

**IS ERM LEGALLY REQUIRED?  
YES, FOR FINANCIAL & GOVERNMENTAL INSTITUTIONS,  
NOT FOR PRIVATE ENTERPRISES**

Whitman, Andrew F.

**Abstract**

This research assists in determining whether there is a legal duty for each type of organization to implement an enterprise risk management (ERM) process: financial institution, government entity, publically traded company, or private enterprise. We test the hypothesis that ERM is not legally required for enterprises subject to United States (U.S.) law and regulation. We find that ERM is legally required for U.S. financial institutions and for some government-sponsored enterprises: required by U.S. statutes, U.S. regulatory agencies (e.g., Securities and Exchange Commission [SEC]), National Association of Insurance Commissioners (NAIC), and by rating organizations (e.g., Standard and Poor's [S&P]). We found no U.S. statutes or federal court cases requiring an ERM framework for private enterprises, although ERM is accepted as a value contributing, best practice, and elements of ERM are practiced by some private enterprises, including farmers and by owners of intellectual property. For publically traded companies elements of ERM are required by federal statute, by the SEC and by S&P. However, if a private enterprise is sued in U.S. Federal court alleging breach of a duty to practice ERM, the suit will likely be dismissed. Fortunately, ERM is recognized as a value contributing best practice even when legal standards do not require it, and there are important benefits to monitoring legal compliance within an ERM framework.

**Key Words:** Enterprise risk management (ERM), chief risk officer (CRO), traditional risk management (TRM),

[COSO](#)

[Would like to thank Professor James Kallman for invaluable leadership in writing and teaching ERM and the ABA webinar team who developed the webinar presented by the Insurance and Risk Management Committee of the American Bar Association \(ABA\) Section of Intellectual Property Law in September 2012: "Why Every Lawyer Should Understand the Basic Concepts of Enterprise Risk Management". The APRIA which facilitated the presentation of this paper at the NYC conference in July 2013.](#)

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**Comment [1]:** No guidelines for including middle initial

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**Comment [2]:** Not explicitly stated in guide for authors if acronyms need to be defined in abstract and then again at first use within text (or if only in abstract is sufficient)

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**Comment [3]:** Do you want to spell COSO out for key words?

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\*Dr. Andrew Whitman is a professor of insurance in The Carlson School of Management at the University of Minnesota. Dr. Whitman would like to thank...

## 1. Introduction: Importance of ERM

An increasing number of enterprises apply elements of ERM, and professional organizations, such as the Committee of Sponsoring Organizations of the Treadway Commission (COSO), the Risk and Insurance Management Society (RIMS), and the Casualty Actuarial Society (CAS) have designed, promoted or applied an ERM framework, as have authors of authoritative publications. ERM is considered the evolutionary discipline of traditional risk management (TRM) which takes a new and holistic approach. Findings reported in CAS (Dafikpaku and Eng, 2011) show that a simple linkage exists between the ERM processes and benefits (the strategic implications), influenced by numerous factors including risk appetite, risk culture and management competence, which show the value of ERM. According to CAS, ERM assists enterprises in making appropriate strategic decisions on uncertain outcomes to, at worst, reduce disastrous losses, and, at best, improve profitability in cases of opportunities. According to COSO (2004), "Uncertainties present both risks and opportunities, with potential to erode or enhance value."

The Rise and Role of the Risk Committee and the Chief Risk Officer was documented in 2012 by a National Association of Corporate Directors (NACD) Public Company Governance Survey (insert reference) which shows a 198% increase in risk committee prevalence over the last five years (4.5% of public companies in 2008 to 13.4% in 2012). However, 64% of those boards that reported they had a risk committee were from the financial sector (e.g., banks and securities, insurance, private equity, and hedge funds and mutual funds) and government-sponsored enterprises (e.g., Fannie Mae and Freddie Mac [www.fanniemae.com/](http://www.fanniemae.com/)). For financial institutions and publically traded companies, the chief risk officer (CRO) has oversight over the entirety of all risk facing an organization and typically reports to the chief executive officer (CEO).

Moody's Enterprise Risk Management Solutions (2010) advertises that "More than 2,000 leading commercial and investment banks, insurance companies, money management firms and corporations in over 80 countries use our products and services, including most of the 100 largest financial institutions in the world. Enterprise Risk Management solutions from Moody's Analytics combine best-in-class quantitative credit and portfolio analysis with regulatory and balance sheet risk management software to maximize your effectiveness and impact."

The authors of "Enterprise Risk Management Through Strategic Allocation of Capital," (Ai et al., 2012) present a mathematic approach to operationalizing the integration of ERM within the firm to achieve its holistic strategic goals across time periods. Perhaps they have overcome challenges to implementing ERM (Gate, 2006) when risk considerations have yet to be fully integrated into business decision making (Deloitte, 2008), by addressing risk appetite, prioritization, operational decisions, and trade-offs among risk categories. Research presented at the APRIA July 2013 Conference shows that ERM reduces the cost of capital (insert reference).

## 2. Methodology and Limitations

We test the hypothesis that no U.S. statutes or court cases require an ERM framework. This research assists in determining whether there is a legal duty for enterprises to implement an ERM process. We review legal documents to determine if ERM is legally required and find that ERM is legally required for financial institutions and government agencies, and is a practice standard required for publicly traded companies, since some elements of ERM are required by federal statutes, by the SEC, and by a rating organization (i.e., S&P). However, ERM is not legally required by federal law for "private enterprises" defined to not include financial institutions such as banks, insurance, stock brokers, or publically held companies. Private enterprises typically are not under a legal requirement to practice ERM, although ERM is accepted as a value contributing best practice.

ERM is legally required for financial institutions (e.g., banks and securities, insurance, private equity, and hedge funds and mutual funds) and for government-sponsored enterprises such as Fannie Mae and Freddie Mac, and the Tennessee Valley Authority (TVA). The new Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (herein after Dodd-Frank Act) applies to large banks and large non-bank holding companies and does not apply to non-financial enterprises (Dodd-Frank Act, 2010).

Search Methodology. This research assists in determining whether there is a legal duty for "private enterprises" to implement an ERM process. If a law suit is filed in U.S. federal court against a private enterprise alleging breach of a duty to practice ERM as a standard of care, the suit will likely be dismissed. Generally a claim alleging breach

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**Comment [4]:** Check with journal editor if acronyms are allowed in headings (and adjust all heading throughout paper accordingly)

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**Comment [5]:** Unclear in guide for authors (PDF and online) if number or "Introduction" is needed for this section...guide states "introductory section...needs no heading or number" and online states "titing this section is optional". All examples viewed online have "Introduction" as title, not all include number (I have used numbers to help separate main sections). May need to inquire with editors if you use your own title "Importance of ERM" with the intro heading.

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**Comment [6]:** Guidelines conflict whether comma should be used in reference parentheses, I have kept them in.

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**Comment [7]:** Unsure if words need to be capitalized?

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of duty is dismissed if there is no legal duty to the plaintiff or the breach of a duty was not a proximate cause of the alleged damages.

We searched federal court cases and federal statutes which contain the term "enterprise risk management" or "chief risk officer" or its acronym "CRO". We reviewed publications such as Law Review publications, that may indicate whether ERM is legally required. We found a few U.S. appellate court cases that mention a CRO as an expert witness, but no case found that there was a duty to have an ERM framework (specific appellate court cases listed in references).

A Fastcase® search of "all federal appellate cases" found no matches for "enterprise risk management". A search of all jurisdictions found 18 results with the phrase "enterprise risk management". None of these 18 cases are based on a private enterprise's duty to have or implement an ERM program (insert specific case references). The cases do illustrate the duty to have ERM in financial institutions (i.e., banks, insurance companies, and some government enterprises). A few cases involving private companies (not listed on a stock exchange) mention an ERM officer or expert, but do not cite a duty regarding an ERM program.

For publically traded companies, elements of ERM are required by regulatory forces (e.g., Sarbanes Oxley Act of 2002, Basel Capital Accord II), and rating agencies (e.g., S&P's, 2005, 2006a, 2008). ERM is promoted by professional organizations and academic literature (e.g., "ERM and Its Impact Corporate Debt Ratings Analysis NYSE Corporate Governance Rules"; ISO 31000 & ISO 9001, 2008, the new International Risk Management Standard; Recent Events Involving ERM in the Boardroom: WaMu failure; MF Global debacle; JP Morgan trading losses).

We searched regulatory, financial rating, and professional organizations: National Association of Insurance Commissioners (NAIC); Security Exchange Commission (SEC); International Standards Organization (ISO); Basel Capital Accords; the International Association of Insurance Supervisors (IAIS); COSO ; and S&P. We heavily rely on references from a webinar presented by the Insurance and Risk Management Committee of the American Bar Association (ABA) Section of Intellectual Property Law in September 2012: "Why Every Lawyer Should Understand the Basic Concepts of Enterprise Risk Management" (noted in references).

ERM and TRM are defined in Appendix A of this paper. ERM has been defined by COSO, RIMS, and CAS. The following are not considered legally required standards: best practices, ethical/moral/professional standards, or an organization's mission/goals.

**Limitations.** Our research only covered U.S. federal law and did not cover U.S. state law or international law. A basic limitation is that legal requirements vary by individual enterprise, by standards of industry, and by legal jurisdiction: federal, state, and international. Questions of legal requirements are in specific cases determined on an industry by industry basis. Industries are listed by Protiviti Risk and Insurance Consulting (reference?) as follows: 1) Consumer Products and Services; 2) Energy; 3) Financial Services; 4) Government; 5) Healthcare and Life Sciences; 6) Industrial Products; 7) Technology, Media and Communication.

Fortunately, ERM is recognized as a value contributing best practice even when legal standards do not require it. There are important economies of scope in monitoring legal compliance, financial information required for, among other things, securities law compliance, and business ERM risk more generally. Best practice today involves vigorous and widespread monitoring of the various risks that a business assumes. Increasingly, guidance as to how such monitoring should occur has been advanced under the label of "enterprise risk management." Today, those best practices clearly include intense efforts at ERM. Examples of ERM of intellectual property (IP) and ERM in U.S. farming are outlined in this paper.

### 3. ERM Required for Financial Institutions

ERM is legally required for financial institutions to include: banking and securities; insurance; private equity; and hedge funds and mutual funds (Ed Hida, Risk & Capital Management, Global Financial Services Industry, Deloitte Touche Tohmatsu Limited and research and other activities of Deloitte's Center for Financial Services [http://www.deloitte.com/view/en\\_US/us/Industries/Banking-Securities-Financial-](http://www.deloitte.com/view/en_US/us/Industries/Banking-Securities-Financial-)

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Comment [10]: May need to check with editor for accepted placement of periods around quotations...no specific guidance in author guidelines.

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Comment [13]: list specific references

[Services/6d8c180133f0e210VgnVCM3000001c56f00aRCRD.htm](#)). However, no direct authority over insurers of insurance products legally exists. Deloitte's Global Risk Management Survey indicates how financial institutions were navigating the challenges of risk management in the 2010 marketplace ([Deloitte 201?](#))

**Regulation of Insurance.** Insurance companies are legally required to implement an ERM framework, but regulation of insurance in the U.S. is based on the laws of 56 Jurisdictions (i.e., 50 states, Washington DC, and five territories), and is primarily focused on solvency with some attention to market conduct, licensing, guaranty funds, and residual markets. Although the U.S. federal government has no direct authority over insurers and insurance products, the following areas of the federal government importantly impact insurance company operations: Federal Reserve; Financial Stability Oversight Council (FSOC); Federal Insurance Office; Department of Housing and Urban Development (HUD); Consumer Financial Protection Bureau; Securities and Exchange Commission; and Federal Emergency Management Agency, [now the reach of The Dodd-Frank Act](#).

