



Economic, Political & Legislative Update

Presented by
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Key Issues

- Final election outcome
- Tax Policy 2021
- Shutdowns due to Covid-19

These will dictate legislative,
tax and regulatory policy



83 Reasons

Why People Did Not Invest in the Stock Market

1934	Depression	1975	Clouded Economic Prospects
1935	Spanish Civil War	1976	Economic Recovery Slows
1936	Economy Still Struggling	1977	Market Slumps
1937	Recession	1978	Interest Rates Rise
1938	War Clouds Gather	1979	Oil Prices Skyrocket
1939	War in Europe	1980	Interest Rates at All-Time High
1940	France Falls	1981	Steep Recession Begins
1941	Pearl Harbor	1982	Worst Recession in 40 Years
1942	Wartime Price Controls	1983	Market Hits New Highs
1943	Industry Mobilizes	1984	Record Federal Deficits
1944	Consumer Goods Shortages	1985	Economic Growth Slows
1945	Post-War Recession Predicted	1986	Dow Nears 2000
1946	Dow Tops 20 - Market Too High	1987	Record-Setting Market Decline
1947	Cold War Begins	1988	Election Year
1948	Berlin Blockade	1989	October "Mini Crash"
1949	Russia Explodes A-Bomb	1990	Persian Gulf Crisis
1950	Korean War	1991	Communism Tumbles with the Berlin Wall
1951	Excess Profits Tax	1992	Global Recession
1952	U.S. Seizes Steel Mills	1993	Health Care Reform
1953	Russia Explodes H-Bomb	1994	Fed Raises Interest Rates Six Times
1954	Dow Tops 300 - Market Too High	1995	Dow Tops 5,000
1955	Eisenhower Illness	1996	Dow Tops 6,400
1956	Suez Crisis	1997	Hong Kong Reverts to China
1957	Russia Launches Sputnik	1998	Asian Flu & Long Term Capital
1958	Recession	1999	Y2K Scare
1959	Castro Seizes Power in Cuba	2000	Tech Bubble Burst
1960	Russia Downs U-2 Plane	2001	9/11 Terrorist Attacks
1961	Berlin Wall Erected	2002	Recession
1962	Cuban Missile Crisis	2003	War in Iraq
1963	Kennedy Assassinated	2004	Rising Interest Rates
1964	Gulf of Tonkin	2005	Hurricane Katrina
1965	Civil Rights Marches	2006	Real Estate Peaks
1966	Vietnam War Escalates	2007	Subprime Lending
1967	Newark Race Riots	2008	Great Recession Begins
1968	USS Pueblo Seized	2009	Double Digit Unemployment Numbers
1969	Money Tightens - Markets Fall	2010	European Sovereign Debt Crisis
1970	Cambodia Invaded - Vietnam War Spreads	2011	U.S. Credit Downgrade
1971	Wage Price Freeze	2012	Afghanistan War Continues
1972	Largest U.S. Trade Deficit Ever	2013	Dow Tops 16,000
1973	Energy Crisis	2014	Oil Prices Plunge 50%
1974	Steepest Market Drop in Four Decades	2015	ISIS Terrorism
		2016	Global Economic Slowdown

And One Good Reason Why You Should Have:

\$10,000 invested in the Stock Market (Standard & Poor's 500 Index) in January of 1934 would have been worth approximately **\$46,659,186** before fees at the end of 2016.

For illustrative and educational purposes only. Results derived from the return of the S&P 500 Index including the reinvestment of dividends and interest and does not include a reduction of any fees. The S&P 500 Index consists of 500 stocks traded on the NYSE, AMEX and NASDAQ chosen for market size, liquidity, and industry group representation. It is a market value weighted index (stock price times number of shares outstanding), with each stock's weight in the Index proportionate to its market value. The "500" is one of the most widely used benchmarks of U.S. equity performance. The S&P 500 Index is unmanaged and not available for direct investment. Past performance is no guarantee of future results. Source: ASC Company Research, DQYDJ.com.

U.S. Presidential Election Results

S& P 500 Index Average Price Return	Election Year	Following Year
All Election Years	7.11%	5.75%
Republican Elected	11.23%	-0.76%
Democrat Elected	3.33%	11.72%
Republican Elected After Republican	8.21%	4.98%
Democrat Elected After Democrat	10.37%	7.77%
Republican Elected After Democrat	8.92%	-4.27%
Democrat Elected After Republican	-6.52%	17.24%

Source: Bloomberg. Annual percentage change of the S&P 500 Index from 1927 to 2017. Performance is calculated as the percentage change in price from the last trading day of each year from the last trading day of the previous year.

The Role of the Media is NOT to inform but to Sell

8,500 magazines and newspapers
1,761 commercial TV stations
192 million active websites

Source: [google.com](https://www.google.com), [statista.com](https://www.statista.com), [netcraft.com](https://www.netcraft.com)





*“Dow Plummets 800
Points on Worsening
Global Recession Fears”*
(Fox Business)

*“Dow Plummets More
Than 800 Points on
Recession Red Flag”*
(New York Post)

*“Dow Tanks 800 Points in
Worst Day of 2019 After
Bond Market Sends
Recession Warning”*
(CNBC)

**On
Aug 14, 2019,
the headlines
were dire**





*“Circuit Breaker Halts
Stock Trading for First
Time Since 1997”*
(Wallstreet Journal)

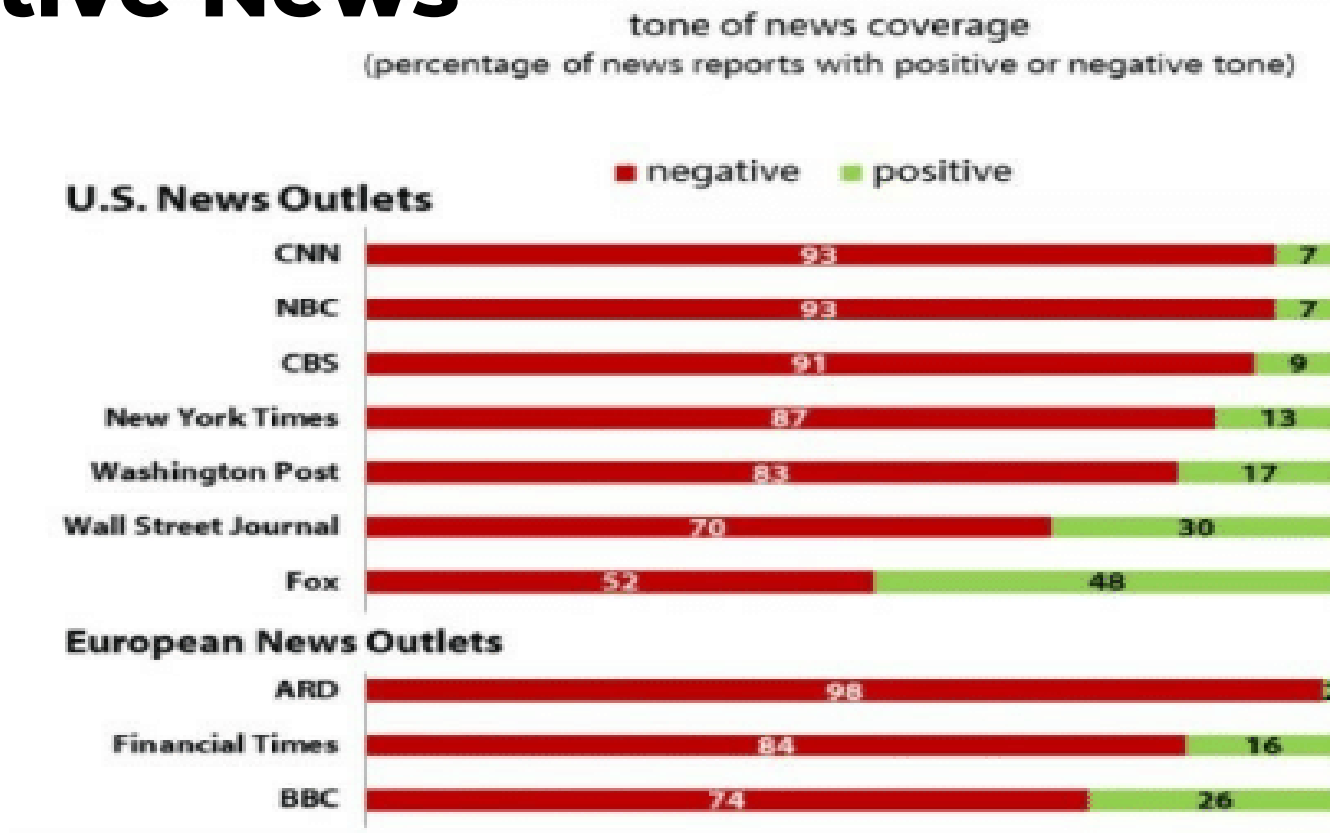
*“Dow Ends 11-Year Bull
Market as Coronavirus
Defies Economic
Remedies”*
(New York Times)

*“Coronavirus Pushes
China’s Economy
to the Brink”*
(Wallstreet Journal)

Headlines from March/ April 2020



Negative News



Harvard study: media coverage of Trump's First 100 days has been 80% negative; CNN, NBC & CBS even higher, 90%+

Average Market Volatility

Market corrections 1928–2018

5 % — About every 2 months

10 % — About every 8 months

20 % — About every 30 months

Staying the Course

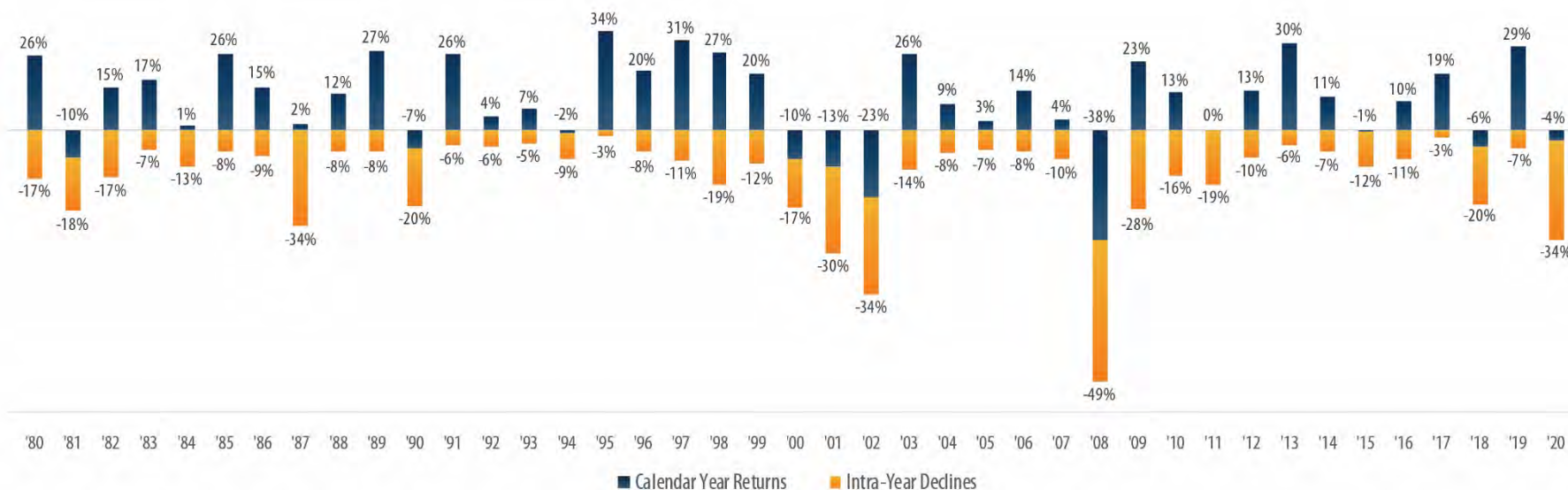
Investors tend to see short-term volatility as the enemy. Volatility may lead many investors to move money out of the market and “sit on the sidelines” until things “calm down.” Although this approach may appear to solve one problem, it creates several others:

1. When do you get back in? You must make two correct decisions back-to-back; when to get out and when to get back in.
2. By going to the sidelines you may be missing a potential rebound. This is not historically unprecedented; see chart below.
3. By going to the sidelines you could be not only missing a potential rebound, but all the potential growth on that money going forward.

We believe the wiser course of action is to review your plan with your financial professional and from there, decide if any action is indeed necessary. This placates the natural desire to “do something”, but helps keep emotions in check.

INTRA-YEAR DECLINES VS. CALENDAR YEAR RETURNS

Volatility is not a recent phenomenon. Each year, one can expect the market to experience a significant correction, which for the S&P 500 has averaged approximately 14% since 1980. Although past performance is no guarantee of future results, history has shown that those who chose to stay the course were rewarded for their patience more often than not.



Source: Bloomberg, First Trust Advisors L.P., as of 6/30/20. **Past performance is no guarantee of future results.** The benchmark used for the above chart is the S&P 500 Index. The S&P 500 Index is an unmanaged index of 500 stocks used to measure large-cap U.S. stock market performance. Investors cannot invest directly in an index. Index returns do not reflect any fees, expenses, or sales charges. Returns are based on price only and do not include dividends. This chart is for illustrative purposes only and not indicative of any actual investment. These returns were the result of certain market factors and events which may not be repeated in the future.

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96% of Market Gains came from just 0.9% of Trading Days

Just 135 Days out of 14,830 Days From 1963 – 2004

Source : www.towneley.com/wp-content/uploads/2016/01/Research-TCM-Mkt-Timing-Study-2004.pdf

Strategies for volatile markets

BlackRock.

The graph below shows how a hypothetical \$100,000 investment in stocks would have been affected by missing the market's top-performing days over the 20-year period from January 1, 2000 to December 31, 2019. For example, an individual who remained invested for the entire time period would have accumulated \$324,019, while an investor who missed just five of the top-performing days during that period would have accumulated only \$214,950.

