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Restructuring Services, Deloitte

Malek brings with him over 20 years of experience in distress entities in a wide range of industries such as petrochemicals, manufacturing, biodiesel, public transport, highway, marine shipping and power industries. Malek specialises in insolvency and his primary focus areas are in restructuring, business reviews, NPL portfolio reviews, liquidation and receiverships



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Director  
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Yang Ping leads the Deloitte Forensic practice in Malaysia as well as Forensic Digital Solutions across Southeast Asia. He is a forensic accountant with over 20 years of experience advising clients on assurance, risk and compliance matters, with international experience in the UK, US, Russia, China, India and across Southeast Asia.



**Justin Wee Kim Fang - Guest Speaker**  
Partner  
Justin Wee Advocates & Solicitors

Justin is a civil litigator who has been actively representing clients in heavily contested litigation for the past 12 years. He has been engaged regularly to represent Companies in taking action against Directors in breach of their fiduciary duties. Justin was one of the contributing editors to the maiden edition of the Malaysian White Book. Since then, he is regularly invited to be a contributing editor to the prestigious Malaysian White Book publication.

Breach of fiduciary duty in a downturn | Monday, 27 April 2020, 4.30 p.m.



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**JUSTIN WEE**  
ADVOCATES & SOLICITORS

# **DIRECTOR'S FIDUCIARY DUTIES**

27 April 2020

BY JUSTIN WEE KIM FANG  
MESSRS JUSTIN WEE



**BOARD OF DIRECTORS**

# SEPARATE LEGAL ENTITY

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- ❖ A company is a legal person.
- ❖ Incorporation under the CA 2016 brings a company to life.
- ❖ A company is therefore a **separate legal entity** from its members – **s.20 CA 2016**.
- ❖ Each company within a group of companies is also separate from one another.



# COMPANY – ASSETS & LIABILITIES

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- ❖ A company may own its own assets (real estate; vehicles; etc).
- ❖ These assets **do not** belong to the company directors and/or members  
– **Law Kam Loy & Anor v. Boltex Sdn Bhd and others**
- ❖ The directors are instead constructive trustees of the company's assets  
– **In re Lands Allotment Company**
- ❖ On the flip side, the company's liabilities are also not the members' liabilities – **Fairview Schools Bhd v. Indrani a/p Rajaratnam (No.2)**



# FIDUCIARIES

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- ❖ A FIDUCIARY is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.
- ❖ A director is a steward of the Company.
- ❖ The definition of a “*director*” includes the CEO; CFO; COO or any other person primarily responsible for the management of the company – **s. 210 of the CA 2016.**
- ❖ A director owes fiduciary duties to the Company.



# DIRECTORS' FIDUCIARY DUTIES TO THE COMPANY

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- ❖ Directors owe fiduciary duties to the company.
- ❖ This means to prioritise company interests over self-interests in the event of conflict.
- ❖ A director must at all times exercise his powers in accordance with the CA 2016, for a proper purpose and in good faith in the best interests of the company – **s.213 (1) CA 2016**;



# DIRECTORS' FIDUCIARY DUTIES TO THE COMPANY (contd.)

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- ❖ A director of a company shall exercise reasonable, care skill and diligence with –
  - a) The knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities;
  - b) Any additional knowledge, skill and experience which the director in fact has.



# GOOD FAITH OR LACK THEREOF?

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- ❖ Court will *prima facie* presume that directors have acted *bona fide* in the company's interests;
- ❖ The **minimum requirement** – directors must be informed of the subject matter under consideration; exercise independent judgment and discretion.





# GOOD FAITH OR LACK THEREOF? (contd.)

❖ However, the presumption may be rebutted where there are evidences of:



## A. Conflict of Interest

Failure to disclose particular business transactions with a family member; disposal of assets to a family member/spouse at a favourable price etc



## B. Absence or Lack of Independent Judgement

Blindly adopting the judgement of advisors without due consideration



## C. Clear Acts of Dishonesty

Selling company secrets (formula; recipe; etc) or disclosure of trade secrets to a competitor; theft; etc.



# EXAMPLES OF BREACH OF FIDUCIARY DUTIES

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## ❖ TAZ LOGISTICS SDN BHD v TAZ METALS SDN BHD & ORS

1. Diversion of employees : Taz Logistics → Taz Metal (“**TM**”);
2. Diversion of business: Taz Logistics → TM;
3. Diversion of business premise: Taz Logistics took over TM’s premises;
4. Confusion over new name: TM name chose to confuse customers due to the word “TAZ”.

