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Dailey LLP



UNMASKING THE DARK WEB OF FINANCIAL CYBERCRIME

Essential Insights for Legal Counsel

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ACC Greater Philadelphia

Presenters:

- Jeffery A. Dailey



- Michael E. Bonner



- Irene Ayzenberg-Lyman



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Agenda

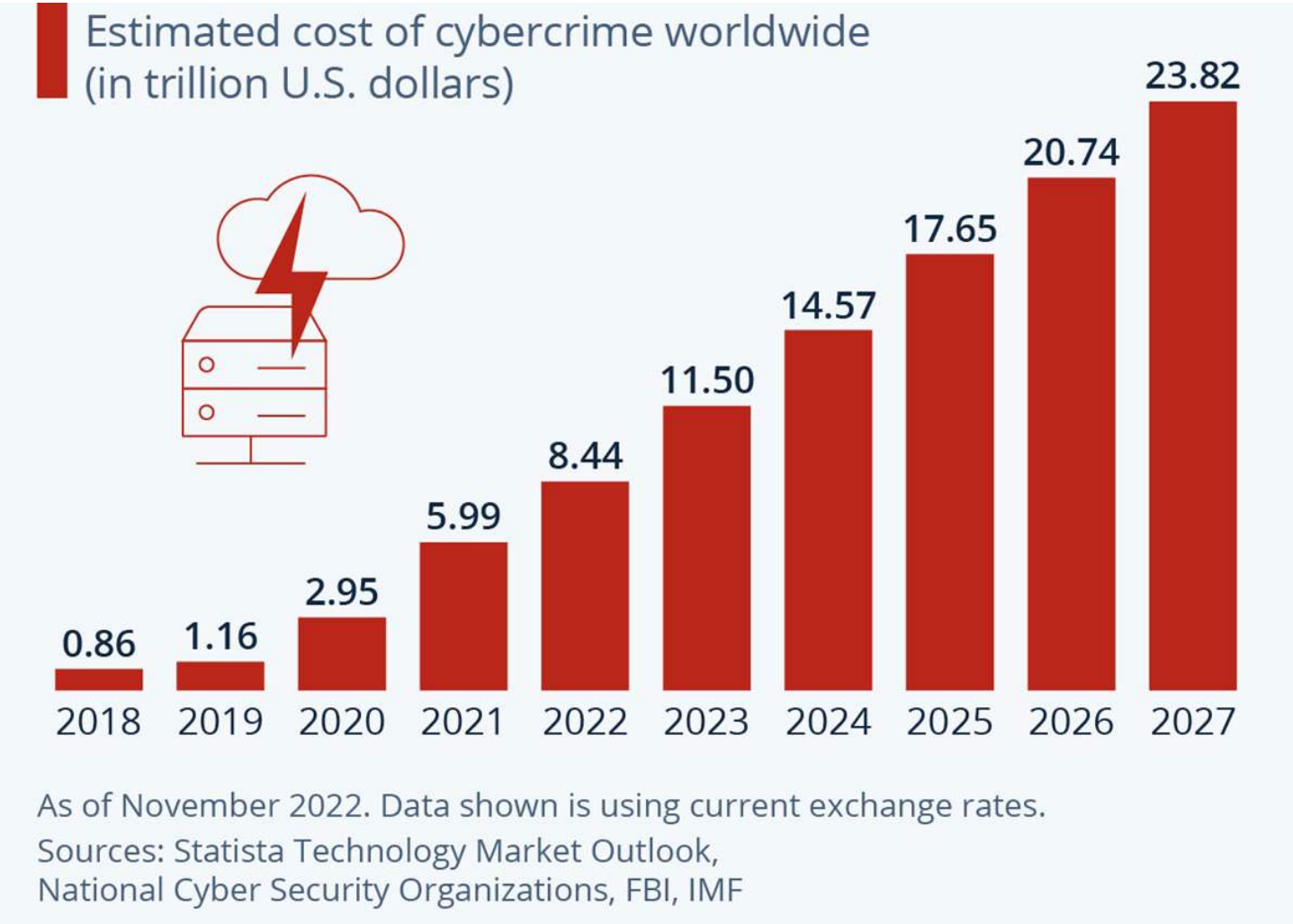
- Landscape
  - The scope of the threat
  - Industries and specific employee profiles that cyber criminals target to attempt to steal a company's financial assets.
- Common Ways Cybercrimes Are Committed.
- Proactive steps counsel can take to prevent or mitigate successful attacks.
- What steps can counsel take with respect to third parties to minimize cascading disruption and compounding liability.
- How to increase the chances of recovering stolen funds or holding third parties accountable.