Stay invested: Missing top-performing days can hurt your return

Hypothetical investment of \$100,000 in the S&P 500 index over the last 20 years (2000-2019)



Sources: BlackRock; Bloomberg. Stocks are represented by the S&P 500 Index, an unmanaged index that is generally considered representative of the US stock market. Past performance is no guarantee of future results. It is not possible to invest directly in an index.



"One of the most important books I've ever read—an indispensable guide to thinking clearly about the world." —Bill Gates

FACTFULNESS

New York Times
Bestseller

Ten Reasons
We're Wrong About
the World—and Why
Things Are Better
Than You Think

Hans Rosling with Ola Rosling and
Anna Rosling Rönnlund

Hans Rosling with Ola Rosling and
Anna Rosling Rönnlund

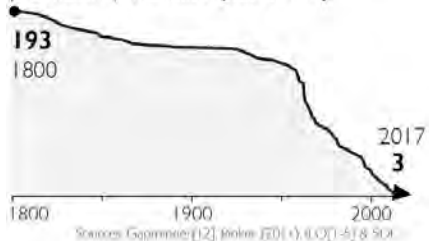
FACTFULNESS



16 BAD THINGS DECREASING

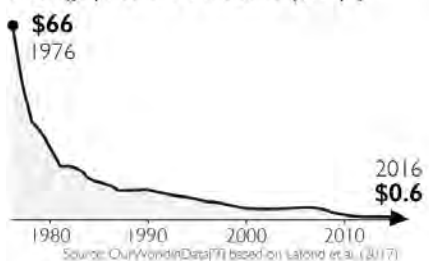
LEGAL SLAVERY

Countries where forced labor is legal or practiced by the state (out of 194)



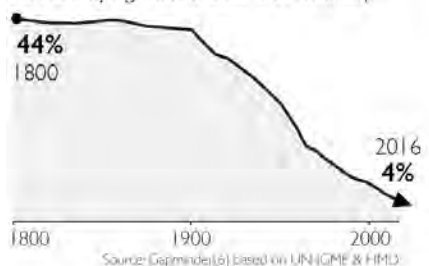
EXPENSIVE SOLAR PANELS

Average price of PV modules (\$/Wp)



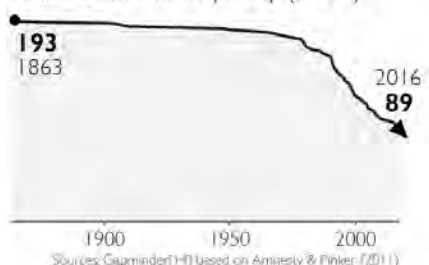
CHILDREN DYING

Percent dying before their fifth birthday



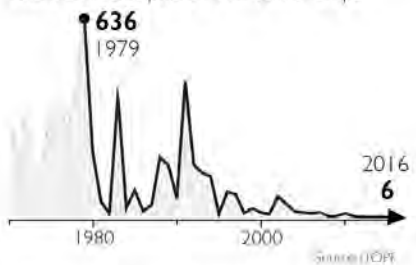
DEATH PENALTY

Countries with death penalty (of 194)



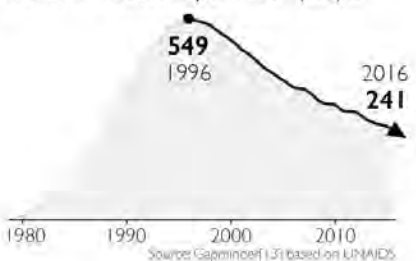
OIL SPILLS

1,000 tons oil spilled from tanker ships



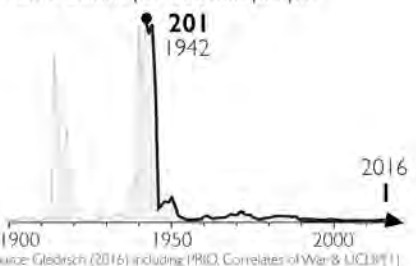
HIV INFECTIONS

New HIV infections per million people



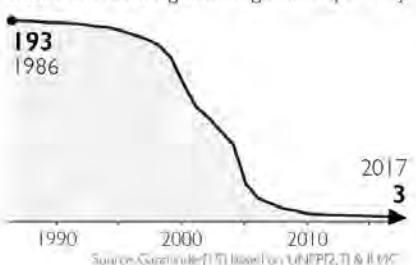
BATTLE DEATHS

Battle deaths per 100,000 people



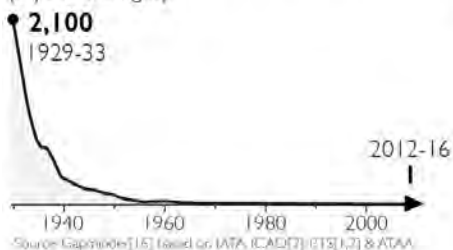
LEADED GASOLINE

Countries allowing lead in gasoline (of 194)



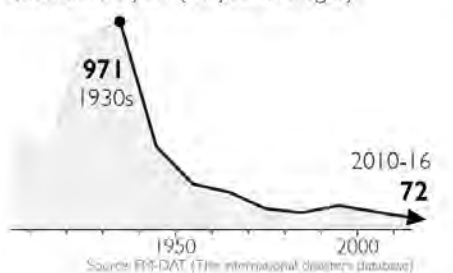
PLANE CRASH DEATHS

Deaths per 10 billion passenger miles (5-year averages)



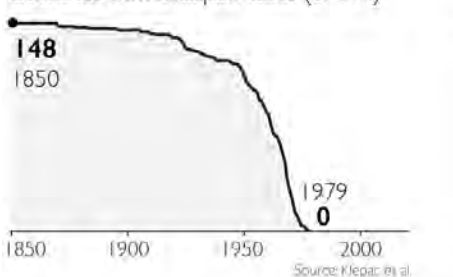
DEATHS FROM DISASTER

1,000 deaths/year (10-year averages)



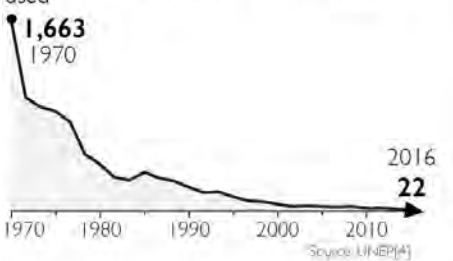
SMALLPOX

Countries with smallpox cases (of 194)



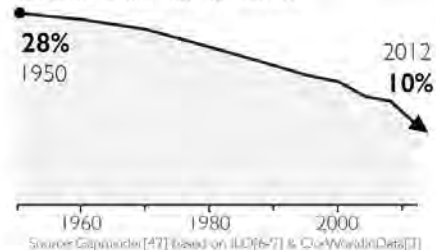
OZONE DEPLETION

1,000 tons ozone-depleting substances used



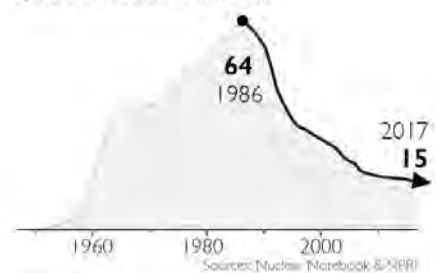
CHILD LABOR

Share of children aged 5-14 who work full time under bad conditions



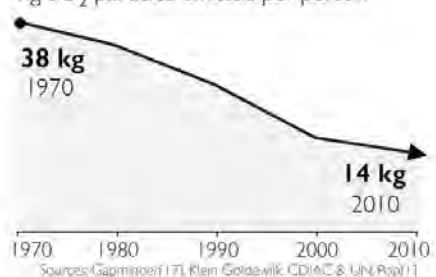
NUCLEAR ARMS

1,000s of nuclear warheads



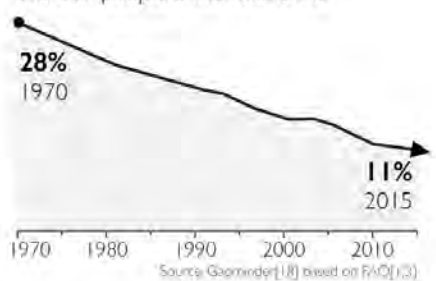
SMOKE PARTICLES

Kg SO₂ particles emitted per person



HUNGER

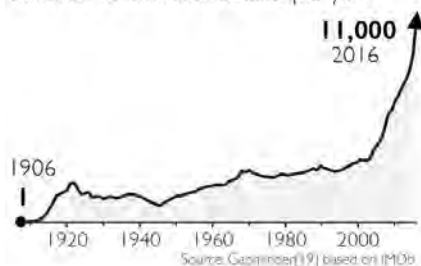
Share of people undernourished



16 GOOD THINGS INCREASING

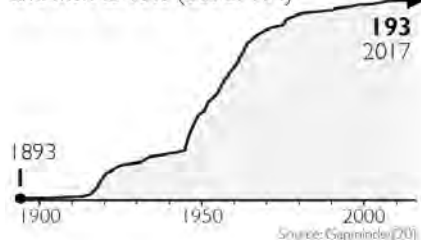
NEW MOVIES

Number of new feature films per year



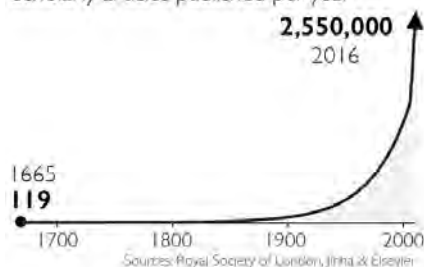
WOMEN'S RIGHT TO VOTE

Countries with equal rights for women and men to vote (out of 194)



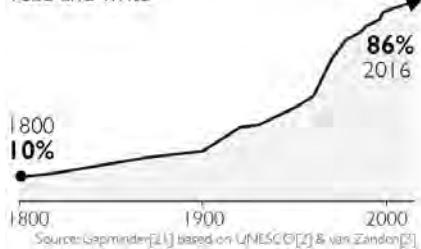
SCIENCE

Scholarly articles published per year



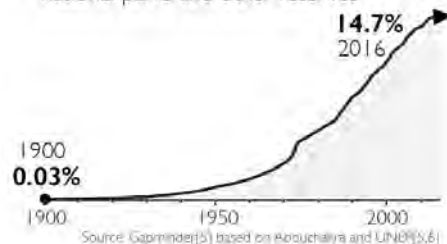
LITERACY

Share of adults (15+) with basic skills to read and write



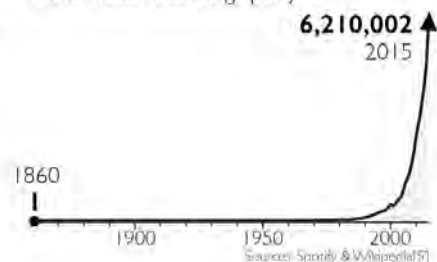
PROTECTED NATURE

Share of Earth's land surface protected as national parks and other reserves



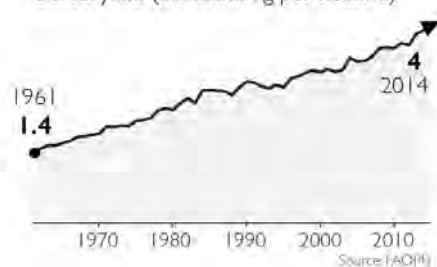
NEW MUSIC

New music recordings per year



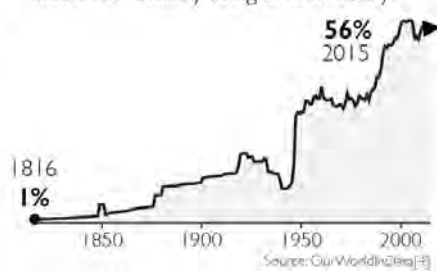
HARVEST

Cereal yield (thousand kg per hectare)