#### 4. ERM Required for Government Sponsored Enterprises

According to 12 U.S.C. Sec. 1811 Federal Deposit Insurance Corporation SEC. 1004. Study Regarding Capital Requirements For Government-Sponsored Enterprises ([United States Code \[2011 Edition\]](#)), see Appendix B:

“(a) In General.—The Comptroller General of the United States shall conduct a study of the risks undertaken by all government-sponsored enterprises and the appropriate level of capital for such enterprises consistent with—

- “(1) the financial soundness and stability of the government-sponsored enterprises;
- “(2) minimizing any potential financial exposure of the Federal Government; and,
- “(3) minimizing any potential impact on borrowing of the Federal Government.”

Continued in Appendix B.

**Duty in Cases Against Governmental Entireties.** The following case demonstrates that governmental agencies have a duty to properly implement an enterprise risk management program ([In re Tenn. Valley Auth. Ash Spill Litig...](#), 787 F.Supp.2d 703 (E.D. Tenn., 2011)).

[In re Tennessee Valley Authority ASH Spill Litig. \(E.D. Tenn., 2011\)](#) March 24, 2011. Based upon our review, we find that: (1) AECOM's focus on the "slimes" layer is misplaced; (2) TVA could have possibly prevented the Kingston Spill by implementing recommended corrective measures; (3) "red flags" existed for years that raised risks that were not captured by TVA's *Enterprise Risk Management Program*; and (4) the culture within TVA's fossil fuel plants resulted in coal ash being treated like garbage at a landfill rather than treating it as a potential hazard to the public and the environment. In re Tenn. Valley Auth. Ash Spill Litig., 787 F.Supp.2d 703 (E.D. Tenn., 2011)

#### 5. ERM for Large Bank and Non-Bank Holding Companies: Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010

The Dodd-Frank Act ([2010](#)) strengthens the capital, governance and risk taking review for banks, and shareholder activism puts the CEO on the defensive if there is a large blow up (e.g., Citibank CEO and the London whale issue) ([reference for Citibank/whale issue?](#)). For example, see [Implementing the Dodd-Frank Act: The Federal Reserve Board's Role](#) (Board of Governors of the Federal Reserve System, 2013) and [Implementing Dodd-Frank Wall Street Reform and Consumer Protection Act - Accomplishments](#)(U.S. Securities and Exchange Commission, 2013)

The Dodd- Frank Act attempts to deal with any company that could threaten the financial system and the economy. The Dodd -Frank Act significantly changed U.S. financial regulation with little effect on the insurance sector. There was broad understanding that the problems of [AIG](#) did not arise from the traditional regulated insurance business, and issues in insurance paled in comparison to the failures in banking sectors. However, elements of the Dodd-Frank Act impact insurers particularly where insurance intersects with banking and capital markets, while not undermining the system of state regulation which clearly demonstrated it was up to task of preparing for and

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**Comment [15]:** Some of these other agencies also have acronyms..unsure if you would like to include all

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Moved large footnote to an appendix B

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**Comment [18]:** These reference dates have been updated (and original link to Board of Gov site no longer worked) – please verify accuracy.

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weathering the financial crisis. For example, the summer 2012 issuance of a proposed rule on Basle III Capital Standards that will apply to thrift holding companies with insurance operations ([reference](#)).

According to the Dodd-Frank Act (2010): “(a) In general (1) Purpose: In order to prevent or mitigate risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large, interconnected financial institutions, the Board of Governors shall, on its own or pursuant to recommendations by the Council under section 5325 of this title, establish prudential standards for nonbank financial companies supervised by the Board of Governors and bank holding companies with total consolidated assets equal to or greater than \$50,000,000,000 that”-----

According to 12 U.S.C. Sec. 5365 Enhanced supervision and prudential standards for nonbank financial companies supervised by the Board of Governors and certain bank holding companies ([United States Code, 2011](#)): “(A) Required standards: The Board of Governors shall establish prudential standards for nonbank financial companies supervised by the Board of Governors and bank holding companies described in subsection (a), which shall include—

- (i) risk-based capital requirements and leverage limits, unless the Board of Governors, in consultation with the Council, determines that such requirements are not appropriate for a company subject to more stringent prudential standards because of the activities of such company (such as investment company activities or assets under management) or structure, in which case, the Board of Governors shall apply other standards that result in similarly stringent risk controls;
- (ii) liquidity requirements;
- (iii) overall risk management requirements;
- (iv) resolution plan and credit exposure report requirements; and,
- (v) concentration limits

Federal Reserve Regulation YY (2012), as proposed, requires bank holding companies with total assets of \$10 billion or more, and certain domestic non-bank holding companies, to have a separate risk committee which includes at least one risk management “expert” with experience managing risk exposures of bank holding companies or non-bank financial companies. The risk committee is charged with overseeing a “robust” ERM system, including board oversight of areas that have in the past generally been viewed as operational in nature. And it requires appointment of a CRO.

#### Corporate Governance and Dodd-Frank:

- Independent compensation committee, voting restrictions, disclosures, claw-back, broker voting restrictions, quarterly reporting on internal controls
- Exemptions for foreign issuers and for issuers with less than \$75 million
- Whistleblower protection enhanced, statute of limitations extended Disclosure and oversight demands: The whistle-blower provisions in the Dodd-Frank Act may drive a need for increased internal investigations. ( [Securities and Exchange Commission, Proxy Disclosure Enhancements, Release Nos. 33-9089; 34-61175; http://www.sec.gov/rules/final/2009/33-9089.pdf](#); [Securities and Exchange Commission, Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934\) Release No. 34-64545 http://www.sec.gov/rules/final/2011/34-64545.pdf](#).
- The Dodd-Frank Act also requires training to assure employees that there will be no repercussions if they point out illegal or unethical actions within the organization.

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#### 6. Few Federal Appellate Court Cases Mention ERM or a Chief Risk Officer

We found no U.S. statutes or court cases requiring an ERM framework for “private enterprises”. U.S. appellate court cases listed in the references section mention a CRO but do not require an ERM framework ([add CRO appellate case references](#)). A Fastcase® search of “all federal appellate cases” found no matches for “enterprise risk management”. A search of all jurisdictions found 18 results with the phrase “enterprise risk management”. None of these 18 cases are based on a private enterprise’s duty to have or implement an ERM program. The cases do illustrate that duty for financial institutions (i.e., banks, insurance companies, and some government enterprises). A few cases involving private companies (not listed on a stock exchange) mention an ERM officer or expert but do not cite a duty regarding an ERM program.



## 7. National Association of Insurance Commissioners (NAIC) Published Elements of ERM

Some insurance companies have for years been looking at risk across the corporate structures of their group, and have a detailed ERM process with an extensive document called a risk management framework. Companies are focused on the future, assessing capital requirements over the next five years, looking at their risk management, risk appetite, assessing growth and acquisition opportunities. Companies are concerned about revealing and protecting their intellectual property and the possibility of multiple jurisdictions to comply with globally. According to Michael Angelina, Executive Director of Saint Joseph's University's Academy of Risk Management and Insurance, and a former CRO (2013 pers comm or journal below?), "There's a lot of education that needs to happen among boardrooms" about ERM and Own Risk and Solvency Assessment (ORSA). "Board members need to understand that the entire board owns assessments of reserve, catastrophe, investment and other risks; not the finance committee, not the risk committee. As they did with Sarbanes-Oxley 10 years ago, boards will learn from the ORSA requirements" (Journal of Applied Risk Management and Insurance, Vol. 1, no. 1, 2013, page 13.)

NAIC works in a number of areas as a foundation for state laws but has little direct legal jurisdiction over company operations. NAIC works on accreditation of state insurance regulation, statutory accounting (more financial strength focused than GAAP which are more focused on measuring profitably), corporate governance, company group supervision, market conduct, reinsurance collateral, and the ORSA Model Act (add reference?). The ORSA Act is a formalization of disclosure that is required by companies; it passed the NAIC general assembly and should be implemented through the 50+ state/territories legislative process. ORSA is a company's enterprise-wide self-assessment of its own risk with the first reports required in 2015. With changes to the NAIC Holding Company Act, adoption of the revised Credit for Reinsurance Models, and the ORSA Act, state regulation has additional tools to identify potential contagion risks in the group that could negatively affect the insurance company. Insurance companies will have to file Enterprise Risk Reports and ORSAs. ORSA's form F is the Enterprise Risk Report focusing on risks of the enterprise, looking to the future at how insurers manage risks and develop prospective strategies rather than looking to the past with financial statement report cards.

According to Robert W. Klein, the NAIC Solvency Modernization Initiative (SMI) reform is motivated more by a desire to raise U.S. regulation to a level of best practices than by a need to fix solvency problems (Klein, 2013). In his comprehensive article Klein (2013) describes the NAIC SMI as an ambitious program of reform that is centered on five key areas: 1) capital requirements; 2) governance and risk management; 3) group supervision; 4) statutory accounting and financial reporting; and 5) reinsurance.

Starting in 2010 all states were required to use a Risk-Focused Surveillance Framework as an essential part of overall improvement of solvency regulation. This framework adopted by NAIC in 2004, links and coordinates four key regulatory functions: 1) risk-focused examinations; 2) off-site risk focused analysis; 3) examination of internal and external changes in an insurance company; and 4) an annual supervisory plan, Insurer Profile Summary (IPS) for each insurer developed by its domiciliary regulator (Vaughn, 2009).

There are elements of ERM in NAIC Model # 440 & 450 and other regulatory rules, but no mandated requirements. (See [http://www.naic.org/documents/frs\\_financial\\_summit\\_presentations\\_12\\_Corporate\\_Governance.pdf](http://www.naic.org/documents/frs_financial_summit_presentations_12_Corporate_Governance.pdf), for further information). There is a Corporate Governance (E) Working Group that is part of the Financial Condition (E) Committee within the Solvency Modernization Initiative (E) Task Force (see [http://www.naic.org/committees\\_e\\_isff\\_corp\\_governance.htm](http://www.naic.org/committees_e_isff_corp_governance.htm)).

## 8. ERM Standards by the International Association of Insurance Supervisors

The International Association of Insurance Supervisors (IAIS) has developed core principles relating to "suitability" corporate governance, risk management, and internal controls (IAIS, 2003). IAIS is focused on COMFRAME, Insurance Core Principles (ICPs), G-SIIs, supervisory colleges, and joint forums (see Appendix C). Associated with partners in the Access to Insurance Initiative (A2ii), the IAIS also participates as an observer or partner with numerous other organizations, including the Arab Forum of Insurance Regulatory Commissions (AFIRC), Asian Forum of Insurance Regulators (AFIR), Association of Latin American Insurance Supervisors (ASSAL), Consultative Group to Assist the Poor (CGAP), European Insurance and Occupational Pensions Authority (EIOPA), Financial Action Task Force (FATF), International Actuarial Association (IAA), International Monetary Fund (IMF), International Organization of Pension Supervisors (IOPS), Islamic Financial Services Board (IFSB),

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Comment [23]: Is this the Act or does ORSA stand alone?

This paragraph mentions several Acts and models that may require inserting references.

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Comment [24]: Or ORSA forms?

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National Association of Insurance Commissioners (NAIC), Offshore Group of Insurance Supervisors (OGIS), Organization for Economic Cooperation and Development (OECD), Insurance and Private Pensions Committee (IPPC), and the World Bank.

### 9. ERM in Basel Capital Accord II and III

Recommendations on banking laws and regulations issued by the Basel Committee on Banking Supervision ([reference](#)).

A widely used vocabulary for risk management is defined by ISO Guide 73, "Risk management Vocabulary" ([reference](#)).