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LANDSCAPE

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Cybercrime Expected to Skyrocket in the Coming Years



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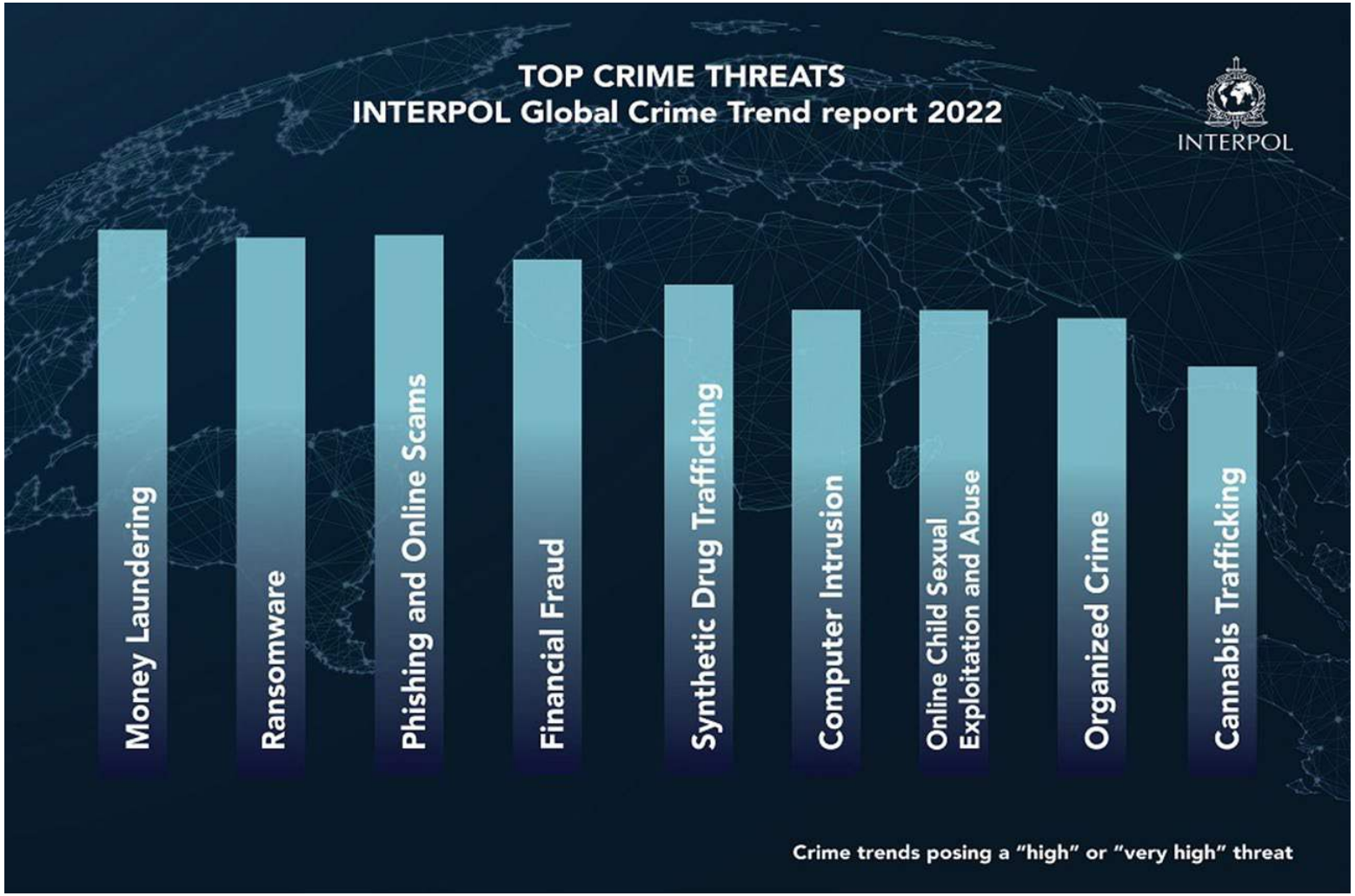
Scale of Annual Cybercrime Compared to Top GDP

- Gross Domestic Product (GDP) is the total market value of all the goods and services a nation produces in a given year.