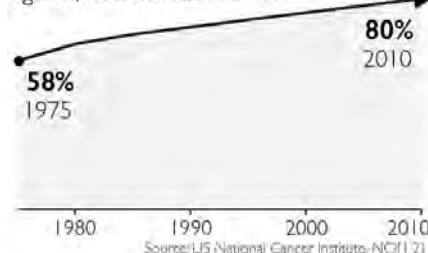
DEMOCRACY

Share of humanity living in democracy



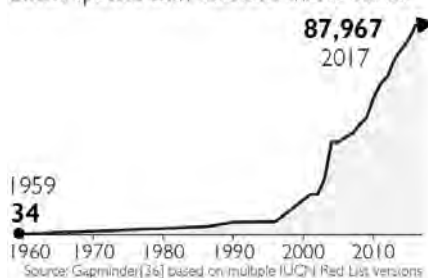
CHILD CANCER SURVIVAL

5 year survival of those diagnosed before age 20, with best treatment



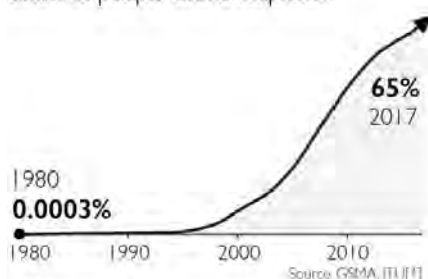
MONITORED SPECIES

Listed species with assessed threat-status



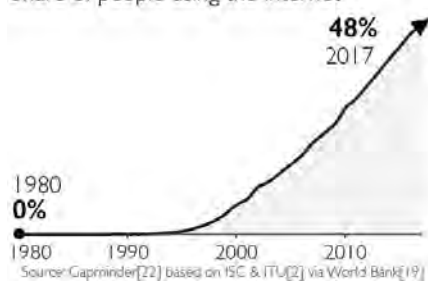
MOBILE PHONES

Share of people with a cellphone



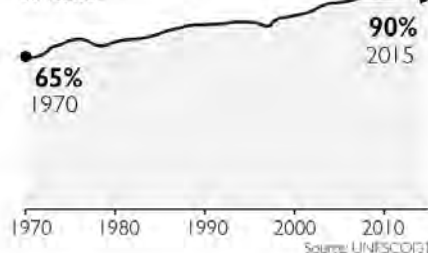
INTERNET

Share of people using the internet



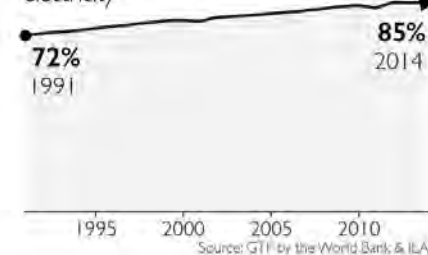
GIRLS IN SCHOOL

Share of girls of primary school age enrolled



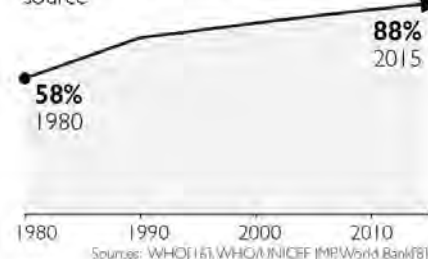
ELECTRICITY COVERAGE

Share of people with some access to electricity



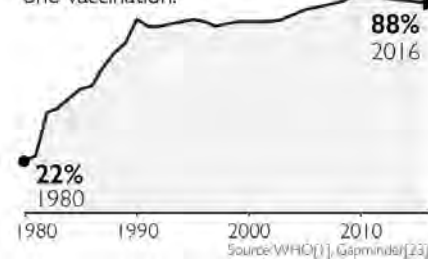
WATER

Share of people with water from protected source



IMMUNIZATION

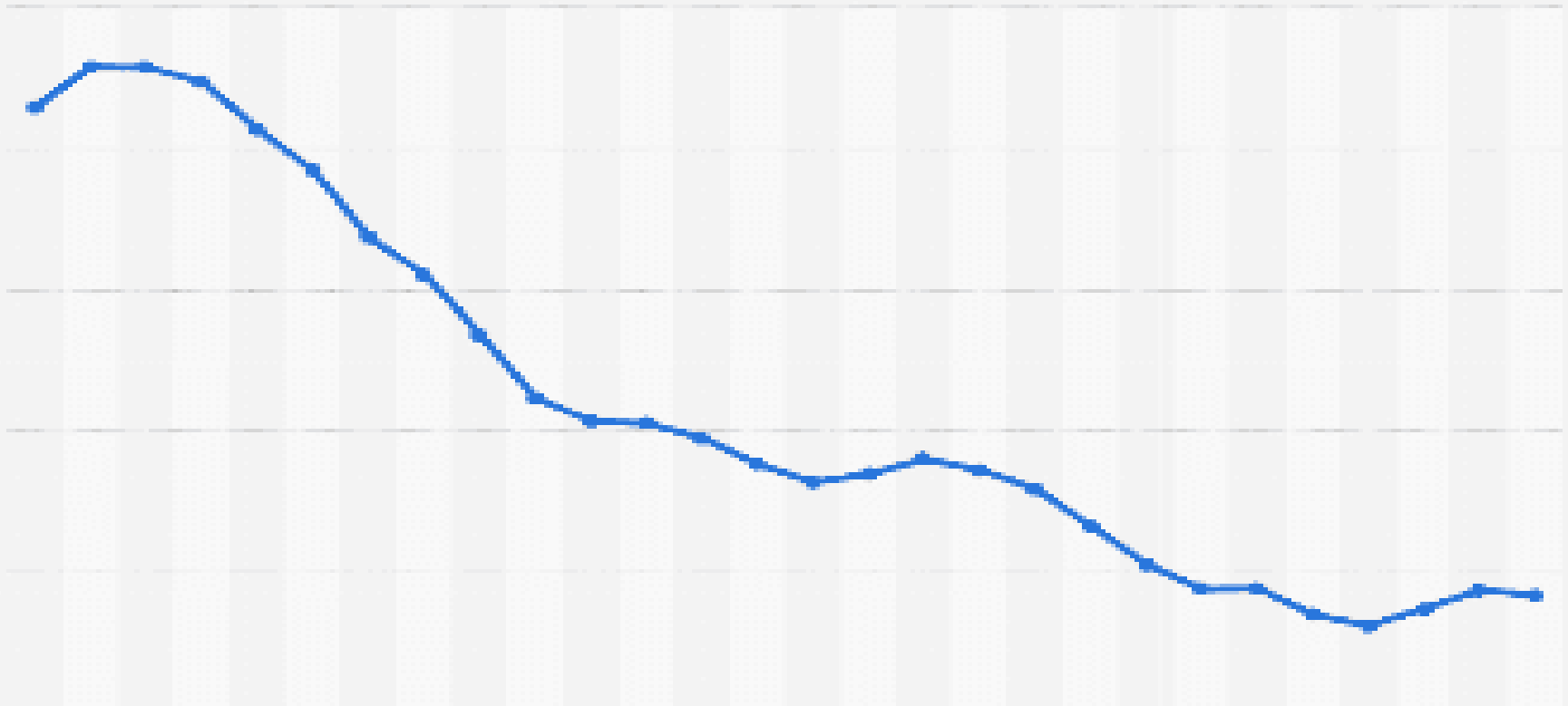
Share of 1-year olds who got at least one vaccination.



Perception Vs. Reality

Violent Crime Rates

Reported violent crime rate in the United States from 1990 to 2017



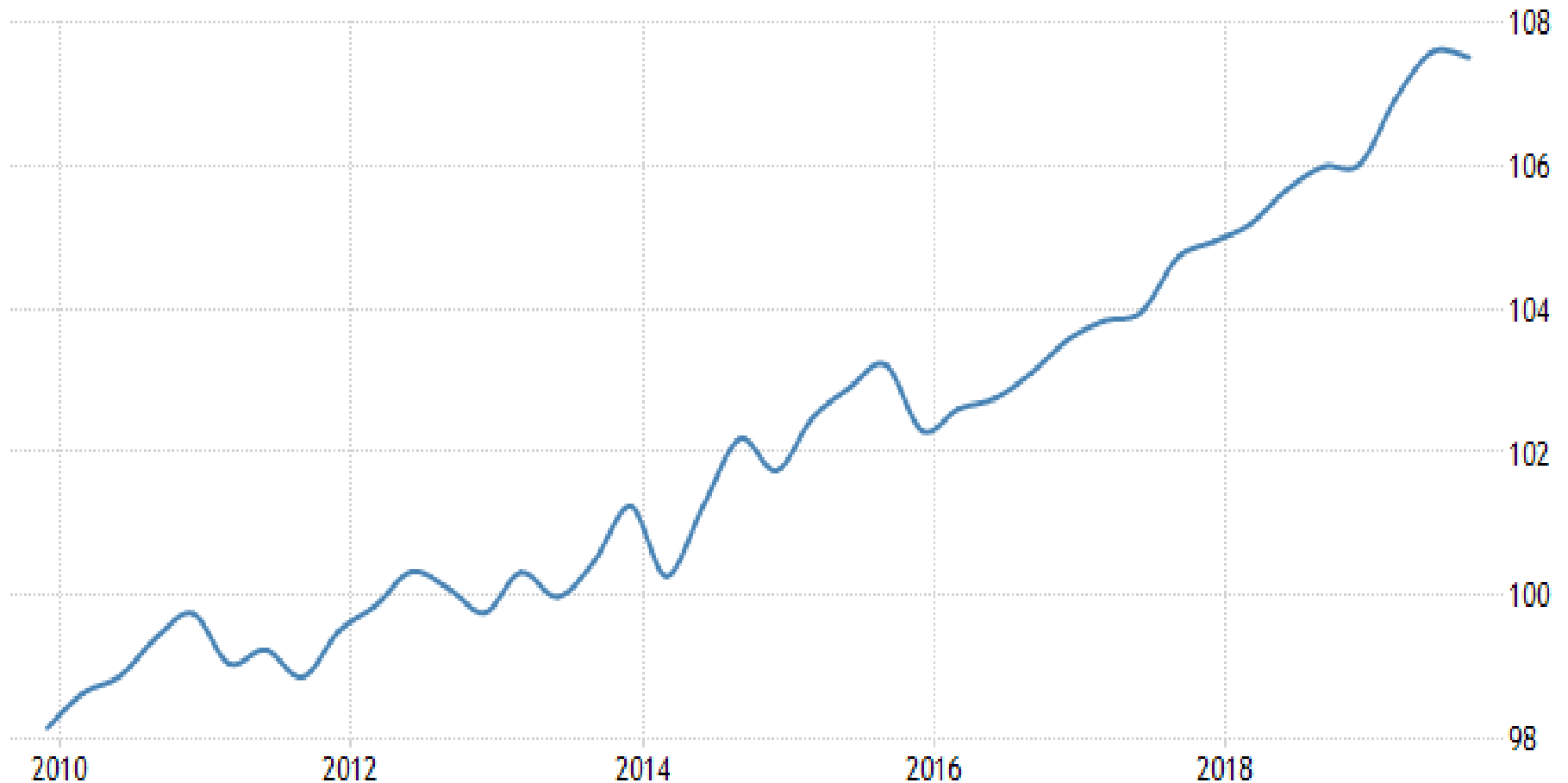
Asking the Right Question



What Lies Ahead with New Admin



Productivity at Record Highs



Comparing how taxes may differ:

Individuals

Taxable income	Previous tax rate	TCJA tax rate	Change
\$0–\$9,525	10%	10%	<i>Unchanged</i>
\$9,526–\$38,700	15%	12%	-3.0%
\$38,701–\$82,500	25%	22%	-3.0%
\$82,501–\$93,700	25%	24%	-1.0%
\$93,701–\$157,500	28%	24%	-4.0%
\$157,501–\$195,450	28%	32%	+4.0%
\$195,451–\$200,000	33%	32%	-1.0%
\$200,001–\$424,950	33%	35%	+2.0%
\$424,951–\$426,700	35%	35%	<i>Unchanged</i>
\$426,701–\$500,000	39.6%	35%	-4.6%
Over \$500,000	39.6%	37%	-2.6%

Significant changes to deductions

Standard deduction	Nearly doubled to \$12,000 (individuals) and \$24,000 (married/filing jointly)
Mortgage interest	Limited to \$750,000 of indebtedness after 12/15/17, deduction for HELOC interest may be limited*
State and local taxes	Capped at \$10,000 in aggregate
Medical expenses	Expanded for 2017 and 2018 with a 7.5% AGI threshold (10% thereafter)
Miscellaneous	Repealed
Charitable contributions	Deduction for cash gifted to public charities increased to 60% of AGI (from 50%)

Summary Biden Tax Plan Proposals

- Repeal TCJA for 'high income' filers – over \$400k?
- Impose 12.4% Social Security Payroll Tax for Wages above 400k
- Increase the Corporate Income Tax to 28%
- Establish a Corporate Minimum Tax on Book Income
- Double the Tax Rate on GILTI and impose country by country
- Temporarily increase Child Tax and Dependent Credits
- Tax long term cap gains and qualified dividends at 39.6% on income above \$1 mil

Capital Gains

Biden's plan would first raise taxes on capital gains by treating them as ordinary income for those earning more than \$1 million.

The Biden/Harris website states they will raise the top rate on ordinary income back up to 39.6% as such, the top rate on long-term gains would nearly double from 23.8 percent to 43.4 percent.

Step Up

- Biden is not simply proposing to raise the top rate on capital gains. He also proposes eliminating step-up basis in capital gains. According to the JCT, not taxing gains at death results in a loss of about \$40 billion each year.
- Biden plan could require heirs to take on the decedent's basis when they receive an asset, but still allow heirs to defer realization of that inherited asset's capital gain.
- This would raise much less than making death a taxable event

Likely

- Onshoring Initiative
- Retirement Savings Credit
- Infrastructure Tax Credits

Unlikely

- Major Tax Increase
 - Individual Income
 - Corporate Rate
 - Capital Gains
 - Social Security “Doughnut Hole”
- Transaction Tax

Future

- Minimum “Book Income” Tax
- GILTI - Congress added a new 10.5 percent minimum tax on global intangible low-taxed income (GILTI) to discourage such profit shifting. ... Thus, if the foreign tax rate is zero, the effective US tax rate on GILTI will be 10.5 percent (half of the regular 21 percent corporate rate because of the 50 percent deduction)
- Green Energy Incentives
- Estate Tax

Estate planning considerations

- Even with the higher lifetime exclusion amount, estate planning remains critical to efficiently transfer wealth and plan for contingencies
- Be mindful of state death taxes
- Plan for low cost-basis property
 - Ensure stepped-up cost basis is maintained when property is transferred at death
- Work with an estate planning professional to account for a potential “sunset” of the law in 2026



2 Questions

Investing



The Four Most Dangerous words for
investors.
This Time It's Different...

— *Warren Buffett* —

3 Possible Reasons for Adjustments

- YOU – your needs
- INVESTMENT Relative PERFORMANCE
- YOUR ALLOCATION



Market Corrections



During the Gold Rush, most would-be miners lost money, but people who sold them picks, shovels, tents and blue-jeans (Levi Strauss) made a nice profit.

— *Peter Lynch* —

Reason's for optimism also potential threats



Massive New Energy Reserves – low cost



Corporate profits at record levels



Leader in Manufacturing



Foreign Investment Flooding In



Huge amounts of capital on the sidelines



Restructuring of debt for business and personal



Innovation

Unrivaled Manufacturing Depth

- Americans produce about 20% of all the *stuff* in the world with 4.5% of the world's population
- China makes 17% with 19% population
- America's productivity, measured on a per capita basis, remains the world standard

Unrivaled Manufacturing Depth

While the U.S. produces 20% of the world's good within our shores,
American companies collectively
produce between 30% and 40% of
everything in the world.

