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NORTON ROSE FULBRIGHT

Litigation trends

Survey report



The 10th Annual Litigation Trends Survey commissioned by Norton Rose Fulbright collects and presents the experiences and opinions of senior corporate counsel regarding various aspects of US litigation and related matters. An independent research firm surveyed 401 participants in all. As in the previous surveys, this is a statistically significant sample.

As with any survey, not all participants answered every question. The sum of percentages may total more or less than 100% due to rounding and/or respondents being given more than one option. The data is analyzed by industry, company size in annual gross revenues (USD), amount of litigation spend and in relation to previous survey findings.

Following the combination that created Norton Rose Fulbright in mid-2013—as the survey was being prepared—the firm resolved to re-focus the survey on its roots in tracking the behaviors and attitudes of senior US litigators and trim the content to a more manageable core set of questions. This distilled product will serve as the groundwork for international expansion of the survey as Norton Rose Fulbright celebrates its first full year as a global legal practice in 2014.

As in past surveys, core questions address respondent and company demographics, litigation costs, various trends in disputes, privacy and data protection and other topics impacting legal leadership. For comparability, all comparisons to prior year survey results refer to responses from US respondents only in those surveys, except where noted.

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Respondent profile

With the focus on the US market in the 2013 survey, companies headquartered in the United States account for most of the 2013 US Litigation Trends Survey sample.

Three-quarters of respondents list their title as General Counsel or Head of Litigation.

Energy, healthcare and financial services are the most heavily represented sectors of the nine industries surveyed.

Respondent profile

Three-quarters of respondents identify themselves as either General Counsel or Head of Litigation.

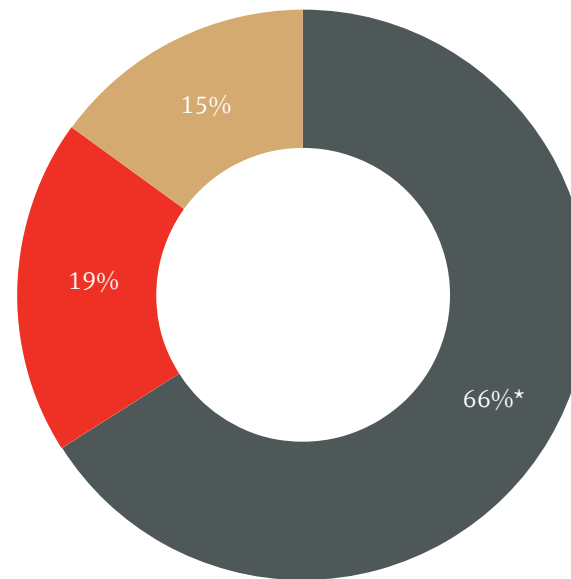
Significant sample: 401 senior corporate counsel responded to the US Litigation Trends Survey conducted at the end of 2013 and beginning of 2014.

Headquarters: US (94%), Other (6%)

Respondent titles: General Counsel (51%), Head of Litigation (25%), Associate/Assistant/Deputy GC (11%) and Other (13%) (including C-levels, VP and Senior Litigator).

Most recent company annual gross revenues: Percentages are based on those respondents who provided gross revenue information for their companies.

Most recent company annual gross revenues



- \$1 billion or more (66%*)
- \$100 million - \$999 million (19%)
- < \$100 million (15%)

The following references to companies by size are used throughout this report:

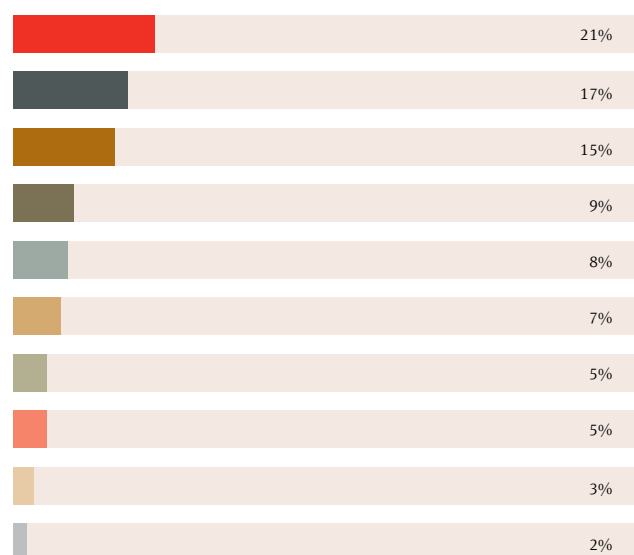
“Smaller companies” – revenues less than \$100 million

“Mid-sized companies” – revenues of \$100 million to \$999 million

“Larger companies” – revenues of \$1 billion or more*

*Among the larger companies, 50% have revenues of \$5 billion or more.

Industries represented



Sum of percentages is greater than 100% due to respondents being allowed to select more than one industry.

■ Energy

■ Healthcare

■ Financial services

■ Technology / communications

■ Manufacturing

■ Retail / wholesale

■ Insurance

■ Engineering / construction

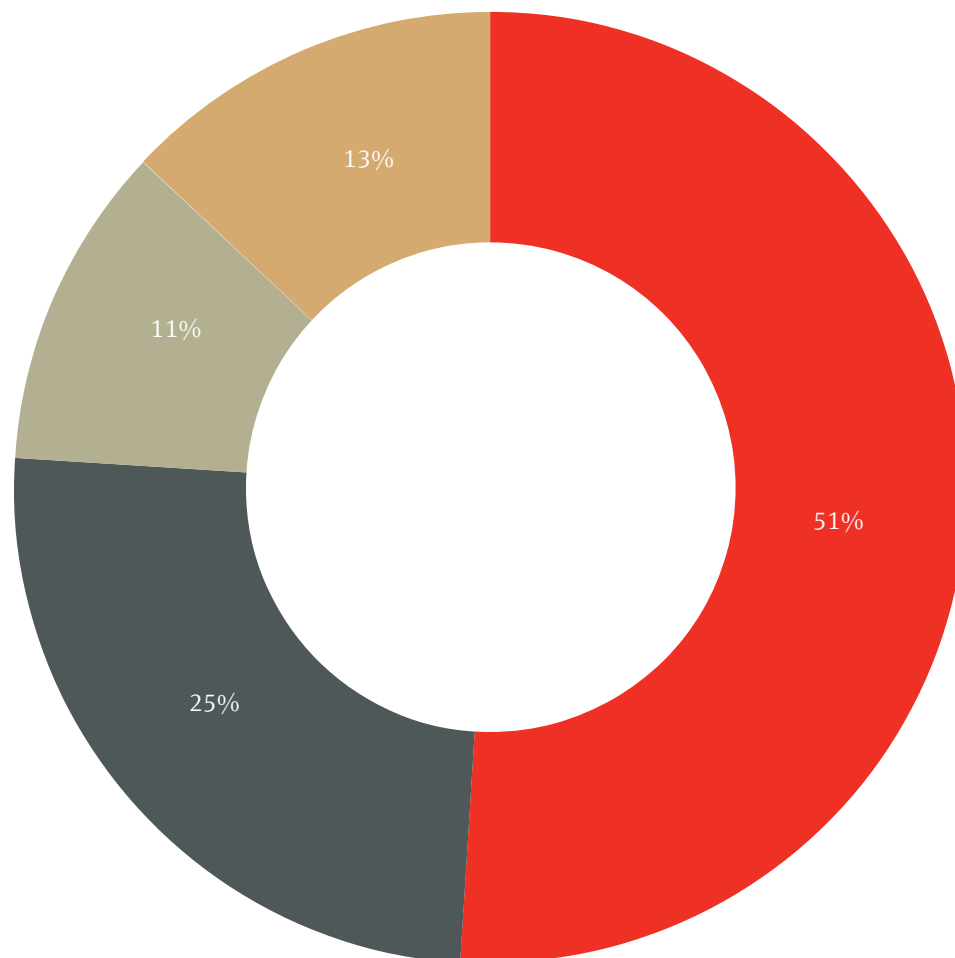
■ Real estate

■ Trade association

- Among larger companies, the largest industry represented is energy (21%), followed by healthcare (17%) and financial services (15%). Other industries represented within the larger companies include technology/communications, manufacturing and retail/wholesale (each 9%).
- Mid-sized companies are somewhat more distributed: healthcare (18%), energy (15%), financial services (15%), manufacturing (11%), technology/communications (9%), engineering/construction (7%) and retail/wholesale (7%).
- Smaller organizations are represented by industries including financial services (22%), healthcare (13%), energy (11%), real estate (9%) and trade associations (9%).
- 26% of respondents work in other industries, including transportation, education, chemicals and agriculture, and professional/business services.