- Largest economies in the world (GDP)
  1. United States -- $25 trillion
  2. China -- $18.3 trillion
  3. Japan -- $4.3 trillion
  4. Germany -- $4 trillion
  5. India -- $3.4 trillion

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Top Crime Threats



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Top Targets of Financial Cybercrime

- Looking for targets with lots of money, personal data, sensitive government information, or trade secret data

- Public administration
- Healthcare & pharmaceuticals
- Finance & insurance
- Retail
- Education & research
- Non-profits
- Vendor to all of the above entities

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Employee Profiles Targeted

- Senior executives, CEO, CFO, COO.
- Members of finance and accounting team.
- Human resources.
- Gatekeepers
  - Administrative staff working with groups that have sensitive data.
  - Helpdesk employees.

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Common Ways Cybercrimes Are Committed

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Common Crimes and Risks

- Business email compromise (BEC)
  - Takeover of your email.
  - Exploits the fact that so many of us rely on email to conduct business.
  - It is one of the most financially damaging online crimes.
- Identity theft
  - Stealing your personal information to commit theft or fraud.
- Ransomware
  - Use of malicious software, or malware, that prevents you from accessing your computer files, systems, or networks and demands you pay a ransom for their return.

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Common Crimes and Risk (con't)

- Phishing emails and websites
  - Over 90% of all successful cyberattacks start with a phishing attack.
  - Many are credential phishing.
  - "Nigerian prince" scams have morphed into sophisticated imposter emails spoofing senior management
  - Realistic Microsoft spoofs
  - Fake websites and fake social media profiles that offer to provide benefits, such as discounts also used to mine information.
- Social Engineering
  - Manipulating individuals into divulging confidential information, often combined with other tactics like phishing.

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SharePoint - 2023 Remote Work Policy

HR

Human Resources <Human_Resources@online-account.info>
To Jeffery A. Dailey

Reply | Reply All | Forward

Tue 1/17/2023 4:17 PM

Click here to download pictures. To help protect your privacy, Outlook prevented automatic download of some pictures in this message.

SharePoint - 2023 Remote Work Policy

Dear Jeffery,

Please view the following document on our updated Remote Work Policy for 2023.

You can view the embedded document or log into the company SharePoint.

Click Here

Please view this as soon as possible.

Thank you,
Human Resources Human_Resources@online-account.info

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Steps Counsel Can Take to Prevent or Mitigate Successful Attacks

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Steps Legal Counsel Can Take

- Draft Clear Policies and Procedures
  - Help create or review company-wide cybersecurity policies and incident response plans. Ensure that these documents clearly define roles, responsibilities, and protocols.
  - Maintain the policy in secure location outside of the company environment (in the event it becomes inaccessible). Key Personnel may want printed copy available at home.

- Contractual Protections: When drafting or reviewing contracts, especially with third-party vendors:
  - Include clauses that specify cybersecurity standards and practices vendors must adhere to.
  - Clearly delineate responsibilities in the event of a security incident.
  - Consider adding indemnification clauses or limitations of liability related to cyber incidents.
  - Upfront vetting of vendors and skepticism of signing “as is.”

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Steps Legal Counsel Can Take (con't)

- Regular Audits and Assessments:
  - Collaborate with IT and cybersecurity teams to conduct periodic risk assessments and audits of the company's cybersecurity infrastructure and practices. Ensure compliance with applicable laws and regulations.
- Employee Training:
  - Advocate for and help design regular training programs for employees to raise awareness about cyber threats, such as phishing, and educate them on best practices. These can be led by MSP or cyber provider.
- Breach Notification:
  - Understand the legal requirements related to breach notifications. Different jurisdictions and regulations have varying requirements about when, how, and to whom breaches must be reported.