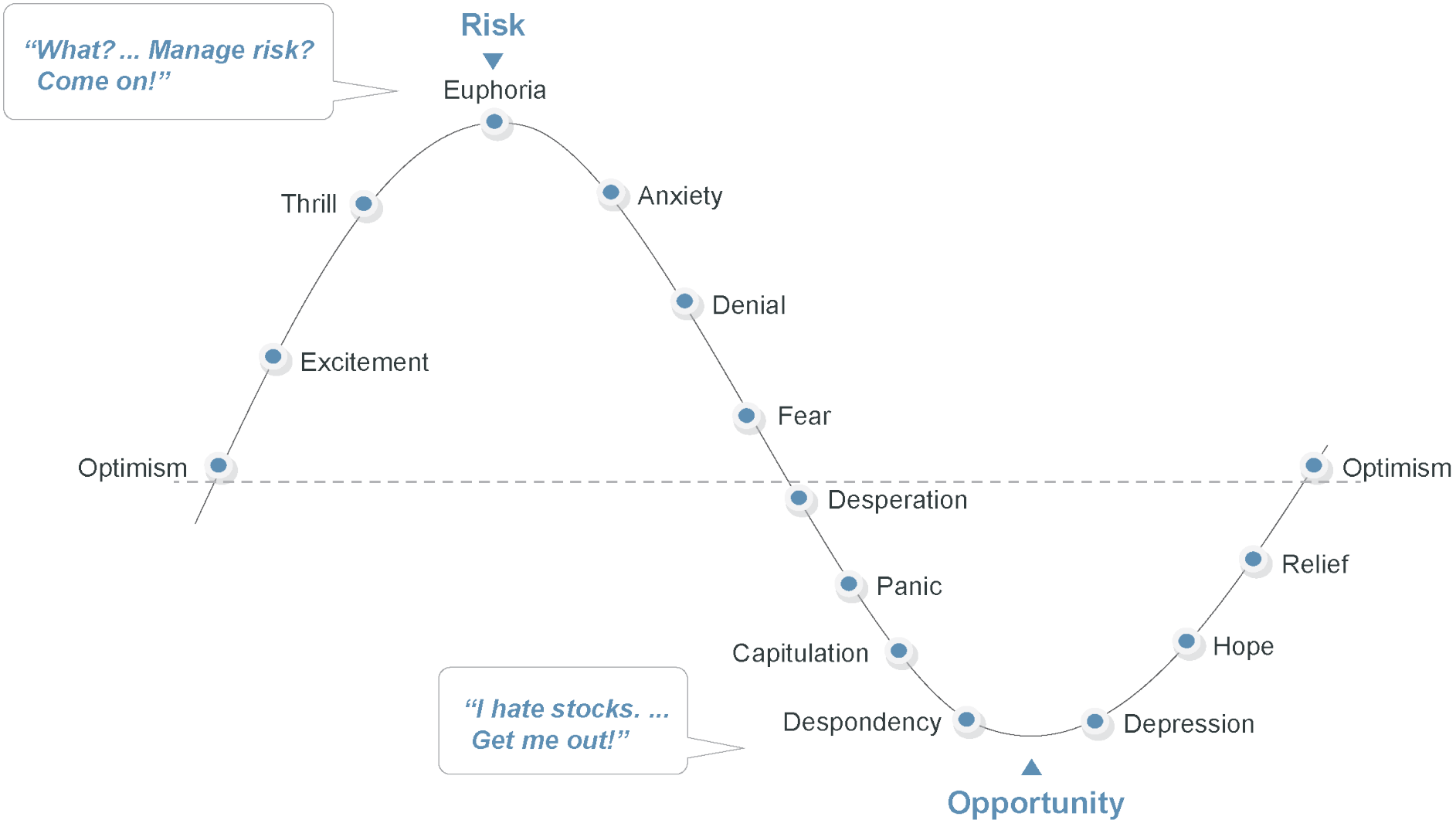
A lot of that money comes from
overseas operations, that cash stays
overseas – changing?



Biggest Challenges for individuals

- Inflation
- Medical Expense
- Making bad decisions based on media hype and emotions or just bad information

Consider This



What's Next - What To Do

- Asking the right question
- With the right planning should not matter



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DICELLO LEVITT GUTZLER

PRACTICAL ASPECTS OF THE ANTI-TERRORISM ACT

“Follow the Money” Or Else...

The Anti-Terrorism Act (“ATA”) – 18 U.S.C. § 2333

- U.S. national can bring a civil claim for injuries resulting from an act of “international terrorism.”
 - Injured parties (which includes family members left behind due to other family members being hurt or killed) recover triple their damages, including emotional distress
- Judge and jury awards for damages are extraordinarily high (pain and suffering, loss of consortium, economic loss, mandatory treble damages)

International Terrorism - 18 U.S.C. § 2331(1)

Activities that:

- A. involve violent acts or acts dangerous to human life that are a **violation of the criminal laws**; and
- B. **appear to be intended** to intimidate or coerce a civilian population; influence the policy of a government by intimidation or coercion; or affect the conduct of a government by mass destruction, assassination, or kidnapping;
- C. occur primarily outside the territorial jurisdiction of the United States.

Violation of Criminal Law - Material Support for Terrorist Act

- 18 U.S. § 2339A: Violation of U.S. criminal law to provide “material support” **[defined broadly: “Any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services...”]** or resources ... knowing or **intending** that they are to be used in preparation for, or in carrying out, or concealing a series of enumerated crimes, e.g., the extraterritorial murder of U.S. national, kidnapping, etc.



Violation of Criminal Law – Material Support to FTOs

- **18 U.S. § 2339B**: Violation of U.S. criminal law to provide material support for organizations that have been formally designated as foreign terrorist organizations (“FTOs”) by the Secretary of State - “[w]hoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be” guilty of a crime.



Violation of Criminal Law – Financing of Terrorism

- **18 U.S. § 2339C**: Violation of U.S. criminal law to provide or collect funds “with the **intention** that such funds be used, or with the knowledge that such funds are to be used” to carry out an act intended to cause death or serious bodily injury to a civilian when the purpose of such act is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.



Material Support Intent - Indifference/Recklessness

- Recklessness/deliberate indifference is sufficient
- “To give money to an organization that commits terrorist acts is not intentional misconduct unless one either knows that the organization engages in such acts **or is deliberately indifferent to whether it does or not**, meaning that one knows there is a substantial probability that the organization engages in terrorism but one does not care. When the facts known to a person place him on notice of a risk, he cannot ignore the facts and plead ignorance of the risk.” *Boim v. Holy Land* (7th Cir. 2008)



International Terrorism - 18 U.S.C. § 2331(1)

Activities that:

- A. involve violent acts or acts dangerous to human life that are a violation of the criminal laws; and
- B. **appear to be intended** to intimidate or coerce a civilian population; influence the policy of a government by intimidation or coercion; or affect the conduct of a government by mass destruction, assassination, or kidnapping;
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International Terrorism – Element 2 – Objective Appearance

- B. Activities that **appear to be intended** to: intimidate or coerce a civilian population or influence a government by intimidation or coercion
- The standard is external appearance rather than subjective intent. For example, a donor to a terrorist group such as al-Qaeda knows that al-Qaeda seeks to harm Americans. Therefore, donations to al-Qaeda would augment its resources, enabling it to kill or wound Americans.
 - “And given such **foreseeable** consequences, such donations would ‘**appear to be intended** to intimidate or coerce a civilian population’ or to ‘affect the conduct of a government by assassination.’”



JASTA Aiding and Abetting Liability

- Justice Against Sponsors of Terrorism Act (“JASTA”) **aiding and abetting liability**
 - Defendant aided a third party who performed a wrongful act that caused an injury
 - Defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time of the assistance
 - Defendant must knowingly and substantially assist the principal violation



JASTA Conspiracy Liability

- Parties who conspire with the person who committed such act of international terrorism:
 - An **agreement/common scheme** between two or more persons;
 - Proof of an explicit agreement is not necessary; can show that defendant “shared some knowledge of the conspiracy’s unlawful aims and objectives.”
 - To participate in an unlawful act;
 - Injury;
 - Injuring act was done pursuant to and in furtherance of the common scheme.





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ATA CASE STUDIES

EQUAL JUSTICE UNDER LAW

Who gets sued under the ATA?



Banks/Financial Institutions



Social Media Platforms



Charitable Organizations



Entities Purchasing Goods
from FTOs or Their
Middlemen



Companies Paying for
Protection





Banks/Financial Institutions

- Accused of facilitating economic transactions for FTOs, including by providing basic banking services, especially when international sanctions or other enforcement mechanisms are meant to cut off access to legitimate banking institutions
- Accused of “laundering” money for FTOs by facilitating transfer of funds to legitimate accounts
- Frequently sued are foreign banks with US branches or offices
- Most of these cases have failed for failure to allege or prove causation (i.e., causal relationship between actions of banks and actions of terrorist organizations)
- Case law in this area has become much more challenging in recent years, especially where plaintiffs have alleged primary (e.g., “material support”) rather than secondary (e.g., “aiding and abetting”) liability, but a handful of cases have been successful



Banks/Financial Institutions

- *Zapata v. HSBC Holdings, PLC*, 414 F. Supp. 3d 342 (EDNY)
 - Victims of violent acts perpetrated by Mexican drug cartels (e.g., Sinaloa, Juarez, Los Zetas), and their family members, sued HSBC and its subsidiaries under ATA, alleging they committed acts of international terrorism when they laundered drug proceeds for the drug cartels
 - Complaint detailed numerous atrocities committed by cartels: “gruesome public displays designed to intimidate and coerce”; “attacks on children and women”; “mass murders”; “attacks on the media”; “attacks on public officials”; “attacks on police and military”; “kidnappings”



Banks/Financial Institutions

- *Zapata v. HSBC Holdings, PLC*, 414 F. Supp. 3d 342 (EDNY)
 - Plaintiffs alleged HSBC routinely opened USD-denominated accounts for, and accepted large cash deposits from, individuals that were “known or suspected money launderers” for the cartels, without obtaining required know-your-customer information
 - These deposits were used for money laundering, with the cartels using HSBC to inject cash into US financial system by wire transfers and by purchases of bulk physical currency
 - Cartels relied on money laundering of this type to integrate the substantial cash proceeds of drug sales into legitimate economy, which then facilitated purchase of “buildings, factories, equipment, weaponry, personnel, vehicles, aircraft, boats, submersible vessels” used in committing acts of violence



Zapata Case

- It was undisputed that HSBC deliberately maintained substandard anti-money-laundering (AML) policies and failed to conduct appropriate due diligence on its customers
- In fact, in December 2012, HSBC entered into a deferred prosecution agreement with DOJ in which it admitted laundering at least \$881M in drug-trafficking proceeds and agreed to pay \$1.9B in forfeitures and fines



Zapata Case

- But court dismissed ATA claims on HSBC's motion:
 - Because cartels had not been formally designated as FTOs, secondary liability is not available (see 18 USC § 2333(d)(2)), meaning that HSBC could be liable only if it directly committed acts of int'l terrorism
 - This requires plausible allegation that HSBC's money laundering of cartel drug proceeds appeared intended to intimidate or coerce civilians, or influence government policy by intimidation or coercion, or affect government conduct by mass destruction, assassination or kidnapping – i.e., not that the actions of the cartels were so intended, but that the money laundering actions of HSBC appeared to be so intended
 - Court decided that HSBC's motivation appeared to be greed, not terror – “motivated by economics, not by a desire to intimidate or coerce”



Zapata Case

- Court also dismissed ATA claims against HSBC based on failure to plausibly allege causation:
 - ATA requires plaintiff to allege and prove that defendant's violation proximately caused her injuries, i.e., that there is "a sufficiently direct relationship between the conduct in question and the injuries for which recovery is sought," which in turn "requires inquiry into 'foreseeability, directness, and the substantiality of the defendant's conduct'"
 - Court found this direct link between HSBC's money laundering and plaintiffs' injuries to be lacking:

"What Plaintiffs do not allege, however, is any relationship between HSBC's money laundering and the acts of violence perpetrated against them. Plaintiffs do not allege, for example, that the Cartels require laundered money to carry out any acts of violence in Mexico, let alone the specific atrocities inflicted upon Plaintiffs. Moreover, the Cartels are not cash-poor organizations; indeed, Plaintiffs acknowledge that the Cartels have abundant cash resources, and there is no plausible inference that the Cartels would not be able to commit these acts of violence without HSBC first laundering their money."

- What Zapata illustrates is that ATA cases can be very difficult to win, and require careful pleading with close attention to the statute's elements

Banks/Financial Institutions

- *Linde v. Arab Bank*, 882 F.3d 314 (2d Cir. 2018) (US citizens who had been victims of terrorist attacks in Israel, and their estates, survivors, and heirs, brought ATA actions against Jordanian bank, alleging that bank had provided financial services and supports to agents of FTOs including Hamas, Islamic Jihad, and Al Aqsa; Arab Bank provided financial services (depository accounts, wire transfers, etc.) to charitable organizations accused of being fronts for Hamas, and to Hamas itself; court of appeals reversed \$100M jury verdict for plaintiffs, based on EDNY's error in instructing jury as to ATA's "act of international terrorism" definition).
- *Gill v. Arab Bank, PLC*, 893 F. Supp. 2d 474, 523, 542 (EDNY 2012) (similar fact pattern as Linde: US citizen wounded in Hamas shooting in Israel brought ATA action vs. Arab Bank for its banking services provided to Hamas and affiliates; Judge Weinstein granted summary judgment to bank based on insufficient evidence of scienter, probable cause)



Banks/Financial Institutions

- *Kemper v. Deutsche Bank AG*, 911 F.3d 383 (7th Cir. 2018) (mother brought ATA action against DB, alleging that bomb that killed her son, an Army specialist serving in Iraq, was placed by Hezbollah, relying on Iranian banking transactions that DB executed in contravention of U.S. sanctions; case dismissed because DB's efforts to evade U.S. sanctions to turn a profit did not constitute material support for terrorism and were not proximate cause of soldier's death)



Banks/Financial Institutions

- *Rothstein v. UBS AG*, 708 F.3d 82, 95 (2d Cir. 2013) (victims of terrorist attacks in Israel brought ATA claims against UBS, alleging that UBS facilitated the attacks by furnishing U.S. currency to Iran, which in turn sponsored and facilitated various terrorist groups to commit the attacks; case dismissed for failure to adequately plead proximate and “but for” causation)

“The Complaint does not allege that UBS was a participant in the terrorist attacks that injured plaintiffs. It does not allege that UBS provided money to Hizbollah or Hamas. It does not allege that U.S. currency UBS transferred to Iran was given to Hizbollah or Hamas. And it does not allege that if UBS had not transferred U.S. currency to Iran, Iran, with its billions of dollars in reserve, would not have funded the attacks in which plaintiffs were injured.”