### 10. TRM Elements Required for Financial and Health Care Companies

Required elements of ERM include a business continuity plan (BCP) and an emergency action plan. A BCP is required for businesses in the banking, securities, and investment management fields. Companies and organizations that must comply with the Health Insurance Portability and Accountability Act ([reference year](#)) are also required to develop BCPs. Manufacturers with sole suppliers contractually require their suppliers to have BCPs ([from Risk Management and Insurance: Tools & Practices, National Underwriter, 2002, 2009 Supplement](#)).

An emergency action plan is required by the Office of Safety and Health Administration (OSHA). All employers subject to OSHA standards must develop a plan which covers basic notification of emergencies and evaluation and related issues ([US Department of Labor, Occupational Safety and Health Administration, OSHA](#)).

### 11. TRM Elements for Public Corporations (Sarbanes Oxley)

Within federal securities law, the Sarbanes Oxley Act (SOX, 2002) requires elements of ERM, [with](#) some significant regulation of their risk management systems. Under SOX (2002), public companies are required to have:

- [Audit committee oversight of auditors](#)
- CEO/chief financial officer (CFO) certification of quarterly and annual financial statements and reports
  - Section 404: Assessment of internal financial controls and disclosure controls and the outside auditor must also attest as to those controls
- Both management and external auditor are responsible for performing their assessment in the context of a top-down risk assessment.
- §404 a system of internal control sufficiently robust such that material error in future financial statements is remote or less.

Corporate Governance and SOX:

- Independent Audit Committee composed of only independent directors- disclose why, if not a financial expert
- Disclosure rules adopted in 2009 require companies to discuss the board's role in risk oversight and how compensation policies may affect risk management.
- Restricts affiliate compensation, non-affiliation rules
- Disclose who is subject to code of ethics or why it lacks such code
- No loans to directors, if misconduct, pay is forfeited, frozen, trading frozen

[The following](#) March 7, 2013 case illustrates common allegations based on SOX certifications including specific certifications of their evaluations and SEC Form 10-K filings ([Case No. 3:11-Cv-00595; United States District Court For The Middle District Of Tennessee Nashville Division; Entered: March 7, 2013, Judge Haynes. Memorandum](#)):

NORTH PORT FIREFIGHTERS' PENSION-LOCAL OPTION PLAN,  
Individually and on Behalf of All Others Similarly situated, Plaintiff, LAKELAND EMPLOYEES PENSION PLAN,  
Individually and on Behalf of All Others Similarly Situated, Lead Plaintiff,  
v.  
FUSHI COPPERWELD, INC., et al. Defendants.

Jamie Umber 9/30/2013 2:48 PM

**Comment [30]:** The following several sections have incomplete sentences that I was unsure how to edit, so simply attempted to address formatting as possible. Please review carefully.

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**Comment [31]:** No asterik link - unsure of specific reference to include

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**Comment [32]:** Verify appropriate list format with journal editor

Andrew F Whitman 10/10/2013 4:32 PM

**Deleted:** his

Andrew F Whitman 10/10/2013 4:33 PM

**Deleted:** [insert case reference](#)

"C. Relief

For the above stated reasons, the Court concludes that under the holistic standard of review, Plaintiffs have alleged sufficient specific facts that collectively state actionable claims under Section 10(b), Rule 10b-5 and Section 20(a). Accordingly, the Defendants' motion to dismiss should be denied.

An appropriate Order is filed herewith.

William J. Haynes, Jr, Chief Judge, United States District Court"

Plaintiffs allege that the Defendants' Sarbanes-Oxley certifications included specific certifications of their evaluations of: (1) Fushi's disclosure controls and internal controls over its financial reporting, and (2) the effectiveness of Fushi's disclosure controls and internal controls over its financial reporting. Id. at ¶ 64. Plaintiffs assert that these certifications were false for the last three quarters of 2007, all of 2008 and 2009, and the first three quarters of 2010. Id. Plaintiffs allege that Fushi admitted on April 5, 2011 in its delayed SEC Form 10-K for the year ending December 31...

## 12. Rating Agencies and NYSE Reference Elements of ERM

**S&P's Ratings.** Rating agencies have asked many questions on risk management in the past. S&P has one formalized questionnaire on how review of ERM programs will impact rating (**S&P's Ratings Services Corporate Debt Rating Analysis, www.standardandpoors.com**). S&P expanded its review of the ERM practices of financial and non-financial companies in late 2008.

Factors in S&P's analysis of ERM include:

- What management is doing about top risks?
- The staff responsible for risk management and their places in the organization chart.
- What discussions about risk management have taken place at the board level or among top management when strategic decisions were made in the past?

Have a formal Board risk committee, risk limits, stress tests, and ERM program.

**NYSE Corporate Governance Rules.** New York Stock Exchange (NYSE) listing standards require audit committees of NYSE listed companies to discuss the company's guidelines and policies regarding risk assessment and risk management as well as the company's major financial risks and the steps management has taken to monitor and control those risks. The audit committee is not required to be the sole body responsible for risk management and assessment (**insert reference?**).

## 13. SEC Regulation: S-K Risk Factor Disclosures

Demand for increased disclosure and oversight are also reflected in the SEC rules for proxy statements which now require disclosure of the board's role in risk management (**reference?**). What is that role? How should it be disclosed?

Item 503 of Regulation S-K requires discussion of risk in annual and quarterly reports (add reference here or above for all below).

New SEC proxy disclosure rules effective since 2010 require companies to describe in their proxy statements the role of the board of directors and its committees in overseeing risk management.

Also require companies to disclose its compensation policies and practices for all employees if the policies and practices create risks that are reasonably likely to have a material adverse effect on the company.

As an example, the Oracle Corp. September 21, 2012 Proxy Statement Disclosure reads: "The Compensation Committee, in consultation with management ...and the committee's compensation consultant ...has assessed the

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**Comment [33]:** Unsure how to format this text, or if it will simply be removed once reference information is inserted...

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**Comment [34]:** Define, first use within text (either here or in paragraph of this section pending journal editor confirmation of acronym use in headings)

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**Comment [35]:** Verify listing format with journal editor

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**Comment [36]:** Define?

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**Comment [37]:** Should this be a bulleted list?



compensation policies and practices applicable to our executives and other employees and concluded that they do not create risks that are reasonably likely to have a material adverse effect on Oracle.

"While management is responsible for assessing and managing risks to Oracle, our Board is responsible for overseeing management's efforts to assess and manage risk...While the Board has the ultimate oversight responsibility for Oracle's risk management policies and processes, various committees of the Board also have responsibility for risk oversight...Our Board is kept informed of each committee's risk oversight and other activities via regular reports of the committee chairs to the full Board. Our Board's role in risk oversight is consistent with the Board's leadership structure, with the CEO and other members of senior management having responsibility for assessing and managing Oracle's risk exposure, and the Board and committees of the Board providing oversight in connection with those efforts."

#### 14. Boards Should Be Charged With Monitoring Risk

"As articulated in Stone v. Ritter (2006) directors can fail to meet their Caremark duty (In re Caremark Int'l, Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996)) in two ways. One is by not implementing some system of information and control. As we have noted, ERM systems are now standard practice for public corporations. (COSO, 2004). Any system in place, no matter how imperfectly designed will suffice. Some corporations, though, seem to have no ERM system in place.<sup>n96</sup> These corporations will need to put a system in place, or risk facing liability..... Guidance from the extensive ERM literature can tell courts what sort of questions boards should be asking, and what sorts of information they should be looking at. n97 Given the fairly large audit and risk management functions within both Goldman Sachs and Citigroup, it is highly doubtful that plaintiffs could succeed on these grounds; the value, again, would be in the encouragement that the directors go through the exercise of looking." (IN THE BOARDROOM: ARTICLE: RECONSIDERING BOARD OVERSIGHT DUTIES AFTER THE FINANCIAL CRISIS, Copyright (c) 2013 The Board of Trustees of the University of Illinois, University of Illinois Law Review 2013, 2013 U. Ill. L. Rev. 859.)

#### 15. COSO and ISO 31000 Model & Promote ERM

There are important economies of scope in monitoring legal compliance, financial information required for, among other things, securities law compliance, and business ERM risk more generally. Best practice today involves vigorous and widespread monitoring of the various risks that a business assumes. Increasingly, guidance as to how such monitoring should occur has been advanced under the label of "enterprise risk management." The leading authoritative guidance on ERM comes from COSO. Delaware case law often both draws upon and reinforces corporate best practices. Today, those best practices clearly include intense efforts at ERM.

According to COSO, "Uncertainties present both risks and opportunities, with potential to erode or enhance value"(COSO, 2004). The sources of uncertainties with adverse effects or outcomes (the probability of which is defined as risk) are described as due to the volatility, complexity, or heterogeneity of risk; the impact of external events (such as customer preferences or competitors strategies); the response to external events or developments (such as compliance to policies, regulations, and standards or development of strategies); and the behavior of employees.

Emphasizes a board's role in setting the tone at the top and culture for effective risk management.

COSO focuses on providing a flexible evaluation standard against which current ERM process can be evaluated rather than focusing on specific risk management activities.

COSO's Integrated Framework highlights four areas for board involvement: 1) establish with management a mutual understanding of the corporation's risk philosophy and risk appetite; 2) know the extent to which management has set up effective enterprise risk management of the organization; 3) review the corporation's portfolio of risk in relation to the agreed risk appetite; and 4) be apprised of the most significant risks and whether management is responding appropriately (Figure 1. ISO 9001 and COSO Cube)

Family of standards relating to risk management codified by the ISO (ISO 31000) focuses on:

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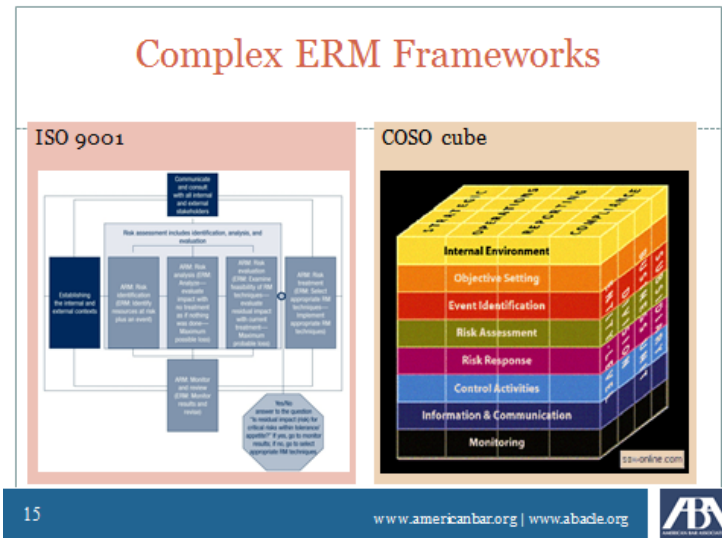
Comment [40]: Unsure if this is to be a list or separate paragraphs? Adjust formatting accordingly

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Comment [41]: check accuracy of edit

Implementation of risk management processes and Identification of risk owners and the need for widespread education  
 Policy and Governance  
 Program Design  
 Implementation  
 Monitoring and Review  
 Continual Improvement

Figure 1. ISO 9001 and COSO Cube



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**Comment [42]:** Adjust list formatting per journal editor  
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**Comment [43]:** Figures are meant to have "a short descriptive title" – please ensure this title suffices.

According to the standard [ISO 31000](#) "Risk management" – The purpose of ISO 31000:2009 is to provide principles and generic guidelines on risk management. ISO 31000 seeks to provide a universally recognized paradigm for practitioners and companies employing risk management processes to replace the myriad of existing standards, methodologies and paradigms that differed between industries, subject matters and regions. Principles and guidelines on implementation,<sup>91</sup> the process of risk management consists of several steps as follows:

Establishing the context- This involves:

- 1) identification of risk in a selected domain of interest
- 2) planning the remainder of the process
- 3) mapping out the following:
  - o the social scope of risk management
  - o the identity and objectives of [stakeholders](#)
  - o the basis upon which risks will be evaluated, constraints.
- 4) defining a framework for the activity and an agenda for identification
- 5) developing an analysis of risks involved in the process
- 6) mitigation or solution of risks using available technological, human and organizational resources.

