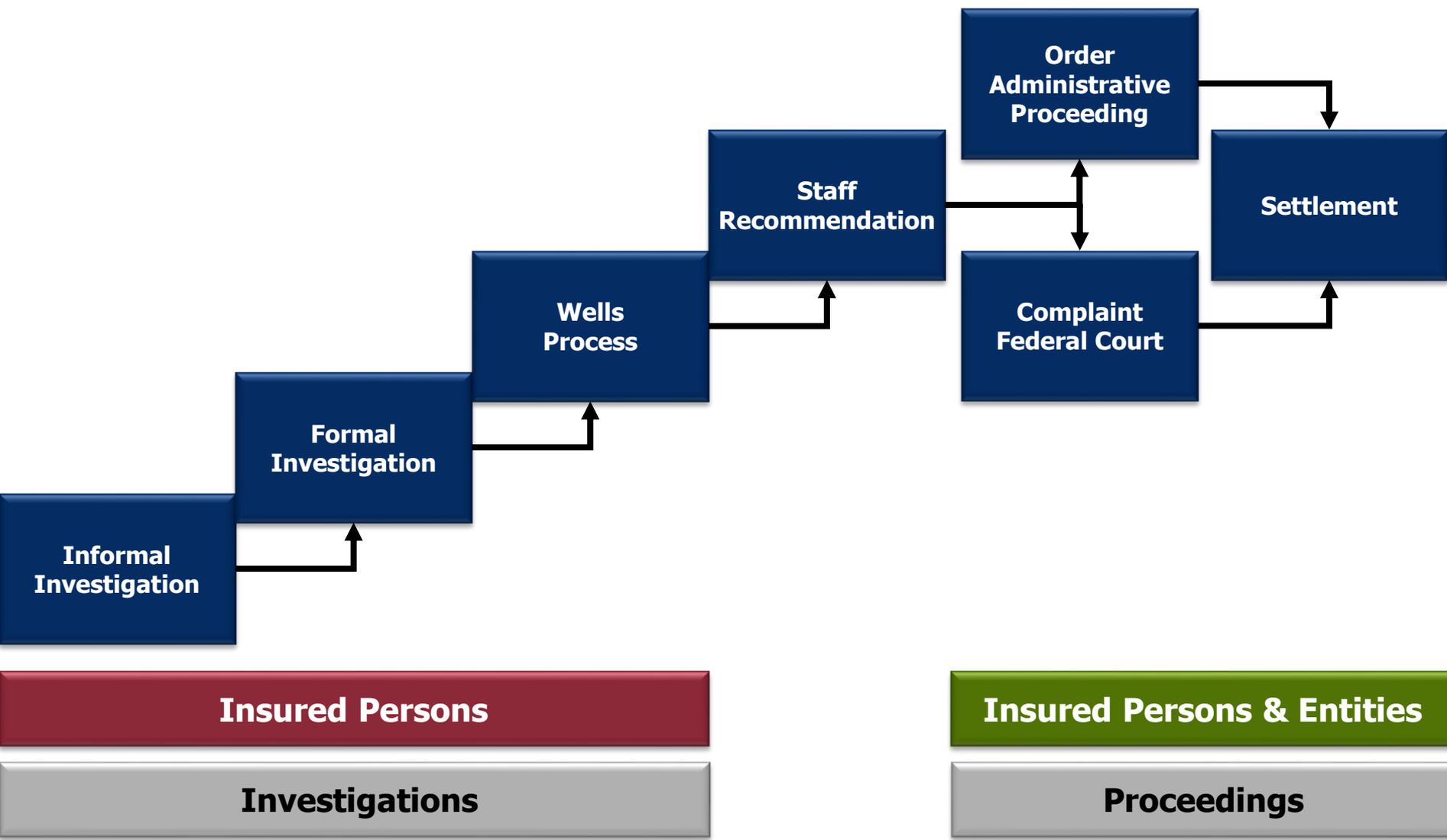
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SEC Investigations

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

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



Entity Investigation Options

A Sampling

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.



Shamoil T. Shipchandler is the Regional Director for the U.S. Securities and Exchange Commission's Fort Worth Regional Office, where he is responsible for leading all aspects of the SEC's enforcement and examination activities in Texas, Oklahoma, Arkansas, and Kansas.

Mr. Shipchandler is formerly a Deputy Criminal Chief with the U.S. Attorney's Office for the Eastern District of Texas, where he was the Attorney-in-Charge of the Plano Office, served as the Asset Forfeiture Chief, and prosecuted complex white collar criminal cases. During his tenure with the U.S. Attorney's Office, Mr. Shipchandler obtained convictions in the areas of securities fraud, tax evasion, bank fraud, mail and wire fraud, money laundering, computer sabotage, and public corruption. Representative cases included the prosecution of 40 defendants in a mortgage fraud scheme in 2011, for which Mr. Shipchandler received the Department of Justice's Director's Award; the prosecution of defendants in a \$400 million Ponzi scheme in 2012; the prosecution of the former mayor of a Texas town for public corruption in 2013; and the negotiation of the largest corporate immigration fraud settlement in history in 2013, for which Mr. Shipchandler was awarded the DHS Secretary's Silver Medal.

Mr. Shipchandler was a partner with the law firm of Bracewell & Giuliani prior to joining the Commission, and an associate with the law firm of Covington & Burling before joining the U.S. Attorney's Office. Mr. Shipchandler graduated from Middlebury College and Cornell Law School, and clerked for Judge Roger B. Andewelt of the U.S. Court of Federal Claims.



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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)
- ❖ Associate in Risk Management (ARM)