Banks/Financial Institutions

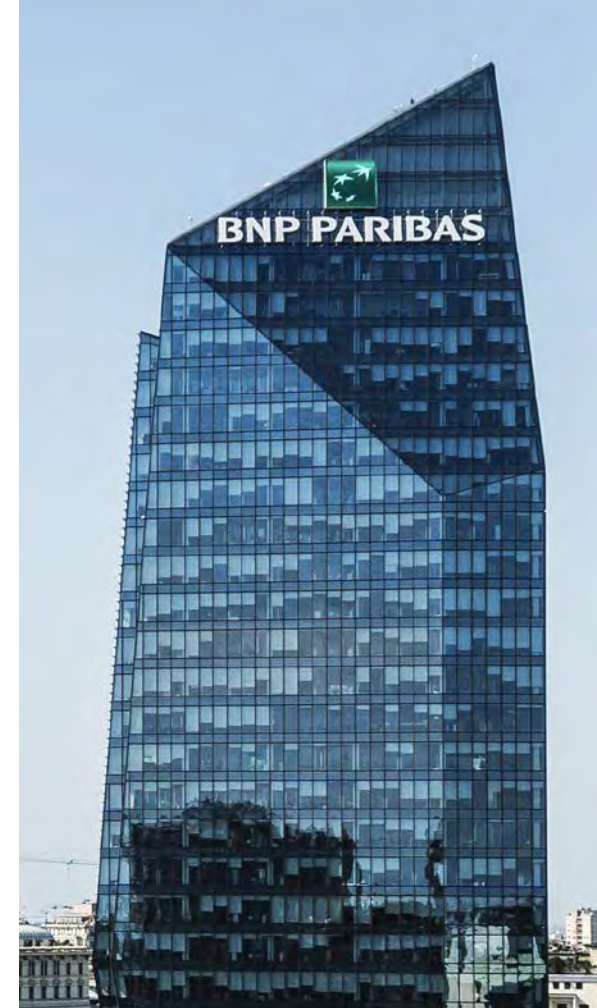
- *In re Terrorist Attacks on Sept. 11, 2011*, 714 F.3d 118 (2d Cir. 2013) (victims of 9/11 terrorist attacks brought ATA claims against supporters of al Qaeda, along with various banks alleged to have knowingly provided financial support and account services to purported charities and front organizations that supported or benefitted al Qaeda; court dismissed complaint because plaintiffs had not made adequate showing of proximate causation)

“We also are not persuaded that providing routine banking services to organizations and individuals said to be affiliated with al Qaeda—as alleged by plaintiffs—proximately caused the September 11, 2001 attacks or plaintiffs’ injuries.”



Banks/Financial Institutions

- *Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 273 (D.C. Cir. 2018)
(Victims of terrorist attacks at U.S. embassies in Africa brought ATA action against French bank, alleging that BNP Paribas provided financial assistance to Sudan, which in turn funded and otherwise supported al Qaeda; bank had pled guilty to illegally conspiring to evade U.S. sanctions and to unlawfully moving \$6B of illegally processed funds from Sudanese banks through U.S. financial system; court nevertheless dismissed ATA action, finding no proximate causation)





Charitable Organizations

- A number of cases have been brought against charitable organizations accused of either being fronts for FTOs and/or of raising money that would then be funneled to FTOs
- *Boim v. Holy Land Found. for Relief & Dev't*, 549 F.3d 685 (7th Cir. 2008) (en banc)
 - ATA suit brought by parents of American Jewish teenager shot to death by two men at bus stop in Israel
 - Not really disputed that teen's assailants were members of Hamas
 - Parents sued several charitable organizations that ostensibly raised money to support some of Hamas's social service programs, as well as several individual donors and others connected to Hamas – defendants did not seriously dispute their ties to Hamas but argued they did not themselves commit acts of international terrorism and only supported Hamas's social services programs



Boim v. Holy Land Foundation

- Partly on summary judgment and partly after trial, district court awarded plaintiffs \$156M in damages, jointly and severally against all defendants
- On appeal, Seventh Circuit *en banc* affirmed the judgment as against all but two of the defendants, making Boim one of the few major cases in which plaintiffs successfully sued and recovered under ATA
- Court of Appeals held that secondary liability not available (this was pre-JASTA), so defendants only liable if they directly committed (rather than simply aided or abetted in) AIT.



Boim v. Holy Land Foundation

- But Court had no difficulty finding primary liability based on material support for Hamas:

“To give money to an organization that commits terrorist acts is not intentional misconduct unless one either knows that the organization engages in such acts or is deliberately indifferent to whether it does or not, meaning that one knows there is a substantial probability that the organization engages in terrorism but one does not care.... But if you give a gun you know is loaded to a child, you know you are creating a substantial risk of injury and therefore your doing so is reckless and if the child shoots someone you will be liable to the victim.... That you did not desire the child to shoot anyone would thus be irrelevant.... A knowing donor to Hamas—that is, a donor who knew the aims and activities of the organization—would know that Hamas was gunning for Israelis..., that many U.S. citizens live in Israel..., and that donations to Hamas, by augmenting Hamas's resources, would enable Hamas to kill or wound, or try to kill, or conspire to kill more people in Israel. And given such foreseeable consequences, such donations would ‘appear to be intended ... to intimidate or coerce a civilian population’ or to ‘affect the conduct of a government by ... assassination’”

Boim v. Holy Land Foundation

- The Court also had no difficulty finding the requisite causal relationship between defendants' actions and the death of Boim:

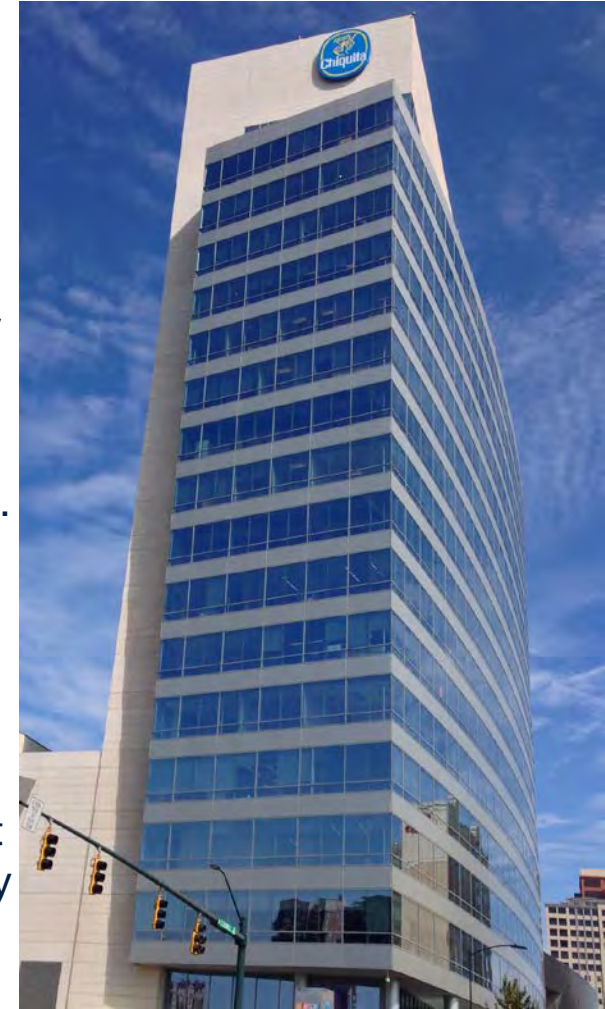
“This case is only a little more difficult because Hamas is (and was at the time of David Boim's death) engaged not only in terrorism but also in providing health, educational, and other social welfare services.... But if you give money to an organization that you know to be engaged in terrorism, the fact that you earmark it for the organization's nonterrorist activities does not get you off the liability hook.... The reasons are twofold. The first is the fungibility of money. If Hamas budgets \$2 million for terrorism and \$2 million for social services and receives a donation of \$100,000 for those services, there is nothing to prevent its using that money for them while at the same time taking \$100,000 out of its social services ‘account’ and depositing it in its terrorism ‘account.’... Second, Hamas’s social welfare activities reinforce its terrorist activities.... Anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities. And that is the only knowledge that can reasonably be required as a premise for liability. To require proof that the donor intended that his contribution be used for terrorism—to make a benign intent a defense—would as a practical matter eliminate donor liability except in cases in which the donor was foolish enough to admit his true intent.”





Protection Payments

- A few cases involve situations where companies with business operations in areas controlled by terrorist organizations pay those organizations to leave their workers alone, or to protect them from acts of violence committed by those or other organizations. This leads to big trouble.
- *In re Chiquita Brands Int'l, Inc.*, 284 F. Supp. 3d 1284 (S.D. Fla. 2018)
 - Family members of 5 American missionaries who were kidnapped and killed in Colombia by the FARC revolutionary terrorist organization filed ATA action against banana producer Chiquita and its subs
 - Chiquita had for years made direct payments to FARC to protect its employees in Colombia. Initially, it acceded to discrete extortion and ransom demands, but over time it actually negotiated with FARC for “volume discounts” and other “reduced settlements.” All of these payments were authorized at top levels in Chiquita’s Cincinnati headquarters, and many were remitted through professional negotiators and shady intermediaries, including some who hid cash in a spare tire in the back of a jeep.
 - FARC generated enormous sums of money (>\$100M/yr) through Colombian drug trade, but also earned significant income through extortion and ransom kidnappings. Protection money demands from FARC were so common that payments were called “vacuna,” the Spanish word for “vaccine.”



Chiquita Bananas

- In March 2007, Chiquita pled guilty to criminal charges of engaging in transactions with a specially-designated global terrorist organization and paid a \$25M fine.
 - DOJ: “Regardless of the company’s motivations, defendant Chiquita’s money helped buy weapons and ammunition used to kill innocent victims of terrorism. Simply put, defendant Chiquita funded terrorism.”
 - Chiquita’s counsel: “The company ‘funded terrorism.’ I would agree with that. Yes, in the same way that an extortion victim funds the mafia. That money that is extorted from the company and goes to the [FARC] is not something that was willingly given, it was given at the barrel of a gun and threats.”
- In denying summary judgment to Chiquita in the ensuing ATA action, Court held that ATA “makes no distinction between voluntary and involuntary conduct in defining an ‘act of international terrorism’” actionable under the statute, and therefore refused to recognize a “duress defense” to an ATA claim



Chiquita Bananas

- Rejected lack of intent defense:

“Chiquita claims it paid the FARC for the sole purpose of protecting the lives of its employees in Colombia, and that conduct motivated by such salutary purposes cannot, as a matter of law, be objectively viewed as conduct which ‘appears to be intended’ to intimidate or coerce a civilian population, or to influence a government by intimidation or coercion.... Even assuming these are part of the motivation for the payments, this would not negate, as a matter of law, the mens rea of a 2339A violation (provision of material support ‘knowing or intending’ it will be used to prepare for or carry out terrorism-related crimes), nor would it negate, as a matter of law, the mens rea ‘appears to be intended’ requirement of 2331(1)(B). Whether the welfare of its employees was part of its motivation in providing the support does not, as a matter of law, resolve the question of whether Chiquita acted ‘knowing or intending’ that the resources would be used for nefarious purposes, and whether its conduct objectively appeared to be intended to intimidate or coerce.”



Chiquita Bananas

- Rejected lack of causation defense:

“[R]easonable jurors could debate whether financial contributions of the magnitude and timing as those made by Chiquita were a material and substantial factor in enhancing the FARC's terror capabilities and enabling it to commit more terror, including the kidnapping and killing of Plaintiffs' decedents between 1994 and 1997. The evidence shows Banadex paid the FARC in a series of 57 payments, beginning in 1989 and continuing up through and during the time of the FARC's kidnapping and killing of Plaintiffs' family members between 1994 and 1997. Further, Plaintiffs adduce expert evidence that the cost of putting a FARC guerilla in the field for one year was \$12,000, that the cost of supplying a guerilla with an AK-47 was \$1,200; and that with \$32K as the average annual funding, Chiquita could have armed 540 guerillas, or put 50 guerillas in the field, full time, for a year.”

“A reasonable jury could find, on this record, that Chiquita's continuous nine-year stream of payments to the FARC created a foreseeable likelihood of enhancing its terror capabilities; that the presence of American citizens living abroad in Colombia, as missionaries or business persons, was reasonably foreseeable to Chiquita; that the FARC's continued targeting of American interests in Colombia, including personal attacks on American nationals, was foreseeable to Chiquita; and that funneling money to the FARC would predictably enhance and facilitate its ability to perpetrate such attacks, including those on Plaintiffs' decedents.”