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**16. U.S. Farmers and Owners of Intellectual Property Practice Elements of ERM**

**Farmers Practice Elements of ERM: An Example.** Farms provide the best example of ERM practices applied to public organizations. The person responsible for managing risks is effectively a CRO. The extent to which ERM

practices rise to a legal standard of care for farming or for other types of organizations must be evaluated on a case by case basis. Looking into the farmer's accounting system may turn up possible incentives for safety or ones that could be incorporated.

FINPACK Financial Software for Agricultural and Farm Management ([reference?](#)) helps producers, lenders, and agricultural professionals evaluate farms' financial positions, explore alternatives, and make informed farm management decisions. The software prepares balance sheets, analyzes financial performance, and projects cash flows, profitability, liquidity, and operating credit requirements for any portion of a year or up to 10 years. Specialized software versions are available for producers, lenders, and agricultural professionals. FINPACK is the most popular financial software in farm management.

Farmers apply many options for managing risks and use a combination of strategies and tools, which differ from farm to farm since risks and the willingness and ability to bear risks differ from farm to farm. Some of the following strategies deal with only one kind of risk, while others address multiple ERM risks.

- Enterprise diversification assumes incomes from different crops and livestock activities do not move up and down in perfect correlation, so that low income from some activities would likely be offset by higher income from others.
- Financial leverage refers to the use of borrowed funds to help finance the farm business. Higher levels of debt, relative to net worth, are generally considered riskier. The optimal amount of leverage depends on several factors, including farm profitability, the cost of credit, tolerance for risk, and the degree of uncertainty in income.
- Vertical integration generally decreases risk associated with the quantity and quality of inputs or outputs because the vertically integrated firm retains ownership or control of a commodity across two or more phases of production and/or marketing.
- Contracting can reduce risk by guaranteeing prices, market outlets, or other terms of exchange in advance. Contracts that set price, quality, and amount of product to be delivered are called marketing contracts, or simply forward contracts. Contracts that prescribe production processes to be used and/or specify who provides inputs are called production contracts.
- Hedging uses futures or options contracts to reduce the risk of adverse price changes prior to an anticipated cash sale or purchase of a commodity.
- Liquidity refers to the farmer's ability to generate cash quickly and efficiently in order to meet financial obligations. Liquidity can be enhanced by holding cash, stored commodities, or other assets that can be converted to cash on short notice without incurring a major loss.
- Crop yield insurance pays indemnities to producers when yields fall below the producer's insured yield level. Coverage may be provided through private hail insurance or federally subsidized multiple peril crop insurance.
- Crop revenue insurance pays indemnities to farmers based on gross revenue shortfalls instead of just yield or price shortfalls. Several federally subsidized revenue insurance plans are available for major crops in most areas of the U.S.
- Household off-farm employment or investment can provide a more certain income stream to the farm household to supplement income from the farming operation.

Uncertainty in prices, yields, government policies, and foreign markets means that TRM and ERM play an important role in many farm business decisions.

Government programs addressing farm risk management have also played a larger role in U.S. farm policy in recent years; over 270 million acres are now covered by crop insurance and government insurance subsidies exceed \$5 billion annually ([reference?](#)).

The U.S. Department of Agriculture (USDA) Economic Research Service (ERS) analyzes farm business risks and risk management strategies, as well as government programs that address farm risk management ([reference](#)). Strategies investigated include:

- Yield and revenue insurance,
- Futures and options,
- Contracting sales and purchases,

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- Enterprise diversification,
- Debt management and credit availability, and
- Off-farm employment.

**Owners of Intellectual Property (IP) Practice ERM at University of Minnesota (UMN): An Example.** This example is based on the Office for Technology Commercialization (OTC) at the University of Minnesota (UMN) risk managing the commercialization of software and information technologies. ERM of IP risks is implemented based on the law; however, ERM is not legally required. ERM by type of discipline is shown in the UMN's OTC website for the following disciplines: Agriculture and Horticulture; Life Sciences; Engineering and Physical Sciences; Software and Information Technology; and Venture Center (start-ups) ([http://www.research.umn.edu/techcomm/#\\_UeahfG31zoQ](http://www.research.umn.edu/techcomm/#_UeahfG31zoQ)). Each technology listing includes a detailed description and the contact information for the appropriate Technology Marketing Manager. Additionally, some technologies may be licensed, non-exclusively, online. These agreements have standard terms and conditions that enable immediate licensing using a credit card or eCheck®. More information is available on the [FAQ's page](http://www.license.umn.edu/faq/default.aspx)(<http://www.license.umn.edu/faq/default.aspx>).

New UMN inventions are presented to the public through this Technology Marketing Site. If a partner has a specific need, OTC may help facilitate a Sponsored Research Agreement through Sponsored Projects Administration (SPA). Typically, Sponsored Research Agreements provide companies a first option to exclusively license any inventions arising from the contracted work. For more information please review the [SPA website](#)

**TRM and ERM Risks Intersect/Overlap** (from a presentation by Jay W. Schrankler, Executive Director, University of Minnesota, Office for Technology Commercialization)

- Hazard Risk: Liability torts, Property damage, Natural catastrophe
- Financial Risk: Pricing risk, Asset risk, Currency risk, Liquidity risk, Inflation, etc.
- Operational Risk: Customer satisfaction, Product failure, Integrity, Reputational risk (Brand)
- Strategic Risks: Competition, Social trend, Capital availability
- Regulatory Risks: Local law, Medical, Trade, etc.

**Three IP Risk Factors are Technical/Technology Factors, Legal Factors, Commercial Factors (reference?)**

The SEC on 07/12/2013 eliminated the prohibition against small business going direct to the capital market with its own IPO (reference). Now small firms can directly ask angel investors to provide funding, circumventing a licensed securities broker.

Strategy in the application for a patent: Costs and avoiding the mistakes. Capable patent writing, Patent timeline; The Honey Crisp Apple example. Importance of the "mark" versus important of the "product"  
 Owning A Patent Is Analogous To The Rights Of An Owner of A Real Estate Lot:  
 You must enforce your right to keep trespassers off.

**Requirements of Financing, Utility And Actual Production To Enforce A Patent.**  
 Cost of Enforcement To Maintain Patent Value.  
 Freedom to Operate, Validity, Infringement; What happens if you lose?  
 Risk Mitigation Strategies; Due diligence by inventors and investors

Patent Trolls cause high costs and put some out-of-business, and U.S. federal government is stepping in.

Opportunities: Patents, Licenses and Trademarks Without Use or Manufacture. License it; Create a product or offering (Work on it; Assign it; Auction it off; Cross license it; Enforce it-prosecute infringers).

Ensuring Proper Royalties: Monitoring Licensee Compliance to Licensing Requirements: Unlike most business processes and functions for which companies can implement controls to manage their risk, licensors must trust and rely on the internal control environment of their licensees to ensure intellectual property is protected and they are compensated fairly.

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**Comment [48]:** Almost everywhere else in the paper "intellectual property" is spelled out, the acronym is not used (though it is first defined in section 2). If decide to use acronym, fine/replace accordingly (and here per journal editor's guidance on acronym use in headings)

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**Comment [49]:** Or spell out per comment JU47

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**Comment [51]:** Or spell out

Internal controls include alerting management when their license agreements are about to expire. The best way to ensure that a license does not expire is to forward any changes in your purchaser, company, billing and shipping contact information to CEO or CRO before those changes occur.

Consider the following example: In the first quarter of 2007, a consumer electronics company that manufactures and distributes products through multiple channels discovered it had been paying royalties to the incorrect licensor. This had been occurring since the inception of the licensing agreement nearly two years earlier, with approximately \$1.2 million disbursed incorrectly. All three companies involved were publicly held so elements of ERM were legally required. The occurrence of such a major error raises several questions:

Why did internal controls as mandated by Section 404 of the Sarbanes-Oxley Act fail to catch this error?

Who is monitoring for any red flags to emerge for the licensor when it did not receive required royalty payments?

With regard to the company receiving incorrect royalty payments, was there a significant shift in royalty revenue from this licensee to this company?

Did anyone at this company notice or wonder why?

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## 17. Conclusion

ERM is legally required for U.S. financial institutions and for government-sponsored enterprises: required by U.S. statutes, regulatory agencies (e.g., SEC), NAIC, and by rating agencies (e.g., S&P). Elements of ERM are practiced by some private enterprises, by farmers, and by owners of intellectual property. Few if any U.S. statutes or court cases require ERM for private enterprises, although elements of TRM are required for financial and health care companies. We found no documentation of a legal duty for "private enterprises" to implement an ERM process. If a private enterprise is sued in U.S. federal court alleging breach of a duty to practice ERM, the suit will likely be dismissed. Fortunately ERM is recognized as a value contributing best practice even when legal standards do not require it, and there are important benefits to monitoring legal compliance within an ERM framework.

## Appendix A

### Distinguishing TRM and ERM

According to an introduction to TRM in *The Tools and Techniques of Risk Management and Insurance* (pages 1-6 of, *The National Underwriter Co.*, ISB 0-218-701-2 and 2009 Supplement, ERM is described in pages 7-22, *Ibid*):

Generally TRM covers insurance and loss control and ERM expands TRM to include a Strategic Management Framework:

- 1) An ERM Program: plan, organize, write
- 2) Risk Analysis: identify, measure, evaluate
- 3) Risk Response: identify, measure, analyze
- 4) Decision Process: model, support, implement
- 5) System Control: monitor, assess, communicate

Both TRM and ERM incorporate a modified standard management process.

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**Comment [52]:** Mostly incomplete sentences/paragraphs, unsure how to edit/format at this stage

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**Comment [53]:** Are caps necessary?

## TRM vs. ERM Summary

### TRM:

- Operational focus
- Silo approach
- Emphasis on insurance
- Middle management
- Focus on losses

### ERM:

- Strategic focus
- Portfolio approach
- Emphasis on portfolio response
- Board level management
- Focus on creating value

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[www.americanbar.org](http://www.americanbar.org) | [www.abade.org](http://www.abade.org)

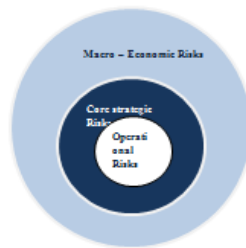


### TRM and ERM Types of Risk

Types of TRM and ERM risk are distinctive and overlapping.

### Enterprise Risk Management Overlay of Risks

- **Overlay of risks**  
The core operational risks are surrounded by strategic risks which are then surrounded on the outside by the economic risks  
• Strategic risks include mergers and acquisitions, new product lines, and joint ventures.



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Dr. James Kalman, ARM

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TRM risks include losses and liability for breach of a legal duty. ERM extends beyond legal compliance to include Strategic Risks, Global standards and External Risks; according to Kaplan and Mikes (2012) risk:

“Preventable risks, arising from within the organization, are controllable and ought to be eliminated or avoided. Examples are the risks from employees’ and managers’ unauthorized, unethical, or inappropriate actions and the risks from breakdowns in routine operational processes. Strategy risks are those a company voluntarily assumes in order to generate superior returns from its strategy. External risks arise from events outside the company and are beyond its influence or control. Sources of these risks include natural and political disasters and major macroeconomic shifts”

TRM deals with unrewarded risks; ERM deals with rewarded risks as described by Deloitte Inc (insert reference). Deloitte’s web site states, “knowledge is power. In addition to knowledge of strategic, financial, tax, competitive, regulatory, legal, security, privacy, property, IT, and reputational risks, it is a worthwhile consideration to develop awareness of rewarded and unrewarded risk.”

Rewarded risks are generally those taken in the pursuit of value. Unrewarded risks provide no upside potential — only the avoidance of penalties, loss, or regulatory censure. Which risks are worth taking?