Respondent job titles

Which of the following is closest to your job title?



Three-quarters of respondents identify themselves as either General Counsel or Head of Litigation.

Associate, Deputy or Assistant GC titles comprise 11% of respondents.

Other job titles include Chief Legal Officer and other C-level titles, Vice President and Senior Counsel.

■ General Counsel (51%)

■ Head of Litigation (25%)

■ Associate/Assistant GC (11%)

■ Other (13%)

Litigation overview

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Labor and employment matters lead the list of the most numerous types of litigation matters pending against US companies in the previous 12 months.

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Concern over regulatory litigation is growing.

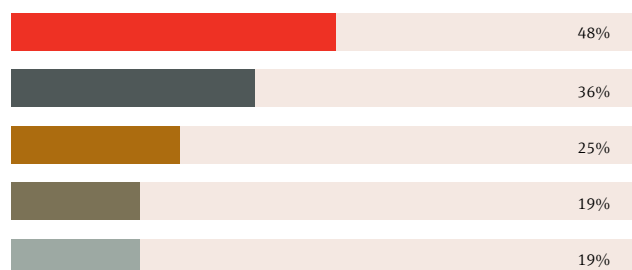
.....

.....

More than a third of all companies faced at least one lawsuit with more than \$20 million at issue in 2013.

.....

Most numerous types of litigation pending in the last 12 months



■ Labor / employment

■ Contracts

■ Personal injury

■ IP / patents

■ Regulatory / investigations

Respondents chose the three to five most numerous types of litigation pending against their companies in the past year from a list of more than 15 categories. Labor and employment matters top the list with 48% of respondents reporting them as among the most numerous. Contracts is the second largest category followed by personal injury, IP/patents and regulatory/investigations matters.

- Regulatory/investigations matters are up significantly among respondents, from 9% in 2012 to 19% in the latest survey. The upward trend is persistent across all company sizes and industry groups but is most pronounced among technology (26%) and healthcare industry organizations (24%), both up from 10% in 2012.
- Personal injury suits are down according to energy sector respondents, from 55% in 2012 to 41% in 2013 for that group.
- The technology/communications industry reports significantly more labor and employment matters, increasing to 65% of respondents in 2013 who included it among the most frequent types of litigation, compared to 52% in 2012 and 40% in 2011. IP/patents disputes in this sector declined over the same period to 38% in 2013 from 55% in 2012 and 43% in 2011.
- IP/patents disputes are up significantly among healthcare respondents, increasing to 29% ranking them among the most common litigation matters from just 15% in 2012.

Types of legal disputes that most concern companies

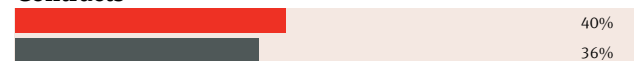
Labor / employment



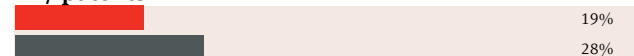
Regulatory / investigations



Contracts



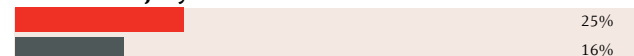
IP / patents



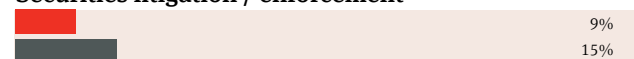
Class actions



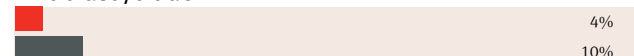
Personal injury



Securities litigation / enforcement



Antitrust /trade



Respondents chose the three to five types of legal disputes of greatest concern to their companies from a list of more than 15 categories.

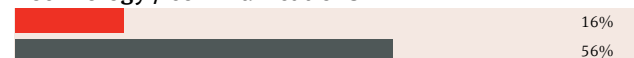
- Areas of greatest concern were labor/employment, regulatory/investigations and contracts.
- IP/patents rose by approximately half versus the previous year, while securities litigation/enforcement and antitrust/trade both virtually doubled year over year, but from much lower levels.
- Among technology companies, employment and labor disputes are of growing concern, up from 26% of respondents in 2012 to 47% in the latest survey.

■ 2012

■ 2013

Regulatory / investigations a top concern by industry

Technology / communications



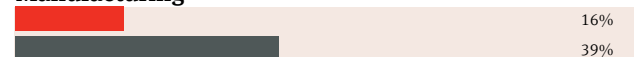
Financial services



Healthcare



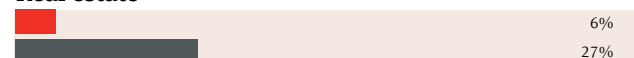
Manufacturing



Energy



Real estate

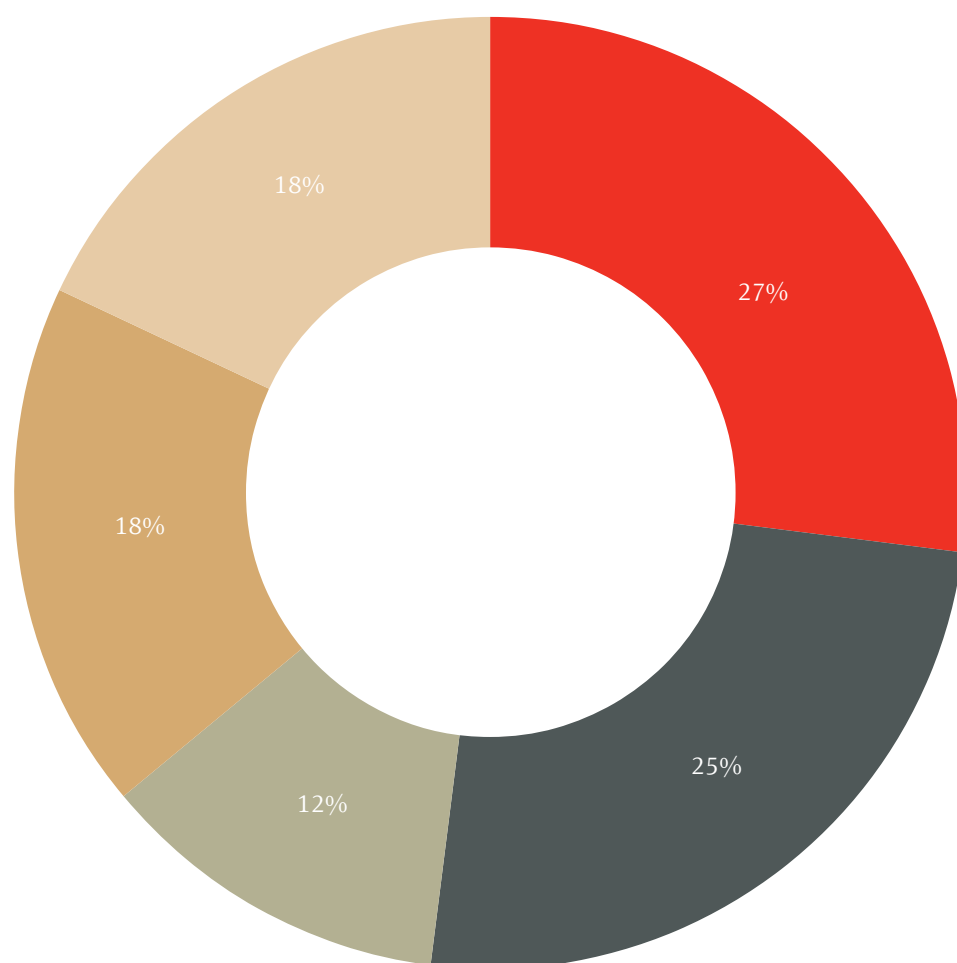


- Regulatory/investigations concerns are up sharply in the 2013 survey, with 41% indicating it as a top concern versus just 23% of US respondents in 2012. The increase is most pronounced among respondents in the technology/communications sector (56% in 2013 versus just 16% in 2012) as well as in financial services (2013: 57%, 2012: 24%) and healthcare (2013: 52%, 2012: 24%).
- By company size, regulatory/investigations concerns have increased most among mid-sized (2013: 40%, 2012: 17%) and smaller (2013: 31%, 2012: 17%) companies. Larger companies continue to have the highest level of concern (2013: 43%, 2012: 27%).