Social Media Platforms



- New frontier in ATA litigation involves claims against social media platforms for publishing or allowing to be posted messages that lead to terrorist violence – most of these cases fail
- *Crosby v. Twitter, Inc.*, 921 F.3d 617 (6th Cir. 2019)
 - Victims of June 2016 mass shooting at Pulse Nightclub in Orlando sued Twitter, Facebook, and Google under the ATA, claiming that ISIS used their platforms to recruit and motivate new members to commit terrorist attacks, including the shooter, Omar Mateen, who allegedly “self-radicalized” after viewing ISIS propaganda and messages of hate on the platforms
 - Creative complaint alleged: Platforms allowed ISIS to reach a global audience, attract new recruits and inspire “lone actor attacks”; these posts successfully recruited 30,000 foreigners to join ISIS and allowed ISIS to spread propaganda and fear; ISIS uses social media to fund its terrorism, including a Twitter campaign to “participate in Jihad with your money” that raised \$7000; platforms profit from ISIS’s use, and allow ISIS to use their tools to create targeted ads or to share revenue with ISIS when individuals view content or watch videos; Defendants ignore requests to block ISIS and fail to prevent ISIS from using their services; ISIS social media accounts recognized Mateen by posting his picture and pictures of the attack and congratulating him as “Islamic State fighter”; etc.



Crosby v. Twitter

- District court dismissed because Pulse Nightclub shooting was not an act of international terrorism: Mateen's conduct did not have "any transnational component," and there were no pleaded facts to show that ISIS "had anything at all directly to do [with Mateen and] the shooting."
- Court of appeals affirmed dismissal on alternate grounds:

"there is not a sufficient link between Defendants' conduct (of allegedly providing social media platforms to ISIS) and Plaintiffs' injuries suffered at the Pulse Night Club (at the hands of Mateen). Plaintiffs' only allegation that connects Mateen and Defendants is that, at some point before the Pulse Night Club shooting, Mateen viewed online content from ISIS and became 'self-radicalized.' But this is a tenuous connection at best. With the 'highly interconnected' nature of social media, the internet, and 'modern economic and social life'—we expect Defendants' websites to cause some 'ripples of harm' that would 'flow far beyond the defendant's misconduct.' But without more, Defendants do not proximately cause all these potential ripples. The content did not compel Mateen's actions.... Defendants do not proximately cause everything that an individual may do after viewing this endless content. Nor can Defendants foresee how every viewer will react to third party content on their platforms. This is especially true where independent criminal acts, like Mateen's, are involved."



Purchasers of Goods and Services



- Final category involves situations where a person or entity purchases good or services, typically from “black market” sellers, knowing or with reason to know that the goods were stolen or looted by terrorist organizations, and that the proceeds of the sale will ultimately fund or support terrorist activities
- *Abecassis v. Wyatt*, 7 F. Supp. 3d 668 (S.D. Tex. 2014) (victims of 21 suicide bombings in Israel brought ATA action against oil and gas business, alleging that they had illegally purchased oil from Iraq outside the U.N. sanctioned Oil for Food Program, and that kickbacks from those purchases were funneled directly to Saddam Hussein to fund terrorist activity against Americans by Hamas and Islamic Jihad; court found that “facts alleged by plaintiffs were ‘sufficient to support an inference that it was foreseeable that Hussein would use the kickbacks to support Palestinian terrorist attacks’ given the off-the-book nature of the kickbacks and Hussein's known support and involvement in attacks on Israel).



Questions?





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Legal Obligations of Employers to Report Conduct of their Employees.

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Overview

- Federal Reporting Requirements
- State General Criminal Reporting Requirements
- Liability for Failure to Report and “Willful Blindness”
- Minimizing Risks and Liability Strategies
- Evolving Area of Law

Federal Law: Child Sexual Abuse Material

- Terminology: ~~Child Pornography~~
 - Pornography = Consensual Adults & Distributed Legally
 - Children Cannot Consent So Images = Child Abuse & Evidence of Crime in Progress.
- Obligation to Report Employee's Use of Company's Computers for Child Sexual Abuse Material
- Full Scope of Employer's Reporting Duty Unclear
- Legal & Ethical Reasons to Report

“Electronic Communication Service Provider”

- 18 USC § 2258A
- Combat Online Sexual Exploitation of Children
- Electronic Communication Service Provider or Remote Service Provider Required to Report Child Pornography to CyberTipline



“Electronic Communication Service Provider”

- ECSP = “any service which provides to users the ability to send or receive wire or electronic communications” 18 USC § 2510(15)
- **ECSP Must Report**
- Penalty for “**Knowingly and Willfully**” Failing to Report
 - Up to \$150,000 (1st violation)
 - Up to \$300,000 (subsequent violations)



“Electronic Communication Service Provider”

- ECSP are ISP (i.e. AOL, Verizon, etc.)
 - Quon v. Arch Wireless, 929 F.3d 892 (9th Cir. 2008) rev’d on other grounds, 560 U.S. 746 (2010)
 - Freedman v. America Online, 325 F.Supp.2d (E.D. Va. 2004)
- ECSP are social network companies (i.e. Facebook)
 - In re 381 Search Warrants, 29 N.Y.3d 231 (2017)



“Electronic Communication Service Provider”

- ECSP May Be Employer: If Provide E-mail Access to Employees
- Hately v. Watts, 917 F.3d 770 (4th Cir. 2019)
 - College’s E-mail Server = ECSP

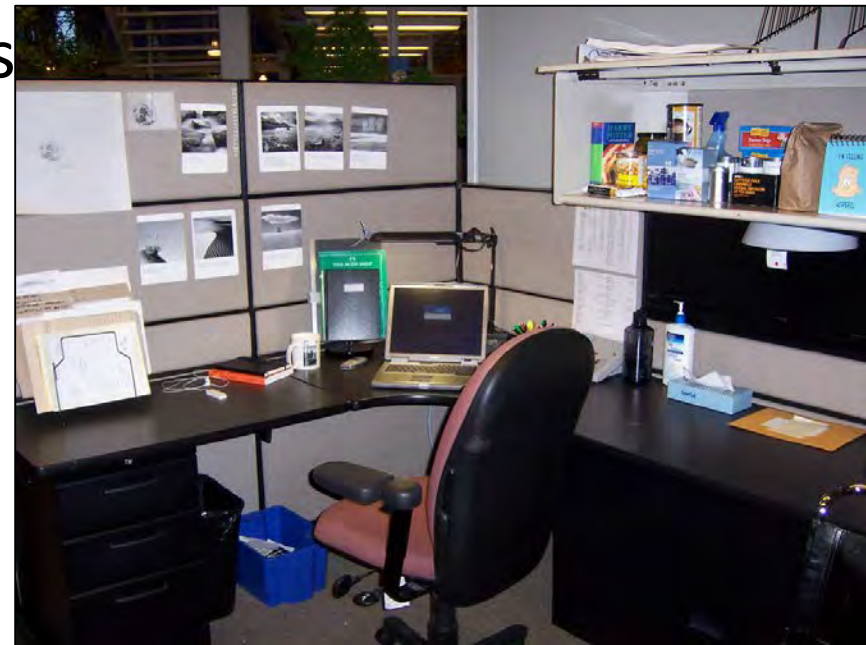


Common Law Duty: Child Sexual Exploitation

- Doe v. XYZ Corporation, 382 N.J. Super. 122 (Super. Ct. App. Div. 2005)
 - Employer Knew Employee Used Work Computer to View Pornography (Possibly Child Sexual Abuse Material)
 - Duty to Investigate & Take Prompt/Effective Action to Stop Because of Harm to Innocent Third Parties
 - Both Federal & State Crime to Possess or View Child Sexual Abuse Material

Monitoring Electronic Devices at Work

- No Legal Duty To Monitor without cause, 18 USC § 2258A(f)
- But, Employers *Should* Monitor to Prevent Equipment's Use for Crimes



"What's On My Desk?" by Virtual Eric is licensed under CC BY-NC-ND 2.0

PRACTICE TIPS: Equipment Policy

- Written Policy that All Employer-Issued Equipment
 - Remains the Employer's Property
 - Employees have No Privacy Rights re: Employer's Equipment
 - Employer has the Right to Access/Search Equipment at Any Time Without Notice
 - Automatic Policy Reminders
- Benefits
 - 1) Eliminates Privacy Violation Concerns
 - 2) Deters Bad Behavior

PRACTICE TIPS: Equipment Policy

- Proactive Measures
 - Block Offensive Websites
 - Establish Key Word Search Alerts Notifying Supervisors
 - Subscribe to Services that Blacklist Porn Sites
 - Conduct Periodic Audits of Employee Internet Use



Reporting SEC Violations

- Securities and Exchange Act of 1934
- Common Violations
 - Misrepresentation/Omission of Important Securities' Information
 - Manipulation of Securities' Market Price
 - Stealing Customers' Funds/Securities
 - Violating Broker-Dealers' Fair Treatment of Customers
 - Insider Trading
 - Selling Unregistered Securities
- Whistleblowers Protected. 15 USC § 78u-6; 17 CFR § 240.21F-2
 - **\$400 Million Dollars!**

Reporting SEC Violations

- No Express Rule Requiring Reporting Employee Misconduct
- But, Several Rules Suggest Reporting (Especially for Broker-Dealers) is Best Practice
- SEC Guidance: Obligation to Supervise Employees & Supervisors May Be Liable for Failure to do so



Reporting SEC Violations

- Practice tip:
- Benefits of Reporting Even When Obligation Ambiguous
- Many Examples of SEC Taking No Action, when Company Promptly Self Reports When Learns Employees Violated



Seaboard Report (2001)



Seaboard Report (2001)

- Controller Gisela de Leon-Meredith
 - 1995-2000: Overstated Assets & Understated Expenses
- 1999-2000: Internal Audit
 - Unusual Entries
- Confesses
- Hired Outside Law Firm
- Firings (Meredith & 2 Supervisors)

Seaboard Report (2001)

- Seaboard Discloses to Public & SEC
- Promises to Restate Financial Statements
- Pledged Complete Cooperation with SEC
 - Details of Internal Investigation
 - Without Privileges or Protections
- Strengthened Financial Reporting Processes
- SEC Takes **NO** Enforcement Action

Seaboard Report (2001)

- SEC Takes **NO** Enforcement Action Because:
 - 1) Self-Policing Prior to Misconduct's Discovery
 - Effective Compliance Procedures & Tone
 - 2) Self-Reporting of Misconduct when Discovered
 - Thorough Review
 - Prompt and Complete Disclosure
 - 3) Remediation
 - Firing & Disciplining Wrongdoers
 - Improving Internal Controls
 - Compensating Adversely Impacted
 - 4) Fully Cooperating with Authorities

Seaboard Report (2001)

- SEC's Other Criteria:
 - Nature of Misconduct
 - How Misconduct Arose
 - Where in Organization Misconduct Occurred
 - How Long Misconduct Lasted
 - Amount of Harm Inflicted Upon Investors/Other Constituencies
 - How Misconduct Detected & Who Uncovered Misconduct
 - Time from Discovery Until Effective Response Implemented
 - Steps Taken Upon Learning of Misconduct
 - Company's Process to Resolve Issues & Uncover Relevant Information & Thoroughness of Review
 - Promptness of Providing this Review & Sufficient Documentation of its Response to SEC Staff

Reporting SEC Violations

- **Benefits of Cooperating with SEC**



- 2012, SEC Charged 4 Credit Suisse for Fraudulently Inflating Price of \$3 Billion in Subprime Bonds
- Ignored Market Information of Sharp Decline in Subprime Bonds Under Their Control & Instead Priced These Bonds to Achieve Fictional Profits
- Directed Traders to Change Bond Prices to Hit Targets, Cover-Up Losses in Books & Send False Profitability Messages to Senior Management



- SEC's Director of Enforcement: "At precisely the moment investors and market participants were urgently seeking accurate information about financial institutions' exposure to the subprime market, the senior bankers falsely and selfishly inflated the value of more than \$3 billion in asset-backed securities in order to protect their bonuses and, in one case, protect a highly coveted promotion."
- **BUT**, Since Credit Suisse Immediately Reported to SEC, SEC Did Not Charge Credit Suisse with Any Crime or Violation

Akamai Technologies & Nortek

- Employees Bribed Chinese Officials for Preferential Treatment, Relaxed Oversight, or Reduced Duties, Taxes or Fees
- Bribes included: cash, gift cards, meals, travel & entertainment
- **BUT**, Companies Immediately Reported & SEC Announced Non-Prosecut Both Companies



Reporting SEC Violations

- On the other hand, not cooperating comes at a cost.



- Agfeed Industries – charged with Fraudulent Accounting Scheme Propped Up Stock Price by Inflating Revenue by \$239 Million with Fake Invoices for Sales of Hogs & Feed, Etc.
- Scheme Boosted Annual Revenue Between 71 & 103 % Over 3 ½ Years
- SEC Charged Employees Who Committed Fraud **AND**
- Charged A Company Executive & A Director (Audit Committee Chair) for Attempting to Avoid or Delay Disclosure Once They Learned of It

- SEC's Director of Enforcement:
“AgFeed’s accounting misdeeds started in China, and U.S. executives failed to properly investigate and disclose them to investors. This is a **cautionary tale** of what happens when an audit committee chair fails to perform his gatekeeper function in the face of **massive red flags.**”

Financial Industry Regulatory Authority

- FINRA Members Must Report ONLY Certain Violations to FINRA
- FINRA Rule 4530
 - Must report several issues including Violation of Securities/Insurance/Commodities/Financial/ Investment-related Laws, Rules, Regulations or Standard of Conduct
 - FAQ's Clarify:
 - Which Has or May Have Widespread or Potential Widespread Impact on Members/Customers/Markets **OR**
 - Significant monetary result on Members/Customers/Markets **OR**
 - Which Arises from Material Failure of Firm's Systems, Policies or Practices & Involves Numerous Customers, Multiple Errors or Significant Amounts of Money
 - Must Report Within 30 Days after firm has concluded or "reasonably should have concluded" that the violation occurred.