**VERDICT:** Directors found to have breached fiduciary duties & liable to account to Taz Logistics for the losses suffered. Also made to disgorge secret profits made through TM.



# EXAMPLES OF BREACH OF FIDUCIARY DUTIES (contd.)

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## ❖ ACUMEN SCIENTIFIC S/B v YEOW LIANG MING

1. Deft disclosed and made use of Acumen's confidential information;
2. Used company assets such as laptop to create webpage for new employers;
3. Deft registered website of competitor and was the administrator whilst being under employment.

**VERDICT:** Deft found to be in breach of fiduciary duties and damages to be assessed.



# WHAT CAN THE COMPANY DO UPON DISCOVERY OF BREACH OF FIDUCIARY DUTIES?

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- ❖ A civil suit against the directors for breach of fiduciary duties.
- ❖ If elements of conspiracy are proven, civil suit against directors and co-conspirators.
- ❖ A complaint to CCM that an offence has been committed under **s. 213 CA 2016**. Penalty: imprisonment for a term not exceeding 5 years or to a fine not exceeding RM 3 million or both.



# RELIEFS THE COMPANY CAN GET

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- ❖ Damages for monetary losses.
- ❖ Potential account for profits, if breach of trust is proven.
- ❖ Potential recovery of property, if breach of trust is proven.





**JUSTIN WEE**  
ADVOCATES & SOLICITORS

# THANK YOU

**Justin Wee**

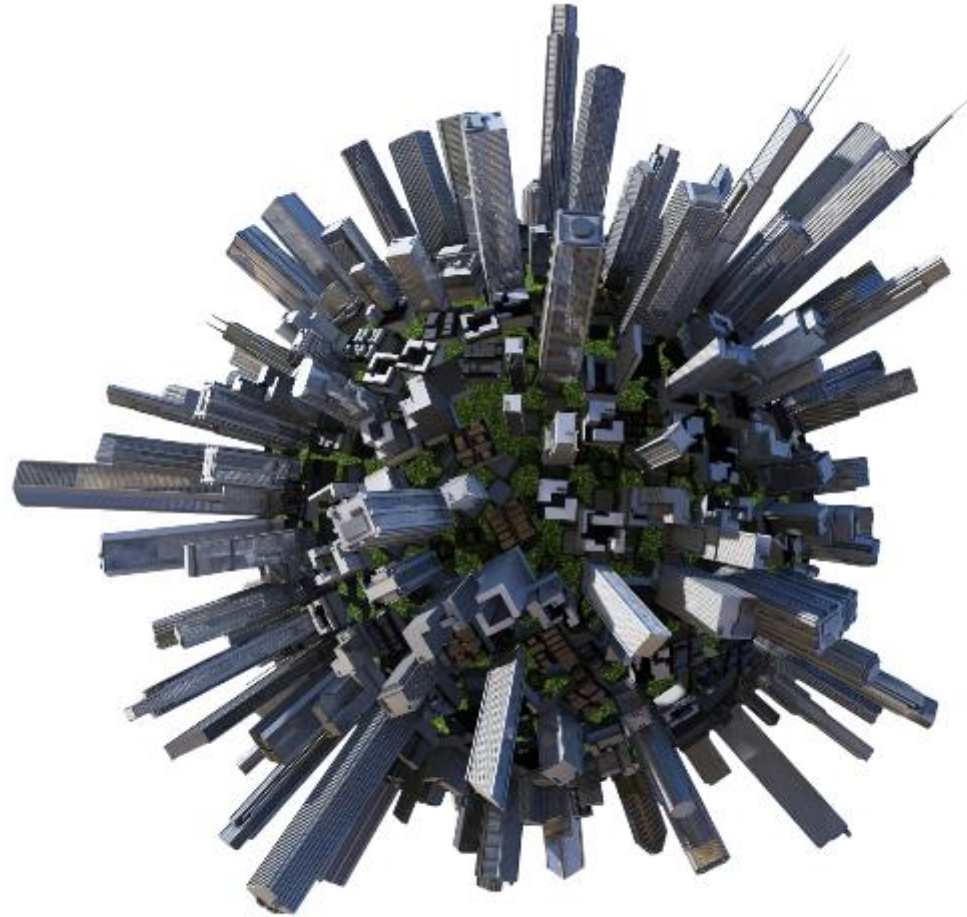
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Possible investigation in an insolvency  
process

Abdul Malek Mohamed Said



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## Avenues available to the liquidator

**1**

Insolvent trading

**2**

Fraudulent trading

**3**

Undue preference

**4**

Liquidator's right to recover in respect to certain sales



# Insolvent trading

Section 539(3) of the Companies Act 2016



Insolvent trading is the act of continuing the day-to-day operations of a business when the company is no longer able to pay its debts.