■ 2012

■ 2013

Lawsuits commenced against companies in the last 12 months



The number of lawsuits filed against respondents' companies in the past 12 months is very stable in recent years, with no significant change since 2010.

- Healthcare industry respondents have the most litigation matters compared with other industries, with 55% indicating more than 20 suits versus 30% for the overall sample.
- Smaller companies are much more likely to have no lawsuits filed against them (35% versus 18% for the total sample).
- Larger companies are more likely to have more than 20 suits filed against them (48% versus 30% among all respondents).
- Among the largest companies surveyed (more than \$5 billion in annual revenue), 60% have 20 or more lawsuits pending against them, 43% have more than 50 and just 12% have none.

■ 1 to 5 (27%)

■ 6 to 20 (25%)

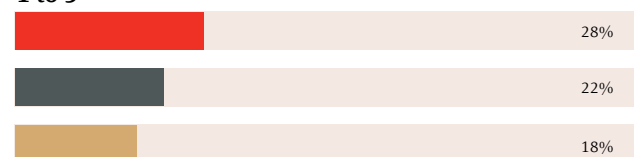
■ 21 to 50 (12%)

■ 51+ (18%)

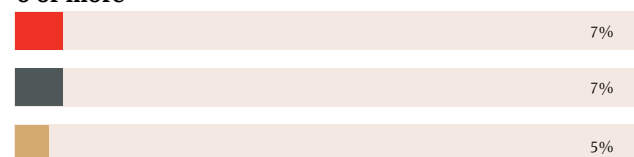
■ None (18%)

Lawsuits faced by respondents with more than \$20 million at issue

1 to 5



6 or more



■ 2013

■ 2012

■ 2011

Companies facing at least one lawsuit with more than \$20 million at issue rose to 34% in 2013, continuing a trend since 2011 that has left fewer respondents untouched by high-value cases.

- Energy companies are much more likely to have one or more large lawsuits pending against them compared to other industries (52% versus 34% for the total sample), as are larger companies generally (51% versus 34% for the total sample).
- Among the largest companies surveyed (revenue greater than \$5 billion), two-thirds reported having one or more lawsuits greater than \$20 million pending against them, twice the rate for the overall sample.

Lawsuits initiated by companies

< \$100 million



\$100 million - \$999 million



\$1 billion or more

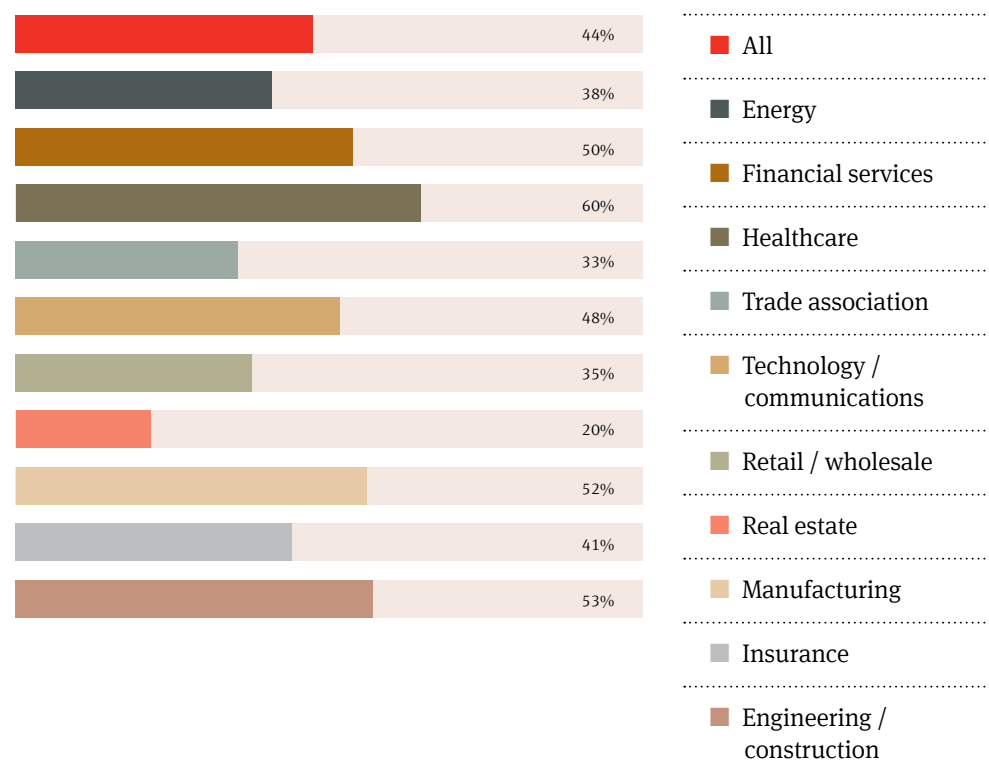


The number of lawsuits initiated by respondents has remained stable in recent years, with no significant changes from 2011 to 2013.

- Companies with \$1 billion or more in revenue are much more likely to have commenced one or more lawsuits.
- Among larger companies, about one in four has initiated at least one lawsuit with \$20 million or more at issue.

■ 1 to 5 ■ 6 or more

One or more arbitrations commenced against companies in the last 12 months



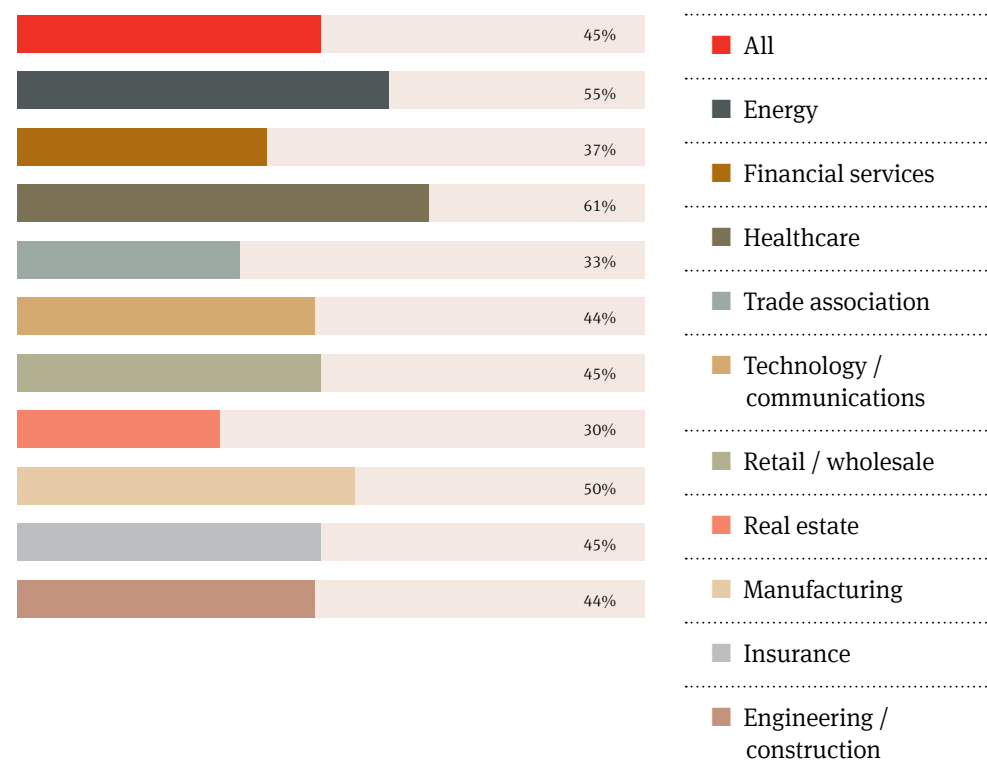
The number of arbitrations pending against companies surveyed has remained stable since 2011, with no significant change.