- Rewarded risks: Rewarded risks usually call for investing financial, human, and other resources in anticipation of returns. These risks are worth taking, provided they are the right ones. Of course, management rarely knows beforehand which rewarded risks (or, rather, potentially rewarded risks) are the right ones. Management, therefore, makes calculated decisions regarding which investments may yield the most favorable returns or competitive advantage.
- Unrewarded risks: Public companies must comply with payroll-tax withholding laws, observe health and safety requirements, and comply with reporting requirements. Although compliance produces no revenue or profit, failure to comply holds penalties. Unrewarded risks (which include risk of waste, loss, security breaches, and other noncompliance-related risks) cannot be ignored, but the incentive for addressing them is value protection, not value creation. In general, unrewarded risks are not worth taking.

## Appendix B

Continued from Section 4 and 12 U.S.C. Sec. 1811 Federal Deposit Insurance Corporation (United States Code (2011 Edition)) “SEC. 1004. Study Regarding Capital Requirements For Government-Sponsored Enterprises.”

“(d) Specific Requirements.—The study shall examine and evaluate—

- “(1) the degrees and types of risks that are undertaken by the government-sponsored enterprises in the course of their operations, including credit risk, interest rate risk, management and operational risk, and business risk;
- “(2) the most appropriate method or methods for quantifying the types of risks undertaken by the government-sponsored enterprises;
- “(3) the actual level of risk that exists with respect to each government-sponsored enterprise, which shall take into account factors including the volume and type of securities outstanding that are issued or guaranteed by each government-sponsored enterprise and the extent of off-balance sheet expense of each government-sponsored enterprise;
- “(4) the appropriateness of applying a risk-based capital standard to each government-sponsored enterprise, taking into account the nature of the business each government-sponsored enterprise conducts;
- “(5) the costs and benefits to the public from application of a risk-based capital standard to the government-sponsored enterprises and the impact of such a standard on the capability of each government-sponsored enterprise to carry out its purpose under law;
- “(6) the impact, if any, of the operation of the government-sponsored enterprises on borrowing of the Federal Government;
- “(7) the overall level of capital appropriate for each of the government-sponsored enterprises; and,
- “(8) the quality and timeliness of information currently available to the public and the Federal Government concerning the extent and nature of the activities of government-sponsored enterprises and the financial risk associated with such activities.

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Comment [56]: End quote here?

## Studies of Relationship Between Public Debt and Activities of Government-Sponsored Enterprises

Section 1404 of Pub. L. 101-73 provided that:

“(c) Assessment of Risk.—In assessing the financial safety and soundness of the activities of Government-sponsored enterprises, and the impact of their activities on Federal borrowing, the Secretary shall quantify the risks associated with each Government-sponsored enterprise. In quantifying such risks, the Secretary shall determine the volume and type of securities outstanding which are issued or guaranteed by each Government-sponsored enterprise, the capitalization of each Government-sponsored enterprise, and the degree of risk involved in the operations of each Government-sponsored enterprise due to factors such as credit risk, interest rate risk, management and operations risk, and business risk. The Secretary shall also report on the quality and timeliness of information currently available to the public and the Federal Government concerning the extent and nature of the activities of Government-sponsored enterprises and the financial risk associated with such activities.

### Appendix C

According to the IAIS website (<http://www.iaisweb.org>):

#### Corporate Governance (E)

The IAIS articulated insurance core principle (ICP) on governance that all regulations need to include. ICP 5, 7 and 8 (see few links on the bottom right side of the governance working group pages) are the governance ones.

#### Insurance Core Principles (ICPs) Related to Corporate Governance

• ICP 8: Risk Management and Internal Controls: The supervisor requires an insurer to have, as part of its overall corporate governance framework, effective systems of risk management and internal controls, including effective functions for risk management, compliance, actuarial matters and internal audit.

#### Financial Sector Assessment Program (FSAP) - 2009 Recommendations

Risk Assessment and Management: A requirement that an insurer have in place comprehensive risk management policies and systems capable of promptly identifying, measuring, assessing, reporting and controlling their risks.

Insurance Activity: Board Approval Requirement; the relevant laws or regulation should explicitly provide that an insurer must have in place strategic underwriting and pricing policies approved and reviewed regularly by the Board.

#### ERM in G-20 and FAB

G-SIIs – focused on Global Systemically Important Insurers; Financial Sector Assessment Program – FSAP, International Monetary Fund; Principles for Effective Risk Appetite Framework and Recovery & Resolution Planning.

The European Union is focused on Solvency II, Group Supervision and Equivalency of regulatory standards.

#### European Union and United States

Are focused on:

- Dialogue Project including areas of:
  - 1) Professional Secrecy and Confidentiality
  - 2) Group Supervision
  - 3) Solvency and capital requirements
  - 4) Reinsurance and collateral requirements
  - 5) Supervisory reporting, data collection, analysis and disclosure
  - 6) Supervisory Peer Reviews

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**Comment [57]:** Need to complete sentences, ensure all acronyms are defined, check formatting of lists, etc in this appendix

- 7) Independent third-party reviews  
to on-site inspections
- EU-US Insurance Trade Agreement Discussions
  - Solvency II vs. ORSA

## References

- I. **Distinguishing TRM and ERM Moved to Appendix**
- II. **This research draws heavily from the development of a webinar presented by the Insurance and Risk Management Committee of the ABA Section of Intellectual Property Law in Sept. 2012: "Why Every Lawyer Should Understand the Basic Concepts of Enterprise Risk Management"**

Material from the following presenters is included:

1. Introductory Remarks, Professor Andrew Whitman, Carlson School of Management university of Minnesota. Outlines ERM for Corporate and Intellectual Property Lawyers
2. Survey of Basic Enterprise Risk Management Concepts, Professors James Kallman, St Edward's University and Andrew Whitman, Carlson School of Management, University of Minnesota.
3. Enterprise Risk Management and Corporate Affairs and Governance, William Lin, Partner Lane Powell PC.

### III. **An Element of ERM For Financial Institutions or Government-Sponsored Enterprises Was Identified in A Search of Appellate Court Cases:**

1. Bank One Corp. v. Comm'r of Internal Revenue, 120 T.C. 174, 120 T.C. No. 11 (U.S.T.C., 2003) May 2, 2003.2. Bank One Corporation v. Commissioner of Internal Revenue (U.S.T.C., 2003). May 2, 2003.Later in 1993, shortly after the G-30 report was issued, the OCC released Banking Circular 277 (BC-277), entitled "Risk Management of Financial Derivatives". This document addressed the valuation of financial derivatives and was sent to the chief executive officer of every national bank.
2. United States v. Valencia, 600 F.3d 389 (5th. Cir., 2010) March 10, 2010.The first witness, Glenn Labhart, challenged by Valencia only, was the **chief risk officer at Dynegy** during the time period of the acts alleged in the indictment. The government retained Labhart to analyze Dynegy's monthly positions at the time of the acts alleged. Labhart
3. Hubbard v. Bankatlantic Bancorp, Inc., 688 F.3d 713, 83 Fed.R.Serv.3d 161, 23 Fla. L. Weekly Fed. C 1330 (11th Cir., 2012) July 23, 2012.BankAtlantic's Chief Risk Officer, testified that "classified" was equivalent to "substandard."
4. In re Bear Stearns Companies Inc. Sec., 763 F.Supp.2d 423, 2011 WL 223540 (S.D.N.Y., 2011) January 19, 2011.As Chief Risk Officer of Bear Stearns during the Class Period, Defendant Alix had an intimate understanding of the risk management tools and processes in place at the Company. Alix made allegedly materially false and misleading statements about Bear Stearns' risk management practices during an August 3, 2007 conference call. As **Chief Risk Officer**, Alix was ultimately responsible for the Company's VaR calculations. (Sec. Compl. ¶¶ 495–96.)
5. In re Merrill Lynch & Co., Inc. Sec. Derivative & Erisa Litig. (S.D.N.Y., 2011) March 29, 2011  
13 The "BofA Defendants" are: (1) Gregory L. Curl, BofA's Global Strategic Development and Planning Executive until June 2009 and BofA's **Chief Risk Officer** as of the filing of the complaint; (2) Brian T. Moynihan, BofA's General Counsel from December 2008 to January 2009 and BofA's CEO as of the filing of the complaint; (3) Joseph L. Price, BofA's CFO at all pertinent times until January 2010; and (4) Kenneth D. Lewis, BofA's CEO at all pertinent times and Chai
6. In re Capital One Derivative S'holder Litig. (E.D. Va., 2012) December 21, 2012  
In addition to naming the directors listed above as defendants, the complaints also name as defendants the following Capital One officers: Peter A. Schnall, the **Chief Risk Officer** since 2006, and prior to that the Chief Credit Officer; Ryan M. Schneider, the President of Capital One's Card division since 2007, and an Executive Vice President prior to that time; Sanjiv Yajnik, the President

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of Financial Services since 2009, and an employee of Capital One's European and Canadian credit card businesses

7. Fed. Hous. Fin. Agency v. JPMorgan Chase & Co. (S.D.N.Y., 2012) November 5, 2012  
FHFA alleges that despite the warning from the Office of Thrift Supervision, WaMu continued its lax origination practices with the full knowledge of upper management. It points to the minutes of a December 2006 WaMu Risk Committee Meeting in which WaMu personnel acknowledged that an increase in delinquencies was due in part to the fact that loans had not been "underwritten to standards." Despite this recognition, however, WaMu's Chief Risk Officer disclosed in an e-mail a few months later that WaMu ...
8. In re Am. Int'l Group Inc. 2008 Sec. Litig..This Document Relates To: All Actions., 741 F.Supp.2d 511 (S.D.N.Y., 2010) September 27, 2010  
(viii) Robert Lewis, Senior Vice President and **Chief Risk Officer** throughout the Class Period, who signed off on each of the CDS contracts and gave investor presentations concerning the Company's exposure to the mortgage market (CCAC ¶¶ 47, 311, 329); rman of the BofA Board until April 29 ...
9. In re Manulife Fin. Corp. Sec. Litig. (S.D.N.Y., 2011) May 23, 2011  
**Chief Risk Officer**, Internal Auditor, and Chief Actuary. The Executive Risk Committee, the Corporate Risk Management group, and the Audit and Risk Management Committee of the Board of Directors were among the groups responsible for risk management at Manulife. Manulife Financial Corp., 2007 Annual Report (Form 6-K) (hereinafter, "2007 Form 6-K"), Ex. 99.1, 21-22 (Mar. 28, 2008), available at <http://sec.gov/Archives/edgar-data/1086888/000119312508067982/dex991.htm>. Manulife represented that ...
10. Weinreb v. Tr Developers Llc, 943 N.E.2d 856 (Ind. App., 2011) February 18, 2011  
In its response to Weinreb's second 60(B) motion, TR Developers submitted the affidavit of Mark Hiltz, the Chief Risk Officer of the Bank, who averred:

#### IV. An Element of ERM For "Public Organizations "Identified in a Search of Appellate Court Cases:

1. Acosta v. Catholic Health Initiatives, CIVIL ACTION NO. 02-1750 (E.D. Pa. 1/\_\_/2003) (E.D. Pa., 2003) January 1, 2003  
Three years later in 1999, however, CHI underwent a wholesale reorganization of its Risk Management Operations to accomplish national uniformity in its claims administration and procedures. (Hancock Decl. at ¶ 5.) Bryan Hancock ("Mr. Hancock"), assumed the position of Assistant Vice President of Risk Management Operations and reported directly to Mitch Melfi ("Mr. Melfi"), **Chief Risk Officer**. ( Id. ) Because CHI was formed as a result of the merger of several health systems, certain aspects of its ...
2. Newby v. Enron Corp. (In re Enron Corp. Sec. Derivative & "Erisa" Litig.) (S.D. Tex., 2010) December 8, 2010  
Executive Vice President and **Chief Risk Officer** of Enron from June 1999 through Enron's bankruptcy, the complaint asserts that he worked for Arthur Andersen, LLP before he joined Enron in 1991. #56, ¶ 128. The complaint does not place Buy on the Board of Directors or any of its five committees. The complaint states that the Board of Directors charged Buy and Causey with monitoring and reviewing all Enron transactions with the LJM SPEs and with overseeing the conflicting obligations of Fastow.
3. In re Enron Corp. Securities, Derivative & ERISA, 284 F.Supp.2d 511 (S.D. Tex., 2003) September 30, 2003  
Buy was Managing Director and Chief Risk Officer of ECT from January 1998-March 1999, Senior Vice President and Chief Risk Officer from March 1999-July 1999, and Executive Vice President and Chief Risk Officer of Enron since July 1999.