A company becomes insolvent when its total liability exceeds its total asset position.



It is an offence for an insolvent company to enter into contracts they do not have the means to fulfill.



On conviction, the officer will be liable to imprisonment for a term not exceeding 5 years or to a fine not exceeding RM500,000, or to both.



# Fraudulent trading



## Who can be convicted?

Every person who was knowingly a party to carrying on the business with the intent to defraud the creditors of the company or creditors of any other persons or for any fraudulent purposes.



## Who can apply?

The application to Court can be made by the Liquidator, any creditor or contributory of the company.



## Penalty

A person on conviction can be liable to imprisonment for a term not exceeding 10 years or a fine of RM1 million or both.

The party may also be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.



## Liquidator may give evidence

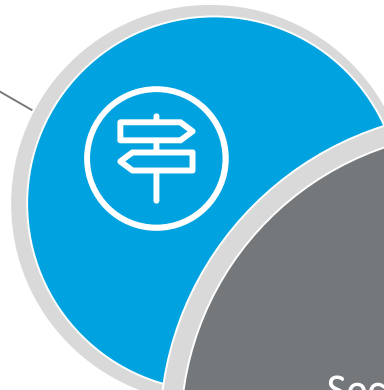
On hearing of the Court application, the Liquidator may give evidence or call witness himself.

**Section 540 of  
the Companies  
Act 2016**

# Undue preference

## What it covers?

Generally, payment or transfer of a company's assets in favour of any creditor or any person in trust for any creditor – giving such creditor preference over other creditors – shall be deemed fraudulent and void.



## Exception

Transactions in favour of any person dealing with the company for valuable consideration without any actual notice of contravention.

## Section 528 of the Companies Act 2016

## Coverage period

Transactions occurring **six months** prior to the presentation of winding up petition or voluntary winding up resolution.



**Undue preference is also applicable to companies under Judicial Management – Section 426 of the Companies Act 2016**

# Liquidator's right to recover in respect of certain sales

## Section 530 of the Companies Act 2016

Relates to Liquidator's right to recover in the following situations:-

- a) Property, business or undertaking acquired by the company for cash consideration **exceeding** the value of the property, business or undertaking **at the time of acquisition**.
- b) Property, business or undertaking sold by the company for a cash consideration **below** the value of the property, business or undertaking **at the time of sale**.

## From whom?

- a) A person who was at the time of sale, a director of the company or a person connected with a director; or
- b) A company of which, at the time of the sale, a person was a director who was also a director of the first-mentioned company or a person connected with a director

## Coverage period

Relates to transactions made within a period of **two years** before:-

- The presentation of a winding up petition against the company; or
- Passing of the resolution to wind up the company.

# Issues to consider

# Issues to consider

01

## Objective

- How much is at stake? What do we want to achieve? Who are we going after – consider net worth and financial standing?

02

## Documentation

- Information and/or documents available as evidence to initiate an action against the relevant parties.
- Any possible forms of assistance i.e. leads, correspondences, etc. from creditors of the company may be useful to the Liquidator – to enable the Liquidator to make a targeted investigation vs. searching for a needle in the haystack.

03

## Co-operation from stakeholders

- Includes directors, management, company secretary, employees / former employees, auditors, consultants, customers, creditors, authorities and any parties which had prior dealings with the company (e.g. parties involved in the sale of property).
- If more documents / information are necessary to complete investigation but not forthcoming, the Liquidator may need to call upon public examination of parties pursuant to Section 503 of the Companies Act 2016.

04

## Funding

- Generally includes the winding up expenses, Liquidator's cost to carry out an investigation, legal fees in the event of recovery action, costs necessary to obtain supporting documents (where company has insufficient funds) i.e. bank statements, cheque imaging, etc.

05

## Duration

- Consider the time required to conduct an investigation and take recovery action i.e. best case vs. worst case.

# What's next?

# What's next?

## Typical actions involved

### 1. Investigate

Review the books and records, interview parties, build a strong case and come up with a report.



### 2. Hire a forensic expert

Where necessary, Liquidator to hire a forensic expert to carry out the investigation using proper methodology and expertise tools.



**3. Work with a lawyer** Work on the drawing board including firming up strategy on how to initiate the recovery action.