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Steps Legal Counsel Can Take (con't)

- Cyber Insurance:
  - Review and advise on cyber insurance policies to ensure they provide adequate coverage based on the company's risk profile. Understand the terms, conditions, and any exclusions in the policy.
- Incident Response:
  - Be an active part of the incident response team. In the event of a breach, legal counsel can advise on disclosure obligations, communication strategies, potential liabilities, and interactions with law enforcement.
  - Have key vendors engaged in advance of an incident.
- Data Management:
  - Advise the company on data retention and disposal policies. Limiting unnecessary data storage can reduce the potential impact of a data breach.

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Steps Legal Counsel Can Take (con't)

- Regulatory Engagement:
  - Maintain open communication channels with regulatory authorities. This can be useful for understanding expectations, seeking clarifications, and building a collaborative approach toward cybersecurity.

- Due Diligence in Mergers & Acquisitions:
  - When the company is involved in M&A activities, conduct thorough cybersecurity due diligence on potential acquisitions. Uncover any past breaches, assess the maturity of their cybersecurity practices, and understand potential risks.

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Clauses to Consider To Minimize Disruption and Liability

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Contractual Provisions For Vendor and Other Contracts

- Require vendors to maintain strong information security practices and policies regarding data retention, breach notification, and security controls.
  - Avoid broad terms that might create ambiguity in contractual interpretation (e.g. “reasonable measures,” “sufficient controls,” “best practices” and “undue risk”)
  - Use quantifiable and recognized security standards instead (e.g. PCI DSS, NIST and ISO 27002).
  - Vet the vendors and get copies of SOC reports and other data.

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Contractual Provisions For Vendor and Other Contracts (con't)

- Liability Caps and Indemnification
  - Consider negotiating a higher cap or an exception to the standard liability cap for breaches of confidentiality, privacy and security incidents of the vendor.
    - The exception could include recovery of costs such as legal fees, forensic investigation and remedial fees, and ransom payments.
  - Consider indemnity provisions.
  - Include provisions that require a vendor to maintain adequate insurance to fund these potential liabilities, and names your company as an additional insured.

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Contractual Provisions For Vendor and Other Contracts (con't)

- Force Majeure
  - Draft contracts to include cyber events as included in the definition of force majeure, and to excuse your company's potential non-performance, or delayed performance, of its contractual obligations.

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How to increase the chances of recovering stolen funds or holding third parties accountable

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Litigation Counsel Proactive Steps

- Develop an Asset Recovery Protocol that includes, among other things:

1. Identification of the internal and outside counsel that should be contacted immediately upon discovery of event.
2. When and how to notify the FBI's Financial Fraud Kill Chain, federal law enforcement, the United States Secret Service, iC3, or other authorities.
3. If necessary, steps to take to obtain a criminal or civil freeze over any money in transit to prevent it from moving further.
4. Notification of any applicable insurer.
5. Notification of any affected third-parties.

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Wire Transfer Fraud – UCC Article 4A

- Article 4A of the Uniform Commercial Code (UCC) governs funds transfers, commonly called wire transfers, in all states that have adopted it.

- Article 4A litigation involves unauthorized funds transfers, brought by parties who allege a financial institution sent their money unlawfully.

- Examples:
  - Fraud, where a third party uses fraudulent means to convince the customer to send money.
  - Transfers that the bank's customer claims were unauthorized or not verified.
  - Alleged errors by either the receiving bank or the beneficiary's bank in executing or accepting a payment order.

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Make Sure Your Company Is Proactive

- Common Defenses in litigation over unauthorized fund transfer litigation include:
  - Common law claims preempted by UCC 4A.
  - The Bank followed procedures agreed to with customer or commercially reasonable steps.

- Counsel rarely involved in vetting procedures or making sure protocols set up to make sure procedures followed internally.
  - Most agreements say that bank and customer will define security protocols together.
  - That is often done loosely without documentation.
    - That creates issues in litigation about what procedures were in place.
    - Harder to review periodically.

- Examples from Real Cases

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  - ACC Docket Magazine
  - InfoPAKs
  - QuickCounsel Guides

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