4. Trusz v. UBS Realty Investors LLC (D. Conn., 2011) February 8, 2011  
On January 22, 2010, this Magistrate Judge filed the January 2010 Ruling, which held that based on the Swiss and English Data Protection Laws, as well as balancing tests under U.S. law, defendants were not required to produce the personnel files of Fraser, Cueni, and Marcuse for an in camera review, without prejudice to plaintiff attempting to create a more complete record.....
5. Anwar v. Fairfield Greenwich Ltd., 728 F.Supp.2d 372 (S.D.N.Y., 2010) August 18, 2010  
The SCAC alleges that these entities were run, in part, by the following individuals: Walter M. Noel Jr. ("Noel") and Jeffrey H. Tucker ("Tucker"), both founding partners and current senior officers at FGG; Andres Piedrahita ("Piedrahita"), Director and President of FGBL, and general partner of Greenwich Sentry and Greenwich Sentry Partners; Amit Vijayvergiya ("Vijayvergiya"), **Chief Risk Officer** and President of FGBL; Daniel E. Lipton ("Lipton"), FGG's Chief Financial Officer; and Mark McKeefry ("McKeefry") ...
6. In re Constellation Energy Grp., Inc. Sec. Litig. (D. Md., 2012) March 28, 2012  
In early 2011, the parties agreed to postpone formal discovery in favor of an informal process under which Constellation voluntarily produced a total of 10,372 pages of material. (ECF No. 130.) In reviewing this material, the plaintiffs "found substantial evidence supporting scienter" and therefore began to proceed with formal discovery by serving requests for production of documents on both Constellation and the underwriter defendants. (Pl. Mot. to File Third Am. Compl. 6-7, ECF No. 138-1). In addition ...
7. Velo Holdings Inc. v. Paymentech, LLC (In re Velo Holdings Inc.) (Bankr. S.D.N.Y., 2012), July 18, 2012  
The language of the January 20 Letter was purposefully unclear about the basis for the purported termination. A preponderance of the evidence at trial, however, establishes that the reason for the purported termination was a material adverse change in the Debtors' financial condition as a result of the missed December 2011 interest payment and the resulting downgrade by Moody's. Although the January 20 Letter references section 26 of the U.S. Agreement, section 26 contains numerous events of default ...
8. Albert Fadem Trust v. American Elec. Power Co., 334 F.Supp.2d 985 (S.D. Ohio, 2004), September 10, 2004  
The lack of internal controls was one of the primary findings of the FERC investigation into the specific issue of false reporting. From the FERC Report, it appears that this round of the investigation began on October 22, 2002, when the FERC sent data requests to the largest natural gas marketers inquiring about their "past reporting practices, any internal procedures or controls they may have had in place; any changes they have made to those procedures; and any investigations they [had] in progress." ...  
  
Covision Capital Group, LLC v. Doyle, 2009 NY Slip Op 30015(U) (N.Y. Sup. Ct. 1/6/2009), 2009 NY Slip Op 30015 (N.Y. Sup. Ct., 2009) January 6, 2009  
  
To formalize their understanding, the Members created a list outlining each Member's responsibilities with respect to both Tower and TCI. Zipp would be the Chief Operating Officer and **Chief Risk Officer** of Tower, and Telljohann added the role of Chief Investment Officer of Tower to his responsibilities as Director of Research and Portfolio Manager.
9. Brirwood Invs. Inc. v. Care Inv. Trust Inc. (S.D.N.Y., 2010) December 29, 2010  
CIT decided to fund Care by warehouse financing (also known as a "warehouse facility" or "warehouse line"), which "is typically a form of short-term financing that is provided by one or more banks." Ashraf Dep. 21:25-22:3, Feb. 5, 2010, Rosenfeld Decl. Ex. 1. Besecker worked with Usama Ashraf, a Senior Vice President and Assistant Treasurer of CIT, to



formulate a financing strategy for Care. Cathleen Crowley-Piscitell, **Chief Risk Officer of CIT Healthcare**, and William Harris, an Assistant Vice President ...

10. Kolchinsky v. Moody's Corp. (S.D.N.Y., 2012) February 27, 2012  
Kolchinsky contends that Moody's knew his claims and recommendations were valid because the company adopted several of his recommendations from the January Emails when it issued its official methodology for rating SF CDOs on March 2, 2009. ( Id. ¶¶ 93, 104-106.) In addition, during the House Committee hearings, Richard Cantor, **Moody's chief risk officer**, testified that Kolchinsky made a policy recommendation that was communicated to Compliance and "[i]t was carefully considered and it was adopted ...
11. Armstead v. Diederich (Mich. App., 2011) July 21, 2011  
Plaintiff is an African-American physician who is board certified in obstetrics and gynecology. He had staff privileges at defendant Oakwood hospital for at least 15 years, with reappointments every two years. In approximately 2004, the **hospital's chief risk officer** notified the chief operating officer, defendant Diederich, of a number of malpractice claims involving plaintiff. The risk officer also informed Diederich of gaps in plaintiff's malpractice insurance coverage. Diederich was concerned ...
12. In re Enron Corp., Derivative & Erisa Lit., 258 F.Supp.2d 576 (S.D. Tex., 2003) March 12, 2003  
The Finance Committee of an October 11, 1999 meeting attended by Outside Directors Winokur, the chairman, Belfer,\* Blake,\* Meyer, Urquhart, and LeMaistre\*); Ex. 27 (minutes of an October 6, 2000 Finance Committee meeting attended by Winokur, Belfer,\* Blake,\* Meyer, Ferraz Pereira, Savage, Urquhart, Duncan,\* Gramm,\* LeMaistre,\* and Mendelsohn, discussing in depth Fastow's role and the need for controls). The knowing waiver of Fastow's clear conflict of interest, for LJM2 and later for LJM3, is the ...
13. Rubin v. Mf Global, Ltd., 634 F.Supp.2d 459 (S.D.N.Y., 2009) July 16, 2009  
Plaintiffs take issue with additional statements regarding **MF Global's risk management system**. The Prospectus describes MF Global's relationship with Man Group and the continuing "group risk services agreement" between the two companies, through which MF Global licensed Man Group's "global risk-management systems and processes [that] it has used historically to provide us with these services." (Id. at 183.) The Prospectus also notes, "We have an active program for monitoring and verifying that our ...
14. San Diego County Employees Ret. Ass'n v. Maounis, 749 F.Supp.2d 104 (S.D.N.Y., 2010) March 15, 2010  
Defendant Nicholas M. Maounis ("Maounis") is the co-founder, managing member, principal, President, and Chief Investment Officer of Amaranth; Defendant Charles H. Winkler ("Winkler"), an attorney, is the Chief Operating Officer of Amaranth; and Defendant Robert W. Jones ("Jones") is **Amaranth's Chief Risk Officer**. (Compl. ¶¶ 25-27.) Upon information and belief, Maounis, Winkler, and Jones are residents of Greenwich, Connecticut. ( Id.) Defendant Brian Hunter ("Hunter") was, at various times, a trader ... why these personnel files are "essential" under Swiss law or "necessary" under British law. (At 4-12).

<https://apps.fastcase.com/Research/Pages/Results.aspx?LTID=H2oLOQbTRBeu8r6sTB94ULrZ5HDs4Z49%2fi3ol81rdqapXyoy9G3R86bx3SoKPr0qLUjoG7TwwhBMSZrf1Ny5eodChl0R1D3qfbzZ2Za6fybmuEh5xJ4QBLN4NupeVvI%2b&jid=>

#### V. Latest ERM News & Information

- New to the CoE! [RIMS 2011 ERM Benchmark Survey](#)
- New to the CoE! [RIMS Executive Report on ERM Technology Tools, September 2011](#)

- New to the CoE! Anette Mikes, assistant professor at Harvard Business School, launched the executive education program Risk Management for Corporate Leaders. Her [website](#) offers numerous articles and resources on risk management.
- New to the CoE! [Accenture's Life Sciences Industry Report 2011 Global Risk Management Survey](#)
- New to the CoE! [Accenture's Global Risk Management Study 2011](#)
- [New to the CoE! Strategic Risk Assessment-A First Step for Improving Risk Management and Governance](#), *Strategic Finance*, December 2009
- New to the CoE! [Strategic Risk Management-Creating and Protecting Value](#), *Strategic Finance*, May 2007
- New to the CoE! [When Strategy and ERM Meet](#), *Strategic Finance*, January 2008
- New to the CoE! [RIMS FAQs on Strategic Risk Management](#)
- New to the CoE! [An Evolving Model for Board Risk Governance](#), A new executive report from RIMS
- New to the CoE! [An Overview of Widely Used Risk Management Standards & Guidelines](#), A new executive report from RIMS, 2011
- [Fall Guys, Risk Management in the Frontline](#), A report from the Economist Intelligence Unit, 2010
- [Enterprise Risk Management Continues to Show its Value for North American and Bermudan Insurers](#), Howard Rosen and Vladimir Uhmylenko, Standard and Poor's, February 1, 2010

## VI. Journal Articles

<http://onlinelibrary.wiley.com/doi/10.1111/j.1911-3846.2012.01194.x/abstract>

1. Enterprise Risk Management Program Quality: Determinants, Value Relevance, and the Financial Crisis† Ryan Baxter, Jean C. Bedard, Rani Hoitash, Ari Yezege;DOI: 10.1111/j.1911-3846.2012.01194.x

**Keywords:** Enterprise Risk Management; Firm value; Earnings Response

This paper investigates factors associated with high quality Enterprise Risk Management (ERM) programs in financial services firms associated with greater complexity, less resource constraint, and better corporate governance.

2. Article | Risk & Regulation | [The Struggle to Codify Risk Management](#)  
[Anette Mikes](#) **Keywords:** Management; Mikes, Anette. "[The Struggle to Codify Risk Management](#)." *Risk & Regulation*, no. 24 (Winter 2012): 18–19.
3. Article | Harvard Business Review | [Managing Risks: A New Framework](#)  
Robert S. Kaplan and [Anette Mikes](#):  
Risk management is too often treated as a compliance issue that can be solved by drawing up lots of rules and making sure that all employees follow them. **Keywords:** [Risk Management](#); [Governance Controls](#); [Corporate Strategy](#); [Management Analysis, Tools, and Techniques](#); [Framework](#)

**Citation:** Kaplan, Robert S., and Anette Mikes. "[Managing Risks: A New Framework](#)." *Harvard Business Review* 90, no. 6 (June 2012).

4. **Risk Regulation** magazine is the biannual magazine of the Centre for Analysis of Risk and Regulation (CARR). This online version of the printed magazine includes articles by leading scholars and practitioners that feature links to other relevant items, events, and publications produced by CARR.

5. Book Review | Accounting Review | [Review of 'Accounting in Networks'](#)  
[Anette Mikes](#).

**Citation:** Mikes, Anette. "[Review of 'Accounting in Networks'](#)." *Accounting Review* 87, no. 1 (January 2012): 346–349.