### 4. Initiate legal / recovery action

The objective is to claw back assets that were dissipated unlawfully to increase the pool of assets for distribution to the creditors.







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**Deloitte.**

Forensic approach in dealing with fraud

Oo Yang Ping



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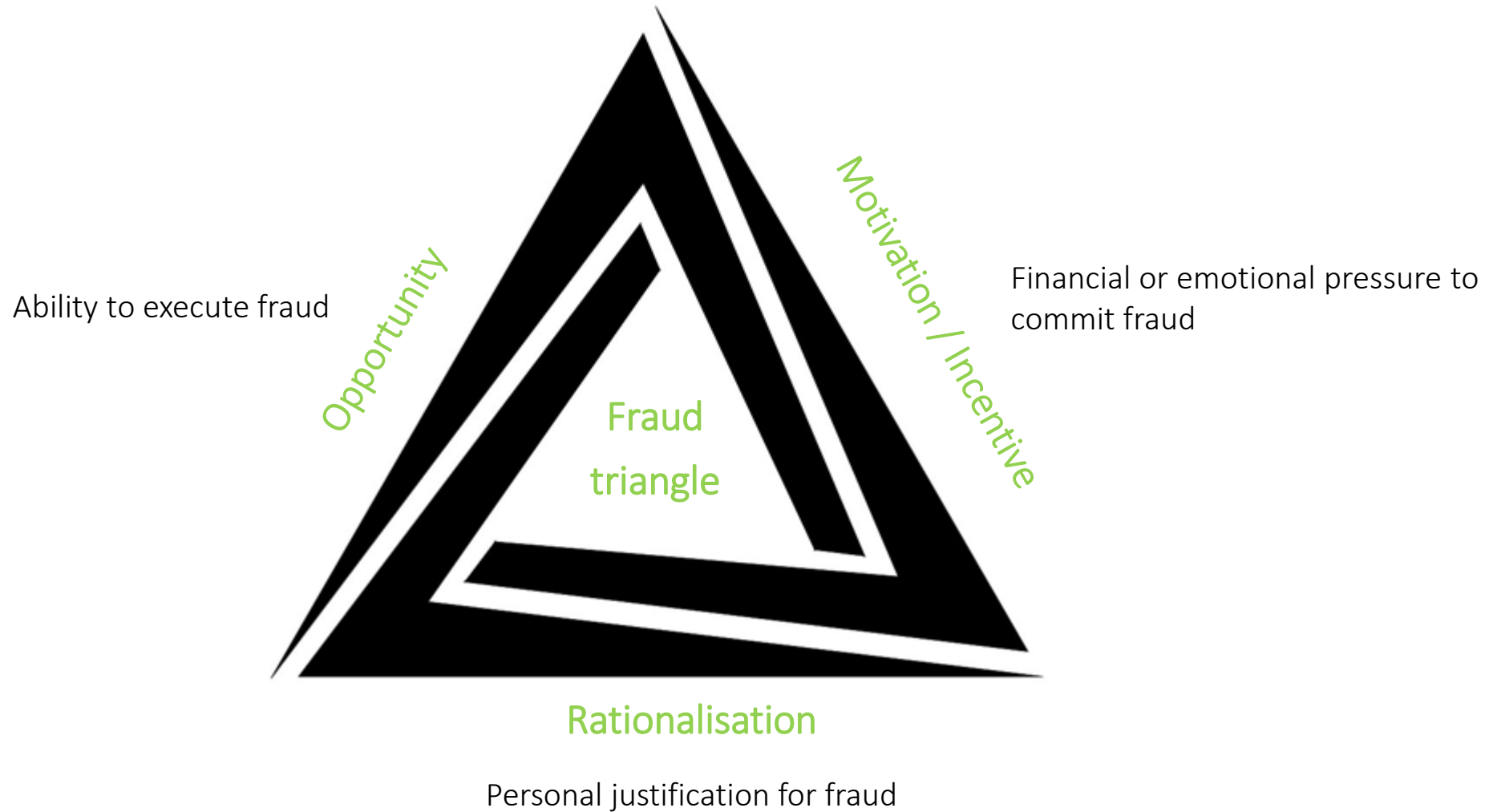
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Our solutions