Violation of FINRA Rule 4530

- Sanctions for Failing to Report or Filing False, Misleading or Inaccurate Reports include
 - \$5,000 to \$146,000 Fines
 - Disgorgement of Any Gains
 - Suspension of Responsible Principal in All Supervisory Capacities for 10 – 30 Business Days
 - Firm's Membership Suspension Until Deficiencies Corrected
 - Suspension of the Responsible Principal for 2 Years
 - Bar the Principal in All Supervisory Capacities

Violation of FINRA Rule 4530

BUT Firm Can Receive Reduced Sanctions By:

- 1) Self-Reporting Violations with Detailed Account & Offering to Provide Additional Explanations, Documents & Witnesses; &
- 2) Taking Extraordinary Actions to Correct Deficiencies & Provide Customers with Remedies; &
- 3) Providing Substantial Assistance to FINRA Investigations



Wage & Hour Violation Reporting

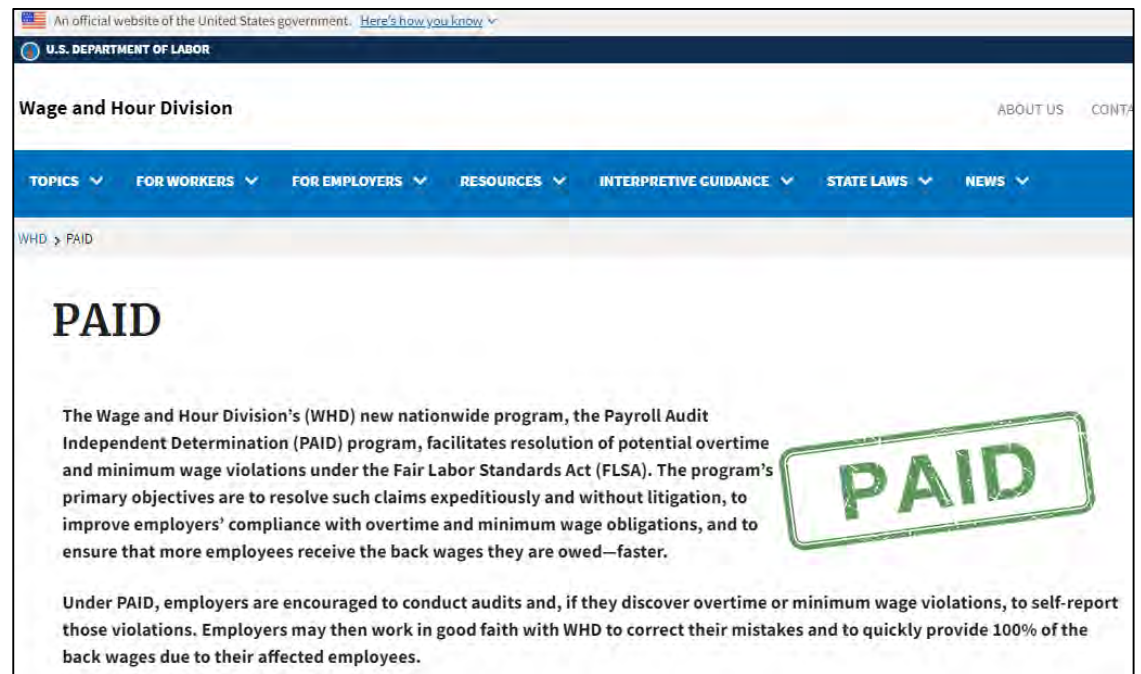
- Fair Labor Standards Act (FLSA), 29 USC section 203 et. seq.:
- Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than \$10,000, or to imprisonment for not more than 6 months or both.

Wage & Hour Violation Reporting

- Wrongdoing's Discovery Often Made Through Agency Investigators or Employee Whistleblowers Whom FLSA Protects from Retaliation
- But Sometimes Employers Discover Through Own Self-Audits or Other Means that Employee Has Willfully Violated FLSA
- What to do if discovered?

PAID Program

- The DOL's Payroll Audit Independent Determination (PAID program) Facilitates Resolution of Some Potential Overtime & Minimum Wage Violations Under FLSA



PAID Program Objectives

- 1) Resolve Claims Expeditiously & Without Litigation
- 2) Improve Employers' Compliance with Overtime & Minimum Wage Obligations
- 3) Ensure More Employees Get Back Wages Owed More Quickly



PAID Program

- Under the PAID Program, Employers Audit Their Compensation Practices for Potentially Non-Compliant Practices & If Employer Identifies Any Potential Claims It Wants to Resolve, Employer Must:
- Specifically Identify:
 - Potential Violations
 - Employees Affected
 - Timeframes for Each Affected Employee
- Calculate the Back Wages the Employer Believes Owed to Each Employee

PAID program

- Should Employers Participate in PAID program?
- Participation May Eliminate Risk of Double Damages & Costly Litigation – **BUT**
- Participation May Subject Employer to a Broader Investigation than Anticipated and/or Follow-Up Investigations & Does Not Cover State Investigations



Workplace Violence

OSHA's General Duty Clause and Guidelines

Section 5(a)(1) of OSAH (General Duty Clause)

Requires Employers to Provide Employees with a Place of Employment:

“free from recognized hazards that are causing or are likely to cause death or serious physical harm”



OSHA

- Nonetheless, OSHA Does Not Appear to Require Employers to Report Workplace Violence Incidents to Law Enforcement



Best Practices: Workplace Violence

- Assign Responsibility & Authority for Aspects of Workplace Violence Prevention Program to Ensure All Managers & Supervisors Know Their Obligations
- Maintain System of Accountability for Managers, Supervisors & Workers
- Establish Policies to Ensure Reporting, Recording & Monitoring of Incidents & Near Misses and that No Reprisals are Made Against Anyone Who Does So in Good Faith
- Determine to Notify, Within the Organization & Outside (e.g., Authorities), When There is an Incident

Best Practices: Workplace Violence

- Understand which Incidents Must Be Reported & What Information Must Be Included
- Develop Standard Response Action Plan for Violent Situations, Including the Availability of Assistance, Alarm System Response & Communication Procedures
- Employers Should Evaluate Safety & Security Measures:
 - Top Management Should Regularly Review the Program and, with Each Incident, Evaluate Its Success
 - Responsible Parties (Including Managers, Supervisors & Employees) Should Reevaluate Policies & Procedures on Regular Basis to Identify Deficiencies & Correct

OSHA

- If OSHA Inspector Learns of Workplace Violence, They Will Likely Report Incident to the Relevant Authorities. See, e.g., [OSHA Directive No. 01-02-058](#)
- Employers Should Self-Report These Incidents to the Authorities When Employers Learns of Them, Rather than Being Forced to Explain Their Failure to Do So After the Fact



State General Criminal Reporting Requirements

- Some States Require Corporations or Individuals to Report Crimes
- Colorado:

“[i]t is the duty of every corporation or person who has reasonable grounds to believe that a crime has been committed to report promptly the suspected crime to law enforcement authorities.” Colo. Rev. Stat. § 18-8-115.
- Texas:

a “person commits an offense if the person observes the commission of a felony under circumstances in which a reasonable person would believe that an offense had been committed in which serious bodily injury or death may have resulted.” Tex. Penal Code § 38.171—Failure to Report Felony.

New York

New York: No General Criminal Reporting Requirement

But, State Statutes Require Reporting in Limited Circumstances



Potential Liability for Failure to Report and “Willful Blindness”

- “Willful Blindness” Doctrine May Impose Obligation to Report Whenever Reasonable Person Would Suspect Improper Conduct & Chooses to Deliberately Remain Ignorant to the Facts
- Courts have Imposed the Willful Blindness Rule in Both Criminal & Civil Contexts



Willful Blindness: Criminal

- “Defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances.”
- United States v. Marsh, 820 F. Supp. 2d 320, 335 (E.D.N.Y. 2011) (quoting Global-Tech Appliances, Inc. v. SEB S.A., 131 S. Ct. 2060, 2070 (2011)).



Willful Blindness - Civil

- A person acts with willful blindness when he or she subjectively believed that there was a high probability that a particular fact exists and took deliberate actions to avoid learning of that fact. On Site Energy Co. v. MTU, 2013 U.S. Dist. LEXIS 109009, at *14 (E.D.N.Y. Aug. 2, 2013)
- “To be willfully blind, a person must suspect wrongdoing and deliberately fail to investigate.” Tiffany Inc. v. eBay Inc., 600 F.3d 93, 109 (2d Cir. 2010)

Minimizing Risk and Liability through Internal Compliance Programs and Reporting

- Develop Robust Compliance Program to Prevent & Detect Violations of Regulations & Laws
 - Even for Small Companies
- Assess & Address the Company's Risks
- Designate Compliance Officer & Compliance Committee
- Implement Written Policies, Procedures & Standards of Conduct
 - Employee Handbook
- Conduct Training & Educate Company's Policies, Procedures & Standards of Conduct

Minimizing Risk and Liability through Internal Compliance Programs and Reporting

- Develop Means to Report Violations to Compliance Officer or Committee
- Have Clear Policy Precluding Retaliation for Reporting
- Conduct Internal Monitoring & Auditing of Compliance with Policies, Procedures & Standards of Conduct
- Enforce Policies, Procedures & Standards of Conduct with Well-Publicized Disciplinary Guidelines
- Provide for Due Process Protections for Suspected Wrongdoers
 - Provides Employer with Some Protection If the Reported Employee Chooses to Object to Their Treatment
- Respond Promptly to Detected Offenses & Take Corrective Action

Employee Codes of Conduct

Employee Code of Conduct
Important:

- 1) Increases Likelihood of Proper Employee Conduct
- 2) Puts Employee On Notice, Reduces Reported Employee's Claim
- 3) If Misconduct Occurs, Employer Can Demonstrate Efforts Taken to Prevent It



Guidance for In-House and Outside Counsel: Reporting to Authorities

- Be Fortright & Honest
- Preserve All Documents (Written & Electronic)
- Have Attorney Contact Investigating Agency to Gage Investigation's Scope
- When Necessary, Hire Outside Counsel with Experience Dealing with Investigation Agency/ies



Decreasing Risk of Reported Employee's Claims

- Defamation & Discrimination Claims Risk, So ...
- Conduct Thorough Investigation
 - In-House / Outside Counsel
 - Experts (*e.g.* an accounting firm)
- Immediately Preserve Documents
- Maintain Paper Trail & Prepare Investigation Memo

ANY
QUESTIONS
?

Contact Us

- www.petersbrovner.com
- 917 639-3270
- Lbrovner@petersbrovner.com
- Mpeters@petersbrovner.com
- While this Powerpoint sets out some basic rules regarding the duty to report, this is a fact intensive—and evolving— issue and, before taking any action, employers should consult with an attorney and review the matter in light of the specific facts at hand. This Powerpoint is not intended to convey legal advice.

How to Get Your Case in Front of the Ohio Supreme Court

Justice Melody J. Stewart | Supreme Court of Ohio

Overview of Ohio Supreme Court Jurisdiction and Authority

- ▶ Established by, and authority derived from, **Article IV of the Ohio Constitution**.
- ▶ Responsible for:
 - ▶ Appellate Review
 - ▶ Original Jurisdiction
 - ▶ Regulation, Oversight and Superintendence of the bench and bar - (admission to practice, disciplinary action)
 - ▶ Promulgation of Rules of practice and procedure

<https://www.supremecourt.ohio.gov/SCO/jurisdiction/default.asp>

Appellate Review

► Five categories of cases the Court hears on appeal:

1. **Appeals of right** in which the Court must hear the case. These cases include:

- (a) death penalty cases
- (b) cases originating in the court of appeals such as extraordinary writs
- (c) election-contest cases under R.C. 3515.15
- (d) appeals from orders that deny applications for DNA testing under R.C. 2953.73 for a person sentenced to death.

2. **Certified-conflict cases** in which the Supreme Court resolves a conflict between or among the district appellate courts on a question of law that the court of appeals has certified.

Appellate Review (cont'd)

3. Certified questions of law from federal courts.
4. Appeals from certain administrative agencies. For example:
 - the Board of Tax Appeals,
 - the Public Utilities Commission,
 - Power Siting Board
5. **Jurisdictional appeals** (formerly called discretionary appeals) - when the court exercises its discretion to decide whether to hear the case. These generally include:
 - (a) cases involving a substantial constitutional question
 - (b) cases involving felony convictions
 - (c) cases involving a question of public or great general interest.

Appeals as of Right

- ▶ The Supreme Court has mandatory appellate jurisdiction over cases originating in the court of appeals. These cases include
 - ▶ Extraordinary writs filed in the court of appeals – (ex. mandamus, procedendo, habeas corpus, quo warranto).
 - ▶ Contempt proceedings instituted in the court of appeals or an issue arising in the court of appeals after judgment in the Supreme Court.
 - ▶ Death penalty cases including any other issues arising from related charges at the same trial and appellate decisions that decide a capital defendant's motion to reopen an appeal due to alleged ineffective assistance of counsel. (Direct appeals now come right to the Sup.Ct.)
 - ▶ An order that denies a motion for DNA testing filed by a person under a sentence of death. (Note, however, that other issues raised in postconviction proceedings in capital cases are generally appealable to the court of appeals).



Certified Questions of Law from Appellate Courts

- ▶ The Ohio Constitution requires a court of appeals to certify the record of a case to the Supreme Court if it finds that its decision in the case conflicts with that of another court of appeals on the same question.
- ▶ An actual conflict of law must exist, *Eastwood v. Capel*, 126 N.E.2d 343, 346 (Ohio 8th Dist.1955) and a conflict does not exist when “the point upon which conflict exists had no arguable effect upon the judgment of the certifying court.” *Pincelli v. Ohio Bridge Corp.*, 5 Ohio St.2d 41, 44, 213 N.E.2d 356(1966).
- ▶ The Supreme Court may sua sponte dismiss a certified question of law as “improvidently certified” if so warranted. See *Fondessy v. Simon*, 142 Ohio St.3d 147, 2014-Ohio-4638, 28 N.E.3d 1202.