- Healthcare companies are the most likely to have one or more arbitrations pending against them (60% versus 44% for the overall sample).
- The largest companies in the sample (greater than \$5 billion in revenue) reported a higher incidence of arbitrations against them than their smaller peers (65% versus 44% for the total sample).
- Of those companies with arbitrations pending against them, 11% face one or more with over \$20 million at issue.

Arbitrations initiated by respondents

- One in four respondents has commenced at least one arbitration against other parties. This rate has remained steady in recent years, with no significant change in the period 2011 to 2013.
- Less than 8% of respondents initiated at least one arbitration with more than \$20 million at issue.

One or more regulatory proceedings commenced against companies



The number of regulatory proceedings against respondent companies has remained relatively unchanged in recent years (2011–2013).

- In 2013, healthcare and energy companies reported a higher rate of regulatory proceedings commenced against them than other industries surveyed.
- More than half of larger companies surveyed have one or more regulatory proceedings pending against them. One-quarter of larger companies have at least one proceeding pending against them with more than \$20 million at issue.

Regulatory proceedings initiated by respondents

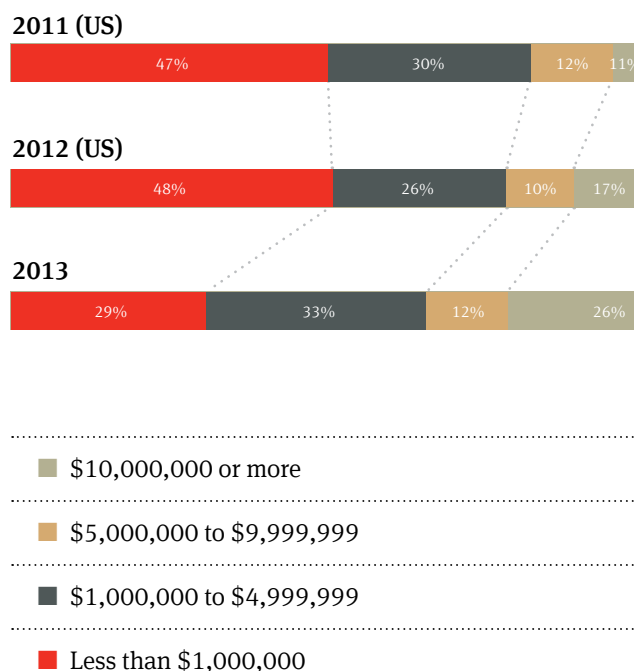
- Fewer than one in ten respondents reported initiating one or more regulatory proceedings in the prior 12 months. This rate is statistically unchanged among US respondents in the past three surveys.
- Also consistent in recent years, fewer than 4% of companies commenced any regulatory proceedings with more than \$20 million at issue.

Litigation costs and disputes trends

Companies are spending more on litigation and disputes in general.

Larger companies continue to be the most frequent users of alternative fee arrangements.

Annual litigation expenditure (Excluding costs of settlement and judgments)



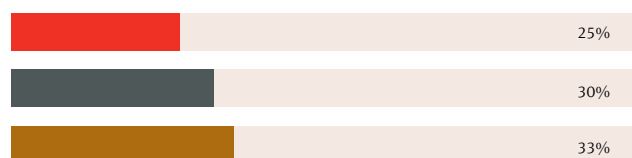
Among those who answered the question, the percentage of companies spending more than \$1 million has risen sharply in this survey to 71%, versus 53% in the two previous surveys. This growth is driven largely by an increase in the number of larger companies spending \$10 million or more on litigation.

Annual litigation expenditure (By company gross revenues, excluding costs of settlement and judgments)

	Under \$100M	\$100M - \$999M	\$1B or more
Less than \$500,000	66%	33%	4%
\$500,000 to \$999,999	3%	13%	4%
\$1,000,000 to \$4,999,999	26%	42%	32%
\$5,000,000 to \$9,999,999	3%	6%	17%
\$10,000,000 or More	3%	6%	43%

- Among smaller companies, those spending \$1 million or more on litigation, excluding costs of settlement and judgments, increased substantially to 32% in 2013 from the previous two years (15% in 2012, 17% in 2011).
- The percentage of larger companies spending \$10 million or more annually increased to 43% for the second consecutive year of growth (33% in 2012, 19% in 2011).
- Industries with the highest levels of companies spending \$5 million or more annually on litigation in 2013 are healthcare (49%) and energy (46%), compared with 38% of companies across the total sample that are at this spending level.
- There was a steep increase in the number of financial services companies spending \$5 million or more on litigation, rising to 38% in 2013 from 15% in 2012 and 11% in 2011.

More than five in-house lawyers managing litigation



The proportion of in-house litigation teams with more than five lawyers has increased over a three-year period.

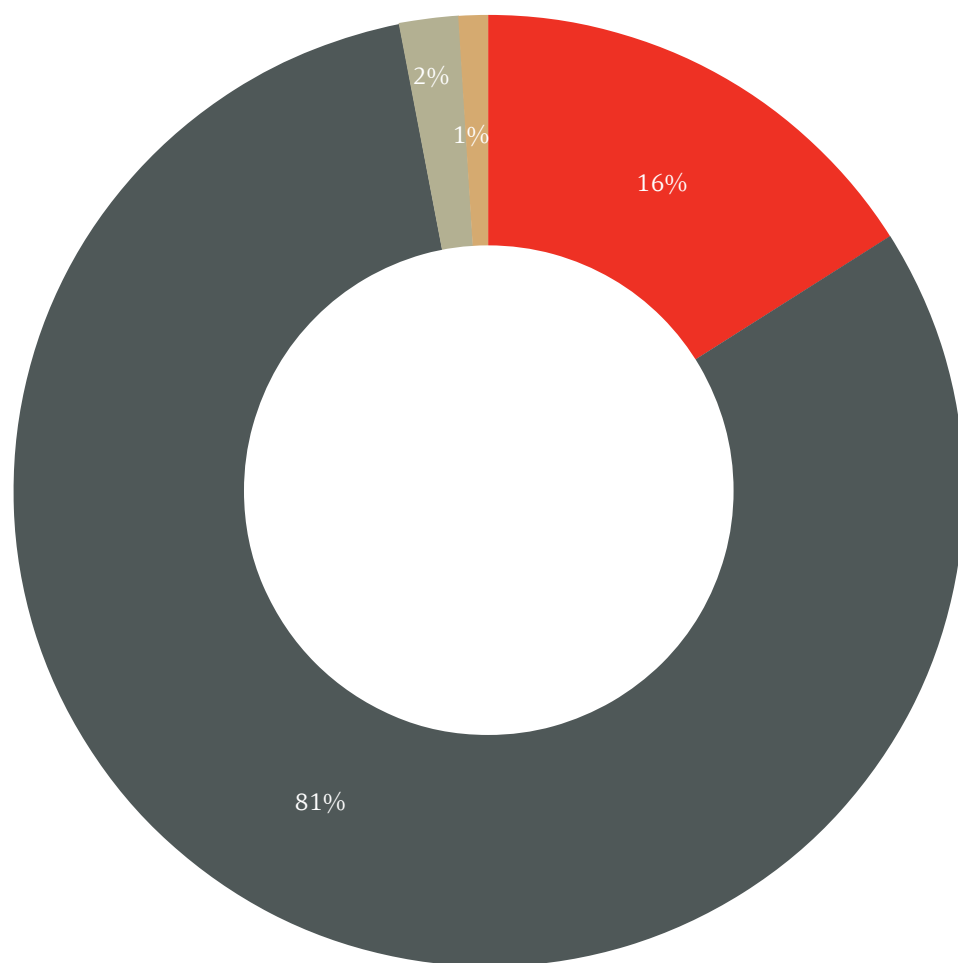
- Industries with the highest percentages of in-house litigation management teams consisting of more than five lawyers are insurance (52%), healthcare (47%) and financial services (36%).
- Among larger companies, 45% have more than five litigation lawyers on staff and 30% have more than 10; 9% of smaller companies and 13% of mid-sized enterprises have more than five lawyers. The proportion with more than five attorneys among the largest companies surveyed (more than \$5 billion in revenue) was 60%.