6. Journal Article | Balanced Scorecard Report |  
[Managing the Multiple Dimensions of Risk-Part II: The Office of Risk Management](#)  
[Anette Mikes](#) and Robert S. Kaplan

In the second article of our two-part series, we explore the concept of an Office of Risk Management along with a case study of an innovative risk management function at JP Morgan Private Bank.

**Keywords:** [Banks and Banking](#); [Innovation and Invention](#); [Management Style](#); [Managerial Roles](#); [Risk Management](#)

**Citation:** Mikes, Anette, and Robert S. Kaplan. "[Managing the Multiple Dimensions of Risk-Part II: The Office of Risk Management](#)." *Balanced Scorecard Report* 13, no. 5 (September – October 2011): 1–6.

None of these 18 cases are based on a private enterprise's duty to have or implement an enterprise risk management program. The cases do illustrate that duty for financial institutions, (banks, insurance companies and some government enterprises. A few cases involving private companies mention an enterprise risk management officer or expert but do not cite a duty regarding an enterprise risk management program.

1. [Fed. Hous. Fin. Agency v. UBS Ams. Inc. \(S.D.N.Y., 2013\)](#)  
June 28, 2013

to add numerous additional document custodians to the 86 that had already been designated by FHFA at that point. Reaching the substance of the underlying dispute, FHFA explained that much of the material defendants sought from the Single Family side would be provided: "defendants are going to get everything about originators that made it over to the PLS side and was considered in connection with the decisions to purchase or not purchase these particular securitizations," regardless of whether the ...

FHFA also argued that its designation of custodians from high-level risk committees with both Single Family and PLS responsibilities at each GSE -- the Private Label Advisory Team at Fannie Mae and the [Enterprise Risk Management](#) Committee at Freddie Mac -- would capture much of the material defendants sought. FHFA further explained that the true dispute was over whether defendants were entitled to "documents that were considered only on the Single Family side and related only to the Single Family business," including "custodians who were cabined on the Single Family side." For example, counsel explained, "if Option One [an Originator] is disapproved as a seller servicer, that list goes to the PLS people. Counter-party risk reports on Option One at Countrywide go to PLS and get considered in connection with the purchasers. And they're going to get all of that."

2. [People's Ins. Counsel Div. v. Allstate Ins. Co., 199 Md.App. 1, 20 A.3d 117 \(Md. App., 2011\)](#) May 10, 2011

Mr. Chernick offered testimony regarding how an insurance company uses underwriting guidelines to implement **enterprise risk management**. Although catastrophe risk is one of the risks that a property insurance company must consider, Mr. Chernick explained that catastrophe risks are different from other insurance risks. Mr. Chernick explained that adding additional catastrophe

risks will not reduce the overall risk by a pooling arrangement. The additional risks in the catastrophe prone area actually ...

3. [In re the Colonial Bancgroup, Inc., 436 B.R. 713 \(Bankr.M.D.Ala., 2010\)](#)  
September 1, 2010  
January 1, 2008 to August 14, 2009, she was responsible for accounting, finance, treasury, compliance, and enterprise risk management (except credit risk). She was responsible, along with the CEO and general counsel, for interaction with state and federal bank regulators. Her testimony largely addresses events occurring in the months leading up to the closing of the Bank.
4. [Kuriakose v. Fed. Home Loan Mortg. Corp. \(S.D.N.Y., 2011\)](#) March 30, 2011  
Plaintiffs allege that various statements by confidential witnesses confirm that Syron, Pizsel, and Cook acted with scienter. These statements come from a Vice President of Investor Relations at Freddie Mac, ( see Am. Compl. ¶¶ 36, 66-67, 70, 90, 96, 98, 99, 100, 101, 117-18, 149, 150, 174, 197-98, 211, 240), a Director of Operational Risk Management, ( see Am. Compl. ¶¶ 37, 89, 222, 223-28, 231-34), a Senior Servicing Default Specialist, ( see Am. Compl. ¶¶ 41, 249), a Director of Enterprise Risk ...
5. [Teitz v. Virginia Elec. & Power Co. \(In re Buffalo Coal Co.\) \(N.D.W.Va., 2011\)](#) March 8, 2011  
David Holden, Dominion's vice president of enterprise risk management, described Brikis' email as "the straw that broke the camel's back: "
7. [Teitz v. Virginia Elec. Power Co. \(In re Buffalo Coal Co.\) \(Bankr.N.D.W.Va., 2010\)](#)  
August 16, 2010  
Brikis's email was not well received by DVP. As stated by David Holden, DVP's vice president of enterprise risk management, the Brikis email was the "straw that broke the camel's back":
7. [People's Ins. Counsel Div. v. Allstate Ins. Co. \(Md. App., 2011\)](#) March 1, 2011  
Appeal from the Maryland Insurance Administration – Procedural history – the contentions-standard of review – Section 19107(a) – an objective basis for the designation of a catastrophe-prone geographic area – Section 27-501(a) – The threshold of Section 27-501(a)(2)'s applicability – the merits, arguendo, of Section 27-501(a)(2) – "Hurricanes hardly happen" – the insubstantiality of the Crumlish Dita – the unique nature of catastrophic risk-conclusion
8. [N. Port Firefighters' Pension-Local Option Plan v. Fushi Copperweld, Inc. \(M.D. Tenn., 2013\)](#) March 7, 2013  
NORTH PORT FIREFIGHTERS' PENSION-LOCAL OPTION PLAN, Individually and on Behalf of All Others Similarly situated, Plaintiff, LAKELAND EMPLOYEES PENSION PLAN, Individually and on Behalf of All Others Similarly Situated, Lead Plaintiff, v. FUSHI COPPERWELD, INC., et al. Defendants.  
  
entity's risk tolerances and risk appetite.  
  
Control Activities - Policies and procedures are established and implemented to help ensure the risk responses are effectively carried out.  
  
Information and Communication - Relevant information is identified, captured, and communicated in a form and timeframe that enable people to carry out their responsibilities. Effective communication also occurs in a broader sense, flowing down, across, and up the entity.  
  
Monitoring - The entirety of **enterprise risk management** is monitored and modifications made as necessary. Monitoring is accomplished through ongoing management activities, separate evaluations, or both."

Id. (emphasis in complaint).

Plaintiffs assert that Fushi's internal control failure were egregious because: (1) the SWAP and the two "bargain" purchases were highly unusual transactions for Fushi; (2) the pertinent GAAP standards for those transactions are not complex; and (3) Fushi's accounting treatments of the transactions "conveniently" resulted in material overstatements of Fushi's net income during the relevant period, particularly in the year of those transactions. Id. at ¶ 58. Plaintiffs further allege that according to a former high-level executive at Fushi, Defendant Fu maintained sole control over Fushi's finances and expenditures and thereby caused the violations of the COSO internal control principles requiring segregation of duties and independent checks for these transactions. Id. at ¶ 59.

#### **e. Sarbanes-Oxley Certifications**

Defendant Wang filed Fushi's August 14, 2007 Form 10-Q for the preceding quarter with details of Fushi's financial results for the quarter with certifications required by the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley"). Defendants Fu and/or Wang signed each certification that stated:

1. I have reviewed this report on Form 10-Q of Fushi International, Inc;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
  - a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
  - b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
  - c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures as of the end of the period covered by this report based on such evaluation; and
  - d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter [the registrant's fourth fiscal quarter in the case of an annual report] that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and

the audit committee of the registrant's board of directors (or persons performing the equivalent functions):

- a) all significant deficiencies and material weaknesses in the design or operation of internal controls over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
- b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Id. at ¶¶ 64, 68.

Additional Sarbanes-Oxley certifications with substantially similar statements are in Fushi's 10-Q and 10-K Forms dated March 12, March 17, May 14, August 13, and November 13, 2008; March 16, May 11, August 10, and November 9, 2009; March 16, May 7, August 10, and November 8, 2010.

Id. at ¶¶ 71, 74, 78, 81, 84, 87, 91, 94, 97, 103, 107, 111, 114.

Defendants other than Fu and Wang signed these forms on three occasions: (1) the November 9, 2009 Form 10-Q signed by Defendants Fu and Zhang; (2) the March 1, 2010 Form 10-K signed by Defendants Fu, Wang, and Longever; and (3) the November 8, 2010 Form 10-Q signed by Defendants Fu and Studwell. Id.

Plaintiffs allege that the Defendants' Sarbanes-Oxley certifications included specific certifications of their evaluations of: (1) Fushi's disclosure controls and internal controls over its financial reporting, and (2) the effectiveness of Fushi's disclosure controls and internal controls over its financial reporting. Id. at ¶ 64. Plaintiffs assert that these certifications were false for the last three quarters of 2007, all of 2008 and 2009, and the first three quarters of 2010. Id. Plaintiffs allege that Fushi admitted on April 5, 2011 in its delayed SEC Form 10-K for the year ending December 31.

[This case illustrates common allegations based on Sarbanes-Oxley certifications included specific certifications of their evaluations and SEC Form 10-K filings.](#)

### C. Relief

For the above stated reasons, the Court concludes that under the holistic standard of review, Plaintiffs have alleged sufficient specific facts that collectively state actionable claims under Section 10(b), Rule 10b-5 and Section 20(a). Accordingly, the Defendants' motion to dismiss should be denied.

An appropriate Order is filed herewith.

\_\_\_\_\_  
William J. Haynes, Jr.  
Chief Judge  
United States District Court"

9. [Manning v. Wells Fargo Financial, Inc., No. 8-081/07-0932 \(Iowa App. 7/30/2008\) \(Iowa App., 2008\)](#)  
July 30, 2008

Background Facts and Proceedings. Manning was employed as Vice President of Compliance Services for Wells Fargo in the spring of 2004 when the company underwent a reorganization of the Compliance Services Department. This restructuring merged the department with the Enterprise Risk Management Group. As part of this restructuring, Manning was invited to apply for the position of Senior Vice President of Compliance Services, classified as a Compliance Manager 4. Following an interview process, Manning ...

10. [Manning v. Wells Fargo Financial, Inc., No. 8-081/07-0932 \(Iowa App. 5/14/2008\) \(Iowa App., 2008\)](#)  
May 14, 2008



Background Facts and Proceedings. Manning was employed as Vice President of Compliance Services for Wells Fargo in the spring of 2004 when the company underwent a reorganization of the Compliance Services Department. This restructuring merged the department with the Enterprise Risk Management Group. As part of this restructuring, Manning was invited to apply for the position of Senior Vice President of Compliance Services, a position he believed to be the same as the position he held. Following ...

11. [In re Washington Mutual, Inc., 55 Bankr.Ct.Dec. 252, 462 B.R. 137 \(Bankr.Del., 2011\)](#)

December 20, 2011

Tranquility also asserts that at all times the heads of the subsidiaries' day-to-day operations, risk management, and control functions reported to Kerry Killinger, WMI's Chairman and Chief Executive Officer. According to Tranquility, WMI, through Mr. Killinger, directed and controlled the organization's entire corporate strategy, including the appraisal and securitization practices of its subsidiaries. Tranquility also contends that Stephen Rotella, WMI's President and Chief Operating Officer, directly ...

12. [In re Washington Mut. Inc. Sec. Deriv. & Erisa Litig., 694 F. Supp.2d 1192 \(W.D. Wash., 2009\)](#) October 27, 2009

Plaintiffs allege these statements are false and misleading because WaMu "had in fact weakened its risk management practices in order to increase loan volume." (§ 62.) Plaintiffs support these allegations with internal memoranda and testimony from CWs spanning the Class Period. Plaintiffs allege that starting in "late 2005, WaMu's risk management operations were purposefully rolled back to such a degree that WaMu's risk management systems and personnel could no longer effectively protect the Company's ...