Certified Questions of Law from Federal Courts

- ▶ Under the Rules of Practice, the Supreme Court may answer a question of law certified to it by a court of the United States. S.Ct. Prac. R. 9.01(A). This rule is invoked if the certifying court, in a proceeding before it, issues a certification order finding there is a question of Ohio law that may determine the proceeding and for which there is no controlling precedent in the decisions of the Ohio Supreme Court.
- ▶ The Supreme Court applies the rule to ensure that federal courts will properly state Ohio law. *Scott v. Bank One Trust Co., N.A.*, 62 Ohio St. 3d 39, 42, 577 N.E.2d 1077 (1991).
- ▶ It is not mandatory for a federal court to certify a question of law, and the federal court should only certify novel or unsettled questions of state law or where there are conflicting federal interpretations of an important state law question which would otherwise evade state court review. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 77, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997).

Appeals from Administrative Agencies

- ▶ S.Ct. Prac R. 5.05(A) lists three “administrative agencies”: the Board of Tax Appeals, the Public Utilities Commission, and the Power Siting Board.
- ▶ Still appeals from other agencies can be made directly to the Supreme Court if authorized by statute. See Article IV, Section 2(B)(2)(d) of the Ohio Constitution (stating that the Ohio Supreme Court has “[s]uch revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law[.]”)
- ▶ Certain types of appeals from the Bureau of Workers’ Compensation are also permitted.

Jurisdictional Appeals

- ▶ The Supreme Court **may grant leave to appeal** from the courts of appeals and may direct an appellate to certify the record of an appeal if it presents:
 - ▶ a substantial constitutional or statutory question,
 - ▶ Involves a felony, or
 - ▶ Is a case of public or great general interest
- ▶ Error correction is not a compelling reason to justify a jurisdictional appeal.
- ▶ One or more propositions of law are set forth in a memorandum in support of jurisdiction filed with the court.

Original Actions

- ▶ The Supreme Court has original jurisdiction to issue extraordinary writs.
 - ▶ Mandamus - to order a public official to perform a required act (but order cannot control outcome of required act)
 - ▶ Prohibition - to prohibit a lower court from performing certain judicial functions
 - ▶ Procedendo - to order a lower court to proceed to judgment
 - ▶ Quo Warranto - to prevent usurpation, misuse, or abuse of a public or corporate office by a person or a corporate entity
 - ▶ Habeas Corpus - for alleged wrongful imprisonment for various reasons

Regulation and Oversight

- ▶ Admission to Practice - Rules for the Government of the Bar
 - ▶ Bar Examination
 - ▶ Admission Without Examination
 - ▶ Admission Pro Hac Vice
 - ▶ Unauthorized Practice of Law
 - ▶ Specialist Certification
 - ▶ CLE Requirements
- ▶ Disciplinary Oversight of Lawyers and Judicial Officers
 - ▶ Rules for the Government of the Judiciary
 - ▶ Rules of Professional Conduct
 - ▶ Code of Judicial Conduct
 - ▶ Rules of Professional Conduct (Replaced the Code of Professional Conduct)

Practice and Procedure Rules

- ▶ The Court prescribes rules governing practice and procedure in all Ohio courts and exercises **general superintendence** over the courts. (Ohio does not have unified courts with an all-encompassing court system that is centrally governed. Ohio courts are separately run).
 - ▶ Rules of Practice and Procedure
 - ▶ Rules of Appellate Procedure
 - ▶ Rules of Civil Procedure
 - ▶ Rules of Criminal Procedure
 - ▶ Rules of Evidence
 - ▶ Rules of Juvenile Procedure
 - ▶ Traffic Rules
 - ▶ Rules of Superintendence for the Courts of Ohio
 - ▶ Supreme Court Rules of Practice
- ▶ <https://www.supremecourt.ohio.gov/LegalResources/Rules/default.asp>

QUESTIONS?

Jurisdictional Appeals and Propositions of Law

- ▶ What constitutes a “substantial” constitutional question or a case of “public or great general interest”?
- ▶ The Supreme Court is more inclined to accept cases
 - ▶ In which appellate courts have differed on how to address an issue even if the end result does not involve an actual conflict of law.
 - ▶ When an appellate court asks the Supreme Court to provide guidance on an issue
 - ▶ When a legal principle has caused unintended results
 - ▶ When an appellate court decision would likely have a wide-reaching implications or would affect many people.
- ▶ Appellants must describe the important legal question to be addressed in a **proposition of law**. A proposition of law:
 - ▶ Is a statement incorporating the dispositive legal issue in a way that also states a holding
 - ▶ Should be a relatively simple statement of the law that the Court could use as a holding in the decision
 - ▶ Should not be argumentative nor should it include facts too specific to the case.

Jurisdictional Appeals and Propositions of Law (cont'd)

- Example - *Brook Park v. Rodojev*, 2020-Ohio-3253

Proposition of Law

Whether the results of any speed measuring device, using either radar or laser technology, [are] admissible without expert testimony establishing, or the taking of judicial notice of, the scientific reliability of the principles underlying that technology.

The Supreme Court Holding

We hold that the results of a speed-measuring device using either radar or laser technology are admissible in court without expert testimony establishing, or the court taking judicial notice of, the reliability of the scientific principles underlying that technology.

Jurisdictional Appeals and Propositions of Law (cont'd)

- ▶ Appellate counsel should make sure that the case he or she seeks to appeal is “clean” (i.e. no outstanding motions that could prevent a full judgment or that might moot the legal issue before the Court).
- ▶ Appellate counsel should also make sure that there is a record of the proceeding at issue.
- ▶ The decision on whether a case is accepted is announced in the court’s weekly announcements.
- ▶ Be sure to keep a more global or universal perspective when formulating propositions of law - being cognizant of not simply arguing for error correction.

Jurisdictional Appeals and Propositions of Law (cont'd)

► Examples of Jurisdictional Appeals Accepted

- Issue of public or general interest involving the exercise of a constitutional right

No. 19-0544, *State v. Weber* - defendant was convicted of violating a statute that prohibited having a firearm while intoxicated. He claims that because he was in his home and the weapon was unloaded, the statute violates his Second Amendment right to bear arms.

- A case with far reaching impact

A.J.R. v. Lute, Slip Opinion No. 2020-Ohio-5168, the question was whether a teacher and school officials could be held liable as acting recklessly on reports that a kindergartener was being bullied, when that kindergartener was injured by another student.

Case Examples (cont'd)

- ▶ In *Athens v. McClain*, 2020-Ohio-5146, a group of cities argued that the General Assembly violated their constitutional home-rule authority by enacting laws that centralized the collection and administration of net-profit taxes with the state and allowed the state to retain a percentage of the collected tax as an administrative fee.
- ▶ In No. 19-1410, *State v. Chapman* a person with eleven children who had been found guilty of criminal non-support and ordered to make attempts to refrain from fathering any more children as a condition of probation argued that he had been denied his fundamental right to procreate.

Case Examples (cont'd)

- ▶ *Lunsford v. Sterilite of Ohio, L.L.C.*, 2020-Ohio-4193 - employees brought an invasion of privacy claim on grounds that they had been forced to undergo drug testing by requiring them to produce a urine specimen while an employer's representative directly viewed the employee providing the sample.
- ▶ *Phoenix Lighting Group, L.L.C. v. Genlyte Thomas Group, L.L.C.*, 160 Ohio St.3d 32, 2020-Ohio-1056 - the issue raised was whether the court of appeals erred by affirming nearly \$4 million in attorney fees for successfully prosecuting a civil action for tortious interference with business relationships, tortious interference with contractual relationships, misappropriation of trade secrets, unfair competition, civil conspiracy.

Case Examples (cont'd)

- ▶ *Sherman v. Ohio Pub. Emps. Retirement Sys.*, Slip Opinion No. 2020-Ohio-4960 -a class action case that involved whether the Ohio Public Employees Retirement System (OPERS) violated the equal protection clause by reducing the subsidy given to retirees for health benefits when a retiree is reemployed by a public employer that is a member of the OPERS network.
- ▶ No. 19-1103, *State v. Kinney* - whether a statute forbidding appellate review of sentences for aggravated murder violates the Cruel and Unusual Punishment clauses of the United States and Ohio Constitutions.

QUESTIONS?

Filing and Other Technical Matters

Filing an Appeal

- ▶ The documents that must be filed to appeal a decision of the court of appeals depends on the type of appeal you are filing.
- ▶ To perfect a jurisdictional appeal, you must file a notice of appeal and a memorandum in support of jurisdiction (misj). A copy of the court of appeals opinion and judgment entry being appealed must accompany your memorandum.
- ▶ To perfect an appeal of right, you must file a notice of appeal and a copy of the judgment entry being appealed must accompany your notice of appeal. A memorandum in support of jurisdiction is not required in an appeal of right.

Filing and Other Technical Matters (cont'd)

▶ Filing a Jurisdictional Appeal to the Ohio Supreme Court

- ▶ A notice of appeal and a memorandum in support of jurisdiction are all that is required — no separate motion is needed.
- ▶ The notice of appeal must identify
 - ▶ The name of the court of appeals whose judgment is being appealed;
 - ▶ The case name and number assigned to the case by the court of appeals;
 - ▶ The date of the entry of the judgment being appealed; and
 - ▶ A statement that one or more of the following are applicable: That the case
 - ▶ raises a substantial constitutional question;
 - ▶ involves a felony;
 - ▶ is one of public or great general interest;
 - ▶ involves termination of parental rights or adoption of a minor child, or both;
 - ▶ is an appeal of a court of appeals' determination under App.R. 26(B);
 - ▶ involves death-penalty postconviction proceedings.

Filing and Other Technical Matters (cont'd)

Memorandum in Support of Jurisdiction (MISJ) Requirements

► 1. COVER PAGE

This should be prepared the same way as the cover page for your notice of appeal, except that it should be titled “Memorandum in Support of Jurisdiction.”

► 2. TABLE OF CONTENTS

The table of contents should list the propositions of law that form the basis for your appeal.

► 3. BODY

The body of your memorandum in support of jurisdiction **must be no more than 15 pages**, not including the cover page, the table of contents, signature, certificate of service, and attachments. The body of the memorandum must contain the following:

- The history of the case
- Your arguments in support of your propositions of law and relevant authority

Filing and Other Technical Matters (cont'd)

► 4. SIGNATURE

Your memorandum in support of jurisdiction must include your signature. Your signature can be included at the end of the 15-page body of your memorandum or it can be alone on a 16th page.

► 5. CERTIFICATE OF SERVICE

A certificate of service, or statement, indicating that you provided a copy of the document to the attorney for the other party in the case. If the other party is not represented by an attorney, you should provide a copy directly to the party.

► 6. ATTACHMENTS

The memorandum in support of jurisdiction must contain the following attachments:

- a. A date-stamped copy of the court of appeals opinion being appealed
 - b. A date-stamped copy of the court of appeals judgment entry being appealed.
- Other court decisions issued in the case being appealed may also be attached.

Filing and Other Technical Matters (cont'd)

► 7. PROHIBITED ATTACHMENTS

The following items are prohibited from being attached or filed:

- a. Affidavits
- b. Newspaper articles
- c. Documents filed in the trial court or court of appeals
- d. Other evidence.

Filing and Other Technical Matters (cont'd)

Other Requirements

- ▶ At least 12-point type
- ▶ Specified fonts to be used
- ▶ Type of paper that should be used
- ▶ Margin justifications, spacing, citation form
- ▶ Filing fee
- ▶ Deadlines - No later than 45 days after the date of entry of the judgment being appealed
- ▶ Filing time deadline - 5:00 p.m. on business days for paper filing; 11:59 p.m. on due date for e-filing

Some Common Mistakes Made When Filing Documents in the Supreme Court

- ▶ Submitting documents for filing after the filing deadline
- ▶ Failing to submit the filing fee with a notice of appeal, a notice of cross-appeal, or a notice of certified conflict
- ▶ When filing in paper, neglecting to submit the required number of copies of a document, including, in an original action, an extra copy of the complaint for each respondent named in the complaint
- ▶ Exceeding the page limitation on a jurisdictional memorandum or merit brief
- ▶ Failing to attach a copy of the decision being appealed to a memorandum in support of jurisdiction or an appellant's brief
- ▶ Attaching the notice of appeal to the front of a memorandum in support of jurisdiction

Common Mistakes (cont'd)

- ▶ Including prohibited materials in the appendix of a memorandum in support of jurisdiction - *i.e.*, anything other than the court of appeals opinion and judgment entry being appealed, and other opinions and judgment entries issued in the case that are relevant to the appeal
- ▶ In an appeal of right, submitting a memorandum in support of jurisdiction with the notice of appeal
- ▶ Omitting the Supreme Court case number from a document's cover page
- ▶ Failing to bind copies of documents securely
- ▶ Submitting documents with plastic or colored covers, tabs or inserts
- ▶ Using margins smaller than one inch, a font smaller than 12 points, or single-spaced or condensed type

Common Mistakes (cont'd)

- ▶ Failing to include a certificate of service on a document tendered for filing, or forgetting to sign or date the certificate of service
- ▶ Neglecting to sign a document
- ▶ Neglecting to designate all counsel of record when two or more attorneys represent a party
- ▶ Submitting an affidavit with an insufficient notary's jurat
- ▶ Failing to put footnotes in 12-point font
- ▶ Using double-sided and/or condensed text attachments
- ▶ Omitting party information from a document's cover

Some Final Thoughts

- ▶ Use the Ohio Supreme Court writing manual, with particular attention to the guide for citations and style. The writing manual includes sample briefs.
- ▶ Appellate counsel should also refer to the Supreme Court's guide to filing in the Supreme Court of Ohio.
<https://www.supremecourt.ohio.gov/publications/filingguide.pdf>.

This is a very useful guide, with forms, that sets forth in detail the steps required to perfect an appeal.

- ▶ Attorneys who have not practiced before the Supreme Court should consider retaining or consulting with competent counsel who have practiced in the court.
- ▶ Review case filings and oral arguments on cases that have issues similar to yours or just to get a feel for what has been successful and what to expect before you get there.

Thank You!