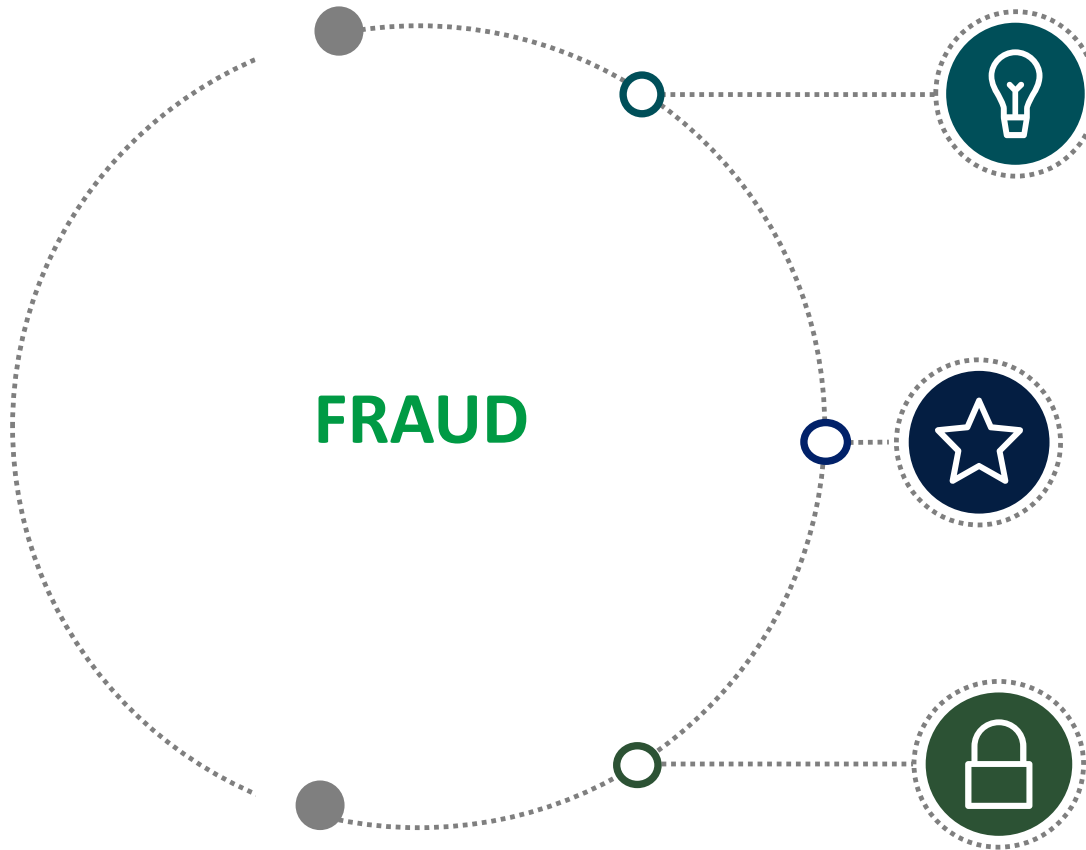
- Whistleblowing
- Analytics
- Discovery
- Investigations

# Fraud triangle

The fraud triangle is a framework used to explain the motivation behind an individual's decision to commit fraud.



# Types of fraud



## Assets misappropriation

- Theft of cash
- Fraudulent invoicing
- Payroll fraud
- Fictitious sales
- Understatement of expenses
- Theft of IP or confidential data

