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JANUARY 30, 2019

BUILDING AND OVERSEEING EFFECTIVE COMPLIANCE AND CORPORATE GOVERNANCE

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KEY 2018 DEVELOPMENTS

KEY DEVELOPMENTS REGARDING INDIVIDUAL LIABILITY

- On November 28, U.S. Deputy Attorney General Rod Rosenstein announced changes to the DOJ policy on individual accountability in corporate cases.
 - The policy change was the result of further review of DOJ’s existing policy and consideration of concerns about inefficiencies in requiring corporations to identify all employees involved in wrong-doing in return for cooperation.
 - Under the new DOJ policy, corporations will now be eligible for cooperation credit in criminal cases where they identify the individuals who were “substantially involved in or responsible for the criminal conduct.”
- In 2018, the DOJ continued to change its approach to international corruption cases, using the full range of options available to it to prosecute not only U.S.-based persons, but foreign officials as well.
- Two examples of the SEC charging public company executives in 2018 FCPA enforcement actions: Patricio Contesse Gonzalez, former CEO of Sociedad Química y Minera de Chile, S.A., and Paul A. Margis, former CEO of Panasonic Avionics Corporation.

“Corporate culture starts at the top, and when misconduct is directed by the highest level of management it is critical that they are held accountable for their conduct.”

- SEC FCPA Enforcement Chief Charles E. Cain (Sept. 25, 2018)

KEY 2018 DEVELOPMENTS

KEY DEVELOPMENTS REGARDING CORPORATE LIABILITY

- On October 11, DOJ issued new guidance providing greater clarity on the Department's decisions to impose monitors and outlining elevated procedures for selecting and approving individuals to serve as monitors.
- DOJ issued four public declination letters in 2018 pursuant to the FCPA Corporate Enforcement Policy.
 - The FCPA Corporate Enforcement Policy adopted in November 2017 incentivizes companies to self-disclose, cooperate, remediate, and pay any applicable disgorgement in return for the possibility of a declination.
 - At a November 2018 conference, DOJ FCPA Unit Chief Daniel Kahn confirmed that in the year since the policy was adopted, all companies that have voluntarily self-disclosed potential FCPA violations received declinations.
- On July 25, DOJ announced that the principles of the FCPA Corporate Enforcement Policy will apply to successor companies that identify and disclose to DOJ potential FCPA violations in connection with a merger or acquisition.
 - The policy creates a presumption that DOJ will decline to prosecute a company for potential FCPA violations when the company satisfies the policy's standards for voluntary self-disclosure, cooperation and remediation.

KEY 2018 DEVELOPMENTS

KEY DEVELOPMENTS REGARDING CORPORATE LIABILITY, CONTINUED

- On March 26, SEC announced that Kinross Gold Corporation, a Canadian mining company with shares on the NYSE, had settled claims of civil FCPA violations involving inadequate accounting controls over two West African subsidiaries.
 - The SEC Order provides that despite conducting pre-acquisition due diligence and several post-acquisition audits that found widespread anti-corruption compliance and accounting deficiencies, Kinross took three years to implement controls after acquiring the subsidiaries, failed to remediate the issues discovered by its own due diligence, and failed to consistently apply its own internal accounting controls after implementing them.
- In May, Deputy Attorney General Rod Rosenstein announced a new “no piling on” policy with respect to corporate enforcement penalties.
 - The policy directs DOJ prosecutors to “coordinate with one another to avoid the unnecessary imposition of duplicative fines, penalties and/or forfeiture against [a] company.”
 - The policy further instructs DOJ personnel to “endeavor, as appropriate, to ... consider the amount of fines, penalties and/or forfeiture paid to federal, state, local or foreign law enforcement authorities that are seeking to resolve a case with a company for the same misconduct.”

KEY 2018 DEVELOPMENTS

ANTITRUST ENFORCEMENT

- An ongoing focus for federal antitrust authorities is the area of Labor/Employment.
 - In late 2016, the DOJ and FTC issued joint antitrust guidance warning about the potential for antitrust exposure with respect to hiring and wage/benefit decisions. Guidance also included a list of “red flags” that HR professionals in particular should watch for in this area.
 - Agreements between employers not to solicit or hire one another’s employees → “no poach.”
 - Agreements (even indirect) between employers regarding wages/compensation/benefits.
 - Conduct would be subject to criminal prosecution if detected after guidance issued.
- Antitrust enforcers have continued to issue public statements emphasizing that this remains a key enforcement priority and that multiple investigations are underway.
- In 2018, DOJ announced an enforcement action against two of the world’s largest rail equipment suppliers alleging that the companies maintained long-standing agreements not to compete for employees. (Numerous follow-on class action complaints by current + former employees).
- DOJ leadership has stated