■ 2011

■ 2012

■ 2013

During the next 12 months, do you expect the number of in-house lawyers within your company who manage and/or conduct disputes to increase, decrease or stay the same?



Overall, 16% of the company respondents surveyed expect an increase in the number of in-house lawyers involved in managing or conducting disputes. That percentage has remained steady among US companies over the past three years.

- The response from smaller companies (16%) expecting to increase their numbers in the current survey is roughly the same as for larger companies (18%).
- Energy (24%) and insurance (19%) companies are the most likely to increase their in-house disputes departments.

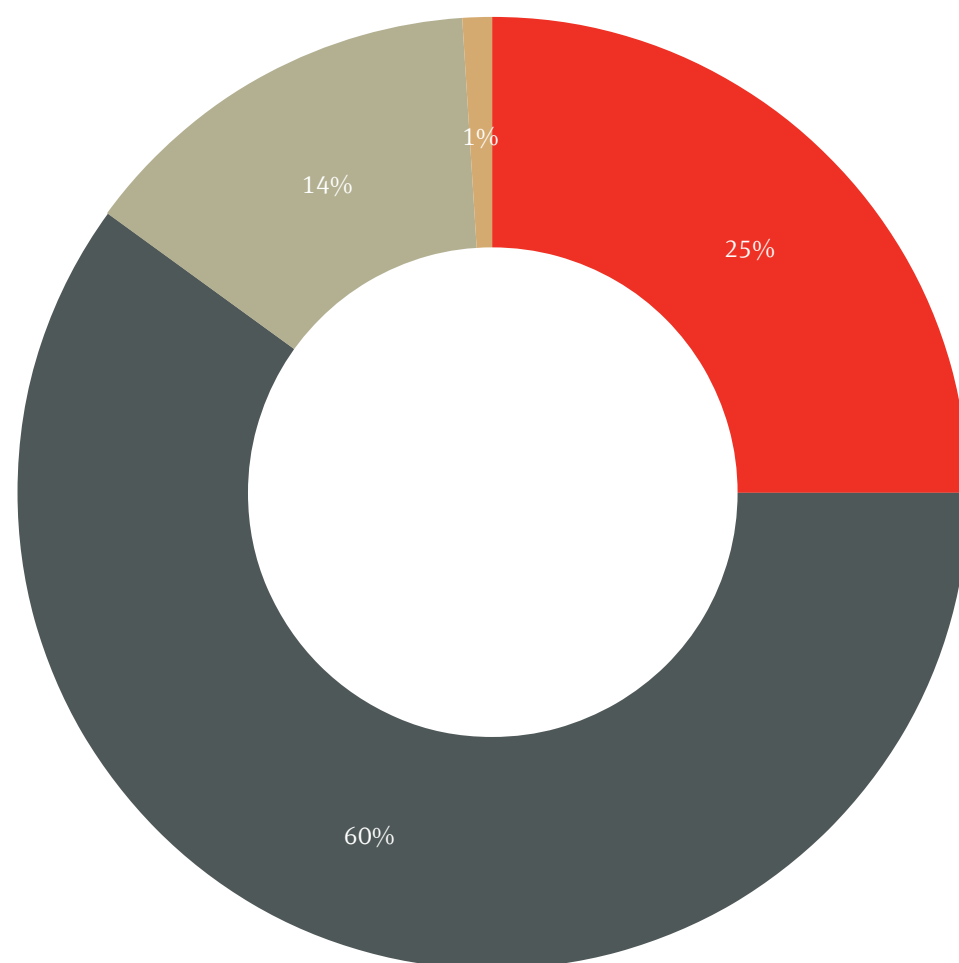
■ Increase (16%)

■ Stay the same (81%)

■ Decrease (2%)

■ Don't know (1%)

Number of law firms on outside counsel disputes roster over the past 12 months



One-quarter of respondents report their companies increased the number of outside counsel firms on their rosters, up from 20% last year.

- Smaller companies are more likely to have increased the number of firms (38%) while a greater proportion of larger companies have trimmed their roster (20%).
- Engineering/construction industry respondents (42%) are the most likely to report adding firms to their outside counsel roster, followed by retail/wholesale respondents (35%).

■ Increased (25%)

■ Stayed the same (60%)

■ Decreased (14%)

■ Don't know (1%)

Does your company use alternative fee arrangements (AFAs)?



■ 2011

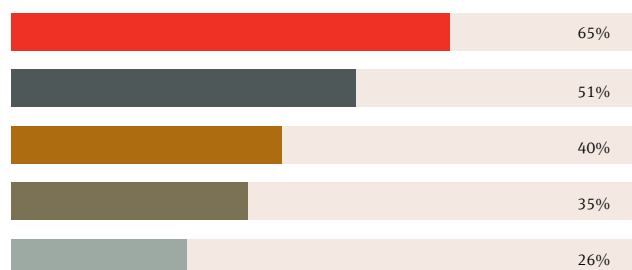
■ 2012

■ 2013

The reported use of AFAs has returned to 2011 levels.

- Larger companies continue to be the most active users of AFAs (71% of those companies with over \$1 billion in gross revenues, 78% among those with more than \$5 billion in revenues).
- The industries most likely to use AFAs are insurance (71%) and financial services (67%), followed by energy and manufacturing (61% each).
- The majority of respondents using AFAs (56%) use them for 20% or less of their outside counsel spend.
- However, the percentage of respondents who use AFAs for more than 20% of spend rose in 2013 to 44%, compared to one-third of AFA users in 2012.
- Just 10% use AFAs for more than half of their outside counsel spend, statistically unchanged versus the two prior annual surveys.

Most used types of AFAs



■ Fixed fee

■ Capped fee

■ Blended rate

■ Performance / rewards-based fee

■ Contingent fee

Respondents were asked to identify the three types of alternative fee arrangements they use the most. As in the last two surveys, fixed fee, capped fee and blended rate were the three most commonly used types of AFAs. The percentage of respondents using blended rate AFAs fell in the most recent survey to 40%, down from more than half of respondents in 2011 and 2012.

- Manufacturing (80%) and technology/communications (80%) rely most heavily on fixed fees. The financial services sector uses fixed and capped fees in almost equal numbers (64% and 62%, respectively).
- Industry sectors most likely to use performance/rewards-based fees are healthcare (51%) and energy (45%) companies.

Effectiveness of the types of AFAs

Blended rate



Capped fee



Contingent fee



Fixed fee



Performance / rewards-based fee

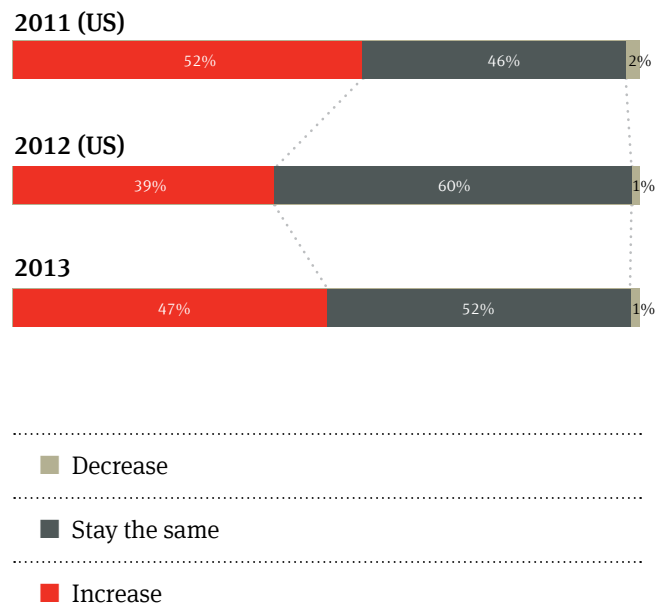


■ Somewhat effective ■ Very effective

Respondents were asked how effective various types of alternative fee arrangements have been in accomplishing their companies' goals.