## Corruption

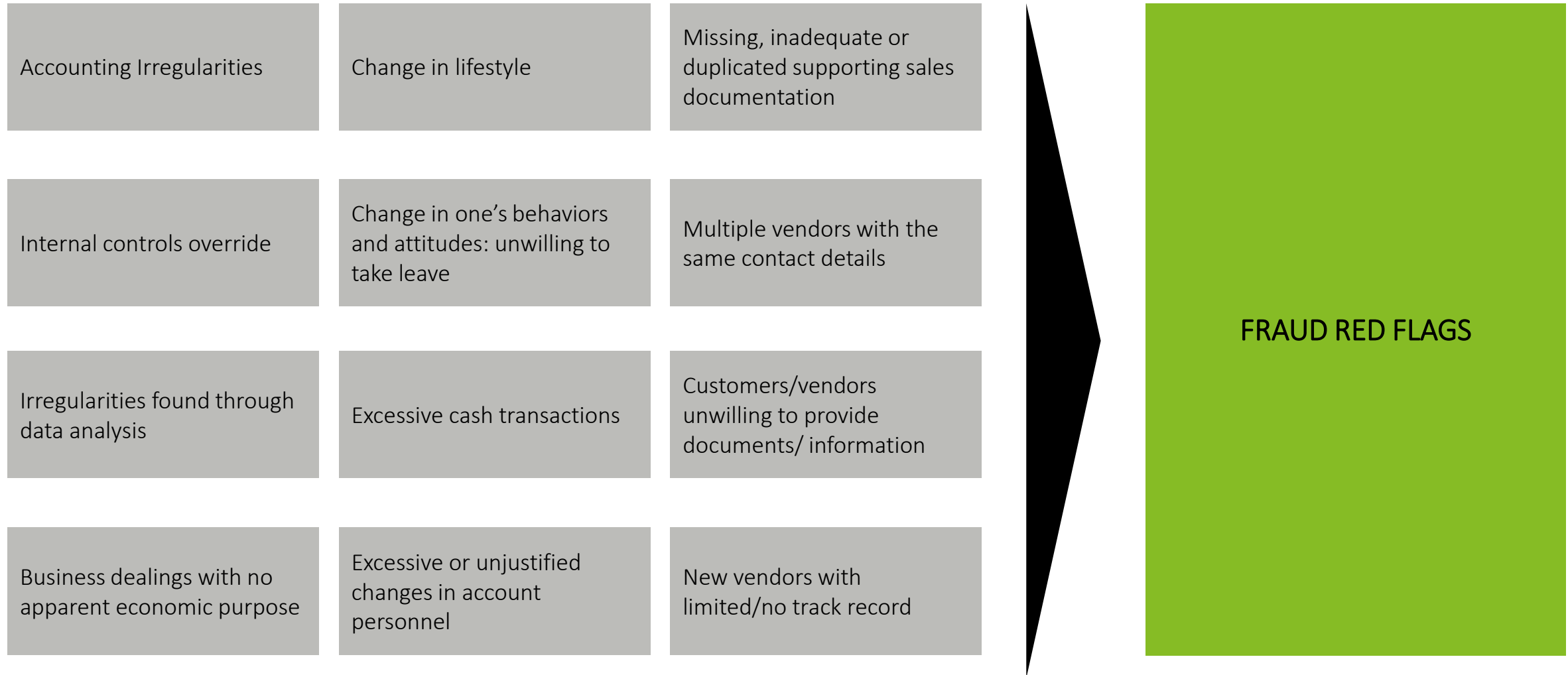
- Giving or accepting a bribe
- Excessive entertainment
- Exchange of inappropriate gifts
- Fictitious vendors
- Misuse of company assets

## Financial statement fraud

- Revenue overstatement e.g. channel stuffing
- Capitalisation of expenses
- Incorrect depreciation
- Overstatement of inventory
- Undisclosed conflict of interest

## Potential fraud red flags

When fraud exists, there may be some warning signs (“Red Flags”). Paying attention to such Red Flags may help you in managing fraud risks.



## What to do if you discover a potential fraud?



# Deloitte forensic overview

There are several ways that Deloitte can help to address fraud and help organisations monitor or identify fraudulent activities.

## WHISTLEBLOWING



Deloitte is a recognised global provider of independent whistleblowing solutions to corporate and public sector entities across the globe.

Deloitte's goal is to design a clear, practical and implementable whistleblowing programme that monitors policies and effectiveness of controls, to help organisations minimise workplace misconduct and strengthen governance effectively.

- Deloitte Halo

## ANALYTICS



Deloitte uses advanced analytics capability and deep technical experience to help clients quickly and efficiently address issues.

Using analytics in new ways to predict future outcomes can help your company mitigate several key risk areas and reduce the possibility of project failure.

- Advanced and predictive analytics
- Data visualisation
- Economic and statistical analysis
- Forensic analytics
- Forensic data reviews

## DISCOVERY



Deloitte's global industry and technical experience yields a more intelligent approach to Discovery & Computer Forensic.

Whether you are a litigation attorney at a law firm or in-house counsel at a corporation, responding to a discovery request involves a myriad of complex requirements for proper data collection, processing, hosting, review and production.

- Cyber crime and computer forensic
- Document reviews
- Electronic discovery and readiness
- Data hosting
- Data capture
- Discovery advisory and managed services

## INVESTIGATION & DISPUTES



Our Investigation practice helps companies assess allegations of corporate fraud or financial mismanagement and respond to government regulatory requests around alleged corrupt practices, anti-bribery and anti-money laundering.

- AML sanctions investigations
- Fraud, bribery and corruption investigations
- Regulatory investigations and remediation
- Litigation support
- International arbitration
- Expert witness
- Class action and claims management
- Economic consulting





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