13. [In re Tennessee Valley Authority ASH Spill Litig. \(E.D. Tenn., 2011\)](#)

March 24, 2011

Based upon our review, we find that: (1) AECOM's focus on the "slimes" layer is misplaced; (2) TVA could have possibly prevented the Kingston Spill by implementing recommended corrective measures; (3) "red flags" existed for years that raised risks that were not captured by TVA's **Enterprise Risk Management Program**; and (4) the culture within TVA's fossil fuel plants resulted in coal ash being treated like garbage at a landfill rather than treating it as a potential hazard to the public and the environment..

14. [In re Colonial Bancgroup, Inc. \(Bankr.M.D.Ala., 2010\)](#)

August 31, 2010

Sarah Moore is a CPA and serves as the Debtor's chief financial officer. She has worked with Colonial since 1996. From January 1, 2008 to August 14, 2009, she was responsible for accounting, finance, treasury, compliance, and enterprise risk management (except credit risk). She was responsible, along with the CEO and general counsel, for interaction with state and federal bank regulators. Her testimony largely addresses events occurring in the months leading up to the closing of the Bank.

15. [In re Tenn. Valley Auth. Ash Spill Litig., 787 F.Supp.2d 703 \(E.D. Tenn., 2011\)](#)

March

24, 2011

Based upon our review, we find that: (1) AECOM's focus on the "slimes" layer is misplaced; (2) TVA could have possibly prevented the Kingston Spill by implementing recommended corrective measures; (3) "red flags" existed for years that raised risks that were not captured by TVA's Enterprise Risk Management Program; and (4) the culture within TVA's fossil fuel plants resulted in coal ash being treated like garbage at a landfill rather than treating it as a potential hazard to the public and the environment.[ ...

15. [In re Washington Mut. Inc. \(Bankr.Del., 2011\)](#)

December 20, 2011

Investment Officer, that WMI's senior management were directly involved in WMB's decisions to securitize and sell Option ARM mortgages with significant known but undisclosed delinquencies. Finally, Tranquility contends that WMI also controlled its subsidiaries' risk management and compliance with regulations through committees of its Board of Directors, including the audit, enterprise risk management, credit policy, finance, and market risk committees.

16. [Equal Emp't Opportunity Comm'n v. Fry's Elecs., Inc. \(W.D. Wash., 2012\)](#)

June 11, 2012

Defendant operates thirty-four retail electronic stores located nationwide and has its home offices in San Jose, California. Motion (Dkt. # 162) at 2. In July of 2005, defendant hired Ms. Rios as a customer service associate in its Renton, Washington store. Response (Dkt. # 172) at 1. Between late 2006 and February 2008, Art Squires served as the Renton Store Manager, Minasse Ibrahim as the Assistant Store Manager, and Duc Le as the Manager of the Audio Visual (hereinafter "A/V") Department. Dkt. # 162 at 2. Kathy Kolder, one of the four Fry's founders, acted as the Executive Vice President. Id. at 2-3. **Lisa Souza was employed as the Manager of Enterprise Risk Management.** Id. at 2-3. Ms. Kolder and Ms. Souza worked from the Home Office in San Jose. Id. at 3.

Defendant seeks dismissal of the claim brought on behalf of Ms. Rios on the grounds that (1) the EEOC failed to follow required procedures and the claim is untimely, and (2) the undisputed evidence shows that Ms. Rios did not endure a sufficiently hostile work environment to affect the terms and conditions of her employment.

**CONCLUSION**

For all the foregoing reasons, defendant's motion for summary judgment on the sexual harassment claim asserted on behalf of Ms. Rios (Dkt. # 162) is DENIED. Plaintiff's "Motion to Supplement the Record" (Dkt. # 205) and defendant's "Motion Under CR 7(d)(2) for Relief from Deadline" (Dkt. # 207) are GRANTED. Robert S. Lasnik, United States District Judge

**"Risk Management" mentioned in 7 U.S. Supreme Court cases**

1. [O'Diah v. Applied Risk Management, 510 U.S. 951 \(U.S., 1993\)](#)

November 1, 1993

O'Diah v. Applied Risk Management et al. O'Diah v. California Workers' Compensation Appeals Board et al.

2. [Wyeth v. Levine, 129 S.Ct. 1187, 173 L.Ed.2d 51, 77 USLW 4165, 555 U. S. 555, 9 Cal. Daily Op. Serv. 2644, 21 Fla. L. Weekly Fed. S 675, 2009 Daily Journal D.A.R. 3199 \(U.S., 2009\)](#)  
March 4, 2009  
Thus, a drug's warning label "serves as the standard under which the FDA determines whether a product is safe and effective." 50 Fed.Reg. 7470 (1985). Labeling is "[t]he centerpiece of risk management," as it "communicates to health care practitioners the agency's formal, authoritative conclusions regarding the conditions under which the product can be used safely and effectively." 71 Fed.Reg. 3934 (2006). The FDA has underscored the importance it places on drug labels by promulgating comprehensive ...
3. [Virginia Office for Prot. & Advocacy v. Stewart, 131 S.Ct. 1632, 179 L.Ed.2d 675 \(U.S., 2011\)](#)  
April 19, 2011  
In 2006, VOPA opened an investigation into the deaths of two patients and injuries to a third at state-run mental hospitals. It asked respondents—state officials in charge of those institutions—to produce any records related to risk-management or mortality reviews conducted by the hospitals with respect to those patients. Respondents refused, asserting that the records were protected by a state-law privilege shielding medical peer-review materials from disclosure.
4. [Vernonia School District v. Acton, 132 L.Ed.2d 564, 515 U.S. 646, 115 S.Ct 2386 \(S.Ct., 1995\)](#)  
June 26, 1995  
515 U.S. 646 115 S. Ct. 2386 132 L. Ed. 2d 564 VERNONIA SCHOOL DISTRICT 47J, PETITIONER v. WAYNE ACTON, ET UX., ETC. No. 94-590 SUPREME COURT OF THE UNITED STATES March 28, 1995, Argued June 26, 1995, Decided ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. 23 F.3d 1514, vacated and remanded. SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and KENNEDY, THOMAS, GINSBURG, and BREYER, JJ., joined. GINSBURG, J., filed a concurring opinion ...
5. [Stenberg v Carhart, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 \(U.S., 2000\)](#)  
June 28, 2000  
530 U.S. 914 120 S.Ct. 2597 147 L.Ed.2d 743 NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press. DON STENBERG, ATTORNEY GENERAL OF NEBRASKA, et al., PETITIONERS v. LEROY CARHART No ...
6. [Farmers v. Murphy \(U.S., 2011\)](#)  
October 3, 2011  
PEANUT FARMERS v. MURPHY, ADM'R, RISK MANAGEMENT
7. [Arizonans for Official English v. Arizona, 117 S. Ct. 1055, 520 U.S. 43, 137 L.Ed.2d 170 \(U.S., 1997\)](#) March 3, 1997  
Federal court litigation challenging the constitutionality of Article XXVIII commenced two days after the ballot initiative passed. On November 10, 1988, Maria-Kelly F. Yniguez, then an insurance claims manager in the Arizona Department of Administration's Risk Management Division, sued the State of Arizona in the United States District Court for the District of Arizona. Yniguez invoked 42 U.S.C. § 1983 [520 U.S. 50] as the basis for her suit. 3 Soon after the lawsuit commenced, Yniguez added as ...

All Federal courts

"Chief risk officer" 7 appellate cases below, are bank or insurance cases, so not applicable to private enterprises

1. [United States v. Valencia, 600 F.3d 389 \(5th. Cir., 2010\)](#)  
March 10, 2010

Prior to trial, defendants moved to limit or exclude the testimony of two government witnesses. Defendants contended that the witnesses were offered to present expert testimony, but did not meet the strictures of admissibility. The first witness, Glenn Labhart, challenged by Valencia only, was the chief risk officer at Dynegy during the time period of the acts alleged in the indictment. The government retained Labhart to analyze Dynegy's monthly positions at the time of the acts alleged. Labhart ...

2. [Starr Int'l Co. v. United States \(C.C., 2013\)](#)

June 26, 2013

In addition to the Board of Directors, the minutes from the January 8, 2013 meeting reflect the presence of the following persons: Michael R. Cowan, Executive Vice President and Chief Administrative Officer; Peter D. Hancock, Executive Vice President - Property and Casualty Insurance; David L. Herzog, Executive Vice President and Chief Financial Officer; Jeffrey J. Hurd, Executive Vice President - Human Resources and Communications; Thomas A. Russo, Executive Vice President and General Counsel; ...

3. [Picard v. JPMorgan Chase & Co. \(In re Bernard L. Madoff Inv. Sec. LLC\) \(2nd Cir., 2013\)](#)

June 20, 2013

In 2006, due diligence conducted by JPMorgan revealed strong and steady yields by Madoff's feeder funds during a time when the S&P 100 dropped thirty percent. As one money manager later acknowledged, that was too good to be true. In June 2007, JPMorgan's Chief Risk Officer John Hogan learned at a lunch with JPMorgan money manager Matt Zames that "there is a well-known cloud over the head of Madoff and that his returns are speculated to be part of a [P]onzi scheme." A 695 ¶ 119. Hogan asked a junior ...

4. [Mayor & City Council of Balt. v. Citigroup, Inc. \(2nd Cir., 2013\)](#)

March 5, 2013

Plaintiffs also claim to offer "specific communications between the Defendants." Reply Br. at 11, cf. Apex Oil, 822 F.2d at 254 ("a high level of interfirm communications" is a potential "plus factor" allowing a fact-finder to infer a conspiracy). Their complaints, however, allege only two actual communications between competitors: (1) UBS's Chief Risk Officer's January 9, 2008, e-mail referring to "discussions with citi" about the student loan segment of the ARS market, Compl ¶ 91, and (2) a UBS ...

5. [Mayor & City Council of Balt. v. Citigroup, Inc., 709 F.3d 129 \(2nd Cir., 2013\)](#)

March 5, 2013

Plaintiffs also claim to offer "specific communications between the Defendants." Reply Br. at 11, cf. Apex Oil, 822 F.2d at 254 ("a high level of interfirm communications" is a potential "plus factor" allowing a fact-finder to infer a conspiracy). Their complaints, however, allege only two actual communications between competitors: (1) UBS's Chief Risk Officer's January 9, 2008, e-mail referring to "discussions with citi" about the student loan segment of the ARS market, Compl. ¶ 91, and (2) a UBS ...

6. [Hubbard v. Bankatlantic Bancorp, Inc., 688 F.3d 713, 83 Fed.R.Serv.3d 161, 23 Fla. L. Weekly Fed. C 1330 \(11th Cir., 2012\)](#)

July 23, 2012

Of this total, BLB loans accounted for \$28.7 million, and non-BLB loans for \$61.6 million. The 8-K referred to these loans as "classified," but Jay McClung, BankAtlantic's Chief Risk Officer, testified that "classified" was equivalent to "substandard."

7. [El Camino Res. Ltd. v. Huntington Nat'l Bank \(6th Cir., 2013\)](#)

April 8, 2013

White took her concerns to John Kalb, Huntington's regional Chief Risk Officer, in November 2003. She mentioned the NSF check and the large transactions showing movement from Cyberco's accounts to accounts abroad. She never mentioned fraud, but stated only that she thought something may be wrong with the account. Kalb directed White to do whatever she needed to and

to keep him informed. White also approached Kelly Hutchings, the portfolio manager of Cyberco's account, with her concerns. She specifically ...

Added References from CAS:

[http://www.casact.org/pubssearch/index.cfm?fa=adv\\_search\\_rs&keywords=Enterprise+Risk+Management&author=&pubYear=&category=&search=Search](http://www.casact.org/pubssearch/index.cfm?fa=adv_search_rs&keywords=Enterprise+Risk+Management&author=&pubYear=&category=&search=Search)