- Although 77% of mid-sized companies and 70% of larger companies judge blended rate fees to be somewhat effective, only 23% and 15%, respectively, find them to be very effective.
- Half of the larger company respondents consider contingent fees very effective; the rest judge them to be somewhat effective.
- The highest approval rating for fixed fees comes from mid-sized companies with 78% finding them to be very effective; 63% of energy companies consider them very effective – the highest rating among industry sectors.

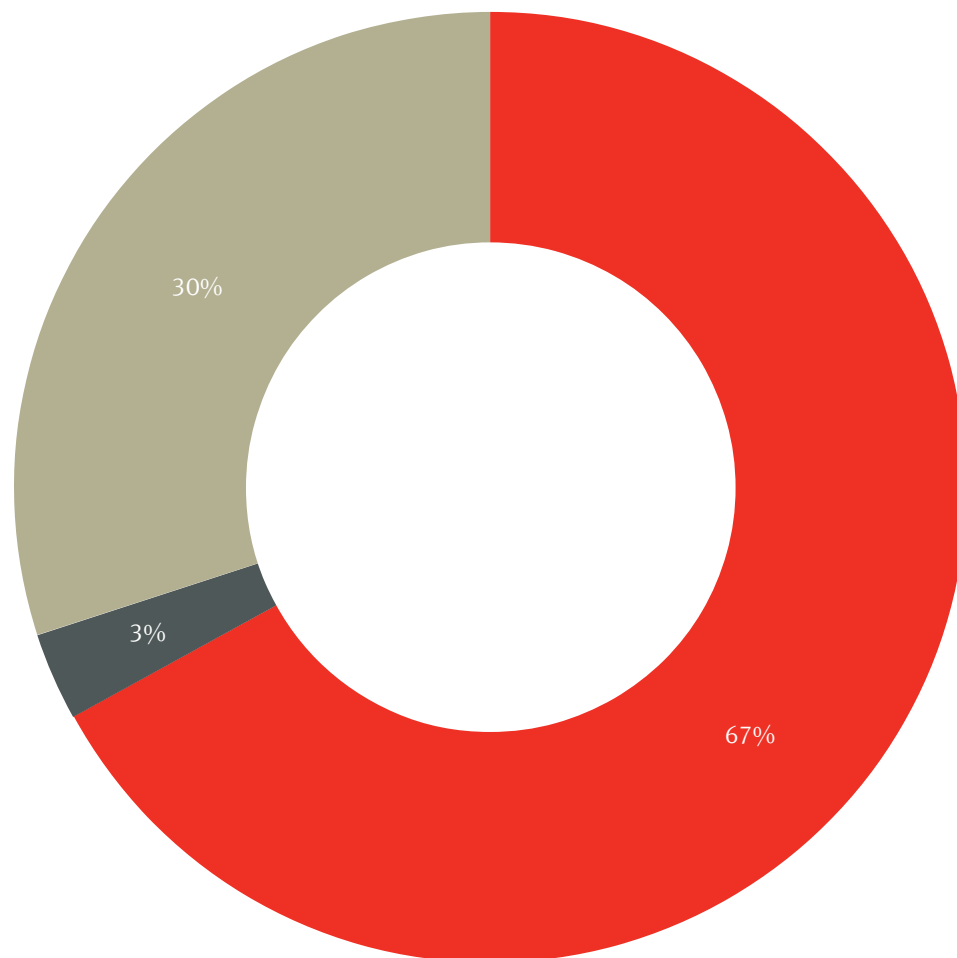
Expectations of an increase in AFA use (Excluding costs of settlement and judgments)



Respondents were asked if they expect their companies' use of alternative fee arrangements to increase, decrease or stay the same over the next 12 months. More respondents report an expected increase following a drop in the previous survey. Those expecting to decrease their use remain at just 1%, virtually unchanged over the prior two years.

- Company size is a good predictor of rising use of AFAs: 56% of larger companies expect to increase their use compared to 44% of mid-sized companies and just 31% of smaller companies.
- Financial services companies are the most likely to expect an increase in AFA use over the next 12 months (56%).

Are you satisfied with the quality of work provided under AFAs?



Companies that have experience with AFAs overwhelmingly report that they are satisfied with the quality of work provided under those arrangements.

- Just over half of the smaller companies and mid-sized companies are satisfied with the quality of work provided under AFAs. Forty percent or more of those two groups have no experience with AFAs.
- Larger companies report the highest level of satisfaction with AFAs at 79%. Satisfaction has increased markedly compared to 2012, when nearly one in four US companies were unsatisfied with the quality of work provided under AFAs, compared to just 3% in 2013.
- Among companies that spend \$10 million or more on litigation annually (excluding costs of settlement and judgments), the satisfaction level with AFAs is 86%.
- The energy sector shows the highest rate of satisfaction with work provided under AFAs at 75% of respondents. Manufacturing (73%) and financial services (71%) fall close behind.

■ Yes (67%)

■ No (3%)

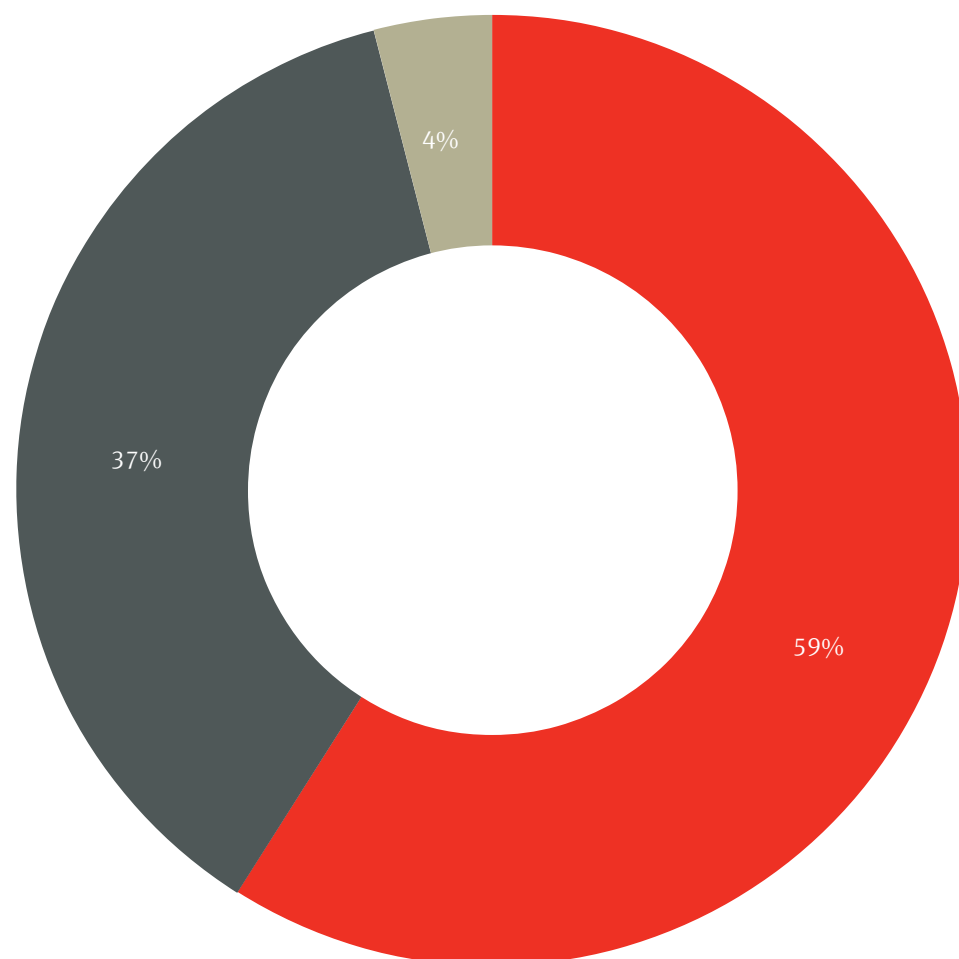
■ No experience (30%)

Internal, government or regulatory investigations

More than half of respondents commenced at least one internal investigation requiring outside counsel assistance.

The amount of time spent addressing regulatory matters has increased for most respondents.

Has your company retained outside counsel for assistance in any government or regulatory investigation in the last 12 months?



The need to retain outside counsel to assist with government and regulatory investigative activity has remained steady over the past three years among US respondents.

- Company size is a good predictor of the level of regulatory need, with larger companies (74%) much more likely to retain outside counsel to assist with investigations than their mid-sized (53%) and smaller (40%) peers.
- Among industry respondents, insurance companies are among the most likely targets of government or regulatory investigations (76%), followed by energy, financial services and healthcare, all with 67% of respondents reporting investigations.

■ Yes (59%)

■ No (37%)

■ Don't know (4%)

Regulators or government entities most often involved in the investigations



■ DOJ (Department of Justice)

■ SEC (Securities and Exchange Commission)

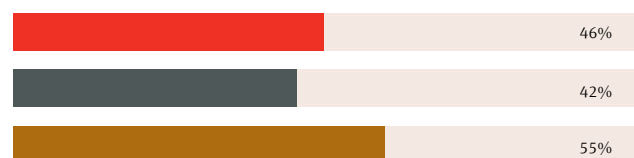
■ EPA (Environmental Protection Agency)

Respondents indicated the various entities concerned in the investigations their companies have faced over the past 12 months. The Department of Justice (DOJ), Securities and Exchange Commission (SEC) and Environmental Protection Agency (EPA) are at the top of the list.

- Of the companies involved in a DOJ investigation, 56% have been the primary targets of the investigation. Three industries have notably higher rates of DOJ primary targets than the total survey sample—they are healthcare (73%), technology/communications (71%) and energy (63%).
- As might be expected, the largest proportion of companies involved in an SEC investigation are in financial services (54% of the sector); however, just one-third of them have been primary targets. Nearly two-thirds of energy companies involved in SEC investigations have been primary targets.
- Two-thirds of the energy companies involved in EPA investigations have been primary targets, as well as 63% of manufacturing companies targeted by the EPA.
- Between 10% and 20% of respondents in the current survey indicate seven other agencies and entities involved in investigations. In descending order they are: State Attorney General, Occupational Safety and Health Administration (OSHA), Financial Industry Regulatory Authority (FINRA), Internal Revenue Service (IRS), US Attorney's Office, Food and Drug Administration (FDA) and State District or County Attorney.
- Healthcare companies report the highest incidence of investigations by both the US Attorney's Office and State Attorneys General of any industry surveyed. Among healthcare companies involved in US Attorney's Office investigations, 70% have been primary targets and 78% involved in State Attorney General investigations have been primary targets.

How many internal investigations requiring assistance of outside counsel did your company commence in the last 12 months?

One or more internal investigations requiring assistance of outside counsel



More than half of the total sample (55%) commenced at least one internal investigation requiring outside counsel assistance in the last 12 months, up from the level of the previous two surveys.

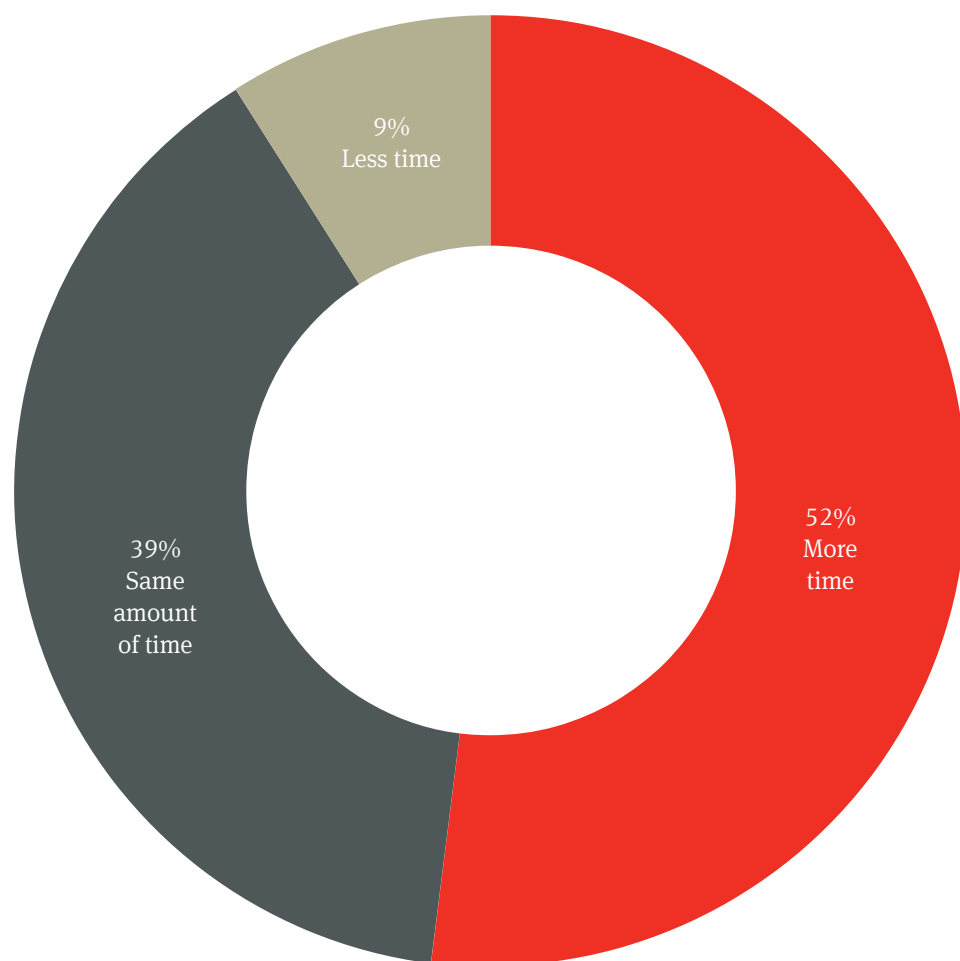
- Industries with the largest proportion of companies that have conducted six or more internal investigations requiring assistance of outside counsel are healthcare (19%) and technology/communications (17%), versus just 9% for the total sample.
- One-quarter of companies that have commenced an internal investigation within the last 12 months also reported the matter to a regulatory agency, about the same level as in the previous two years.

■ 2011

■ 2012

■ 2013

Time spent in the last three years addressing regulatory investigative requests or regulatory enforcement proceedings as a party or non-party



- Most respondents report spending more time during the last three years addressing regulatory requests or enforcement proceedings, either as a party or non-party.
- The industry sectors that have spent more time on such matters in the highest numbers during 2013 are financial services (69%), insurance (67%) and energy (59%), all well above the total survey level (52%).

More time addressing regulatory



- Over the past three years, respondents report that they have spent increasingly more time addressing regulatory proceedings or investigations.

Privacy & data protection

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The number of companies encountering privacy and data protection issues related to possible or actual disputes or investigations over the previous 12 months has risen over the past three years.

.....

Issues associated with the use of third-party vendors to collect and process data for disputes or investigations have increased since the last survey.

In the past 12 months, has your company encountered issues involving privacy and/or data protection in disputes or investigations?

Encountered privacy/data protection issues



■ 2011

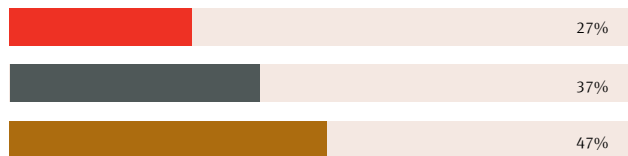
■ 2012

■ 2013

The proportion of respondents encountering privacy/data protection issues has increased steadily in recent years.

- Among respondents to this question, 43% had encountered privacy/data protection issues.
- Half of the larger companies have encountered privacy/data protection issues versus approximately one-third of smaller and mid-sized companies.
- Healthcare companies are by far the most experienced with such issues, with 67% having encountered them.
- By contrast, only 28% of energy companies have encountered privacy/data protection issues.
- As in past surveys, the most common issue is the search for or collection of data from company equipment (55%).
- This year saw a rise in issues related to the use of third-party vendors to collect and process data for disputes or investigations (41% versus 31% last year).

Organizations using cloud computing



■ 2011

■ 2012

■ 2013

Reported use of cloud computing among respondents has increased steadily in recent years.

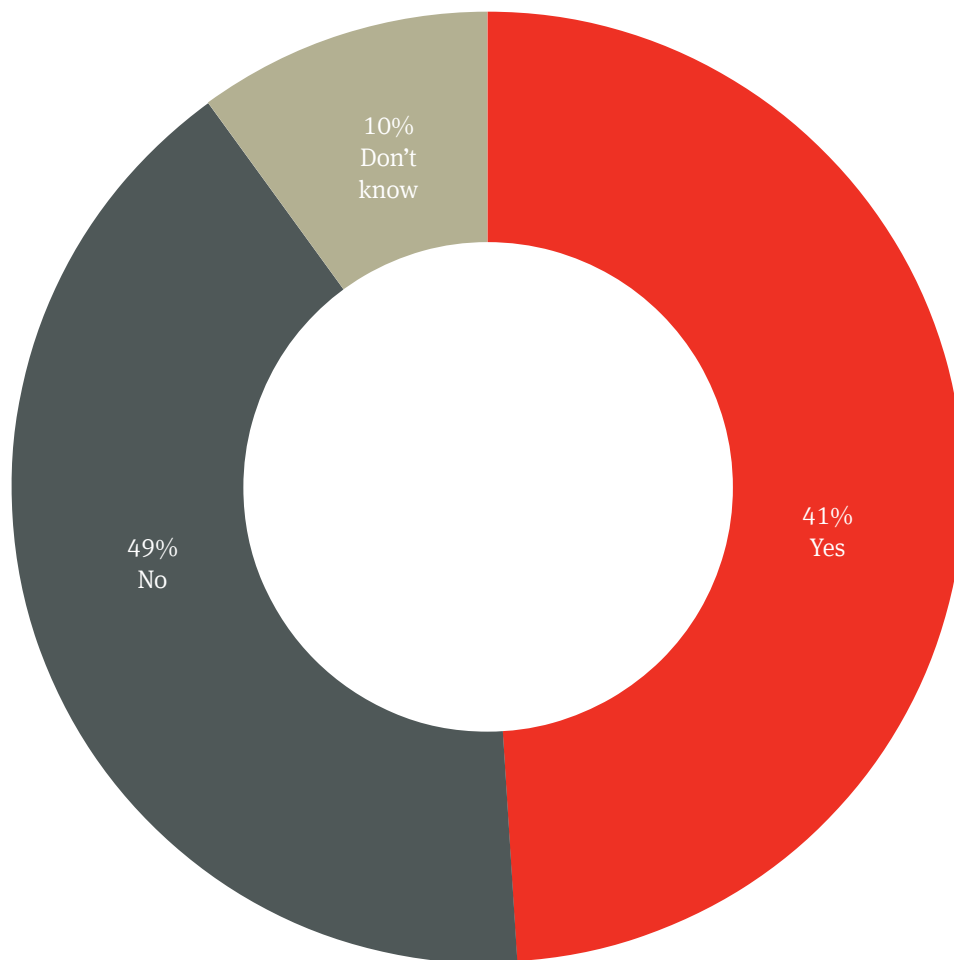
- Smaller and mid-sized companies (56% and 58%, respectively) are much more likely to utilize cloud computing than are larger organizations (43%).
- The companies reporting the highest cloud-usage rate are engineering/construction companies (68%) and technology/communications companies (65%).
- Among energy concerns, only 36% report being users of cloud solutions.
- Among users of cloud computing, 37% report they have had to preserve and/or collect data from the cloud in connection with actual or threatened disputes or investigations.

Electronic discovery

Four out of ten companies have had to preserve and/or collect data from an employee's personal mobile device for litigation or an investigation, consistent with the previous survey.

One in five companies preserved and/or collected data from an employee's personal social media account in connection with a dispute or an investigation.

Has your company had to preserve and/or collect data from an employee mobile device for a litigation or investigation?



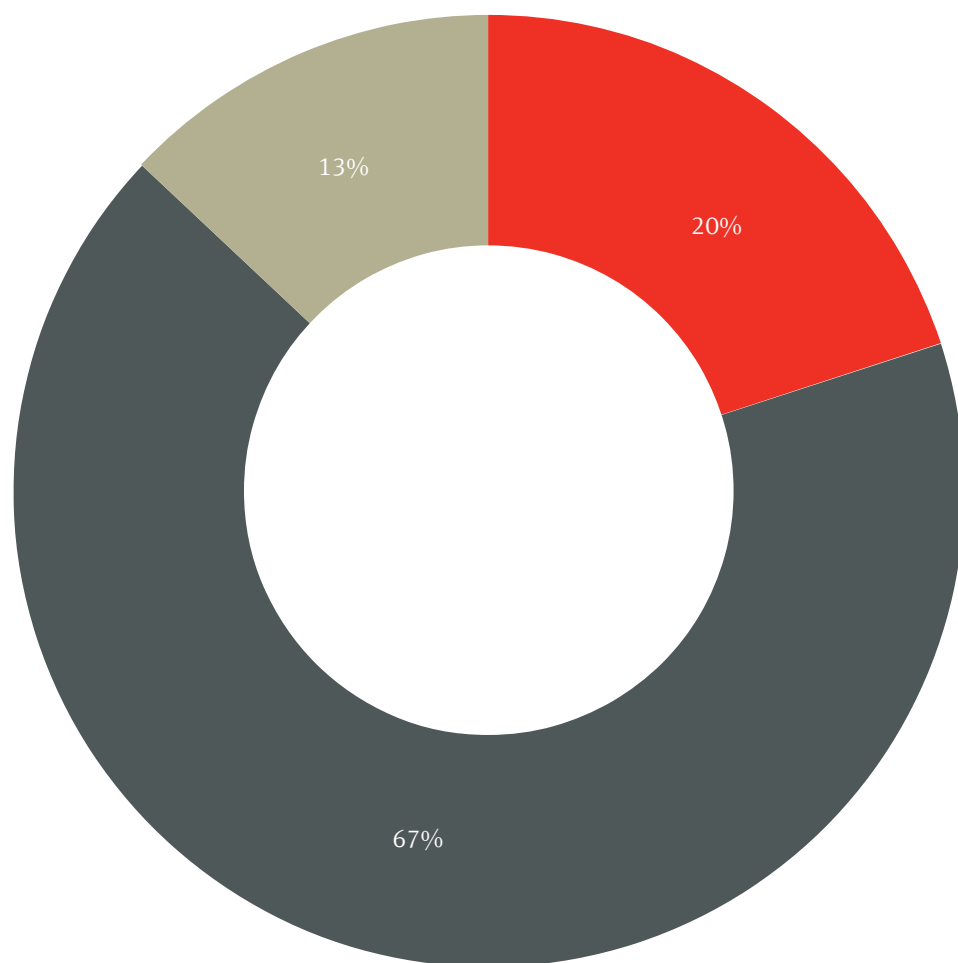
- As in the 2012 survey, 41% of respondents indicate having to preserve or collect data from employee mobile devices due to litigation or investigations. This follows a rise from just 30% in 2011.

Preserve/collect data from employee mobile device



- Energy respondents are the most likely to report this issue (52%) compared to other industry sectors.
- More than half of larger companies surveyed have had to preserve/produce employee mobile data, compared to just 38% of smaller companies.
- Mid-sized companies are the least likely to answer affirmatively (26%).

Has your company had to preserve or collect data from an employee's personal social media account in connection with a dispute or investigation?



One in five respondents indicate they have had to preserve or collect information from an employee's social media account.

- This proportion is comparable across all industry and revenue segments.
- Even fewer (15%) have had to produce electronically stored information from a social media site as part of discovery.

■ No (67%)

■ Yes (20%)

■ Don't know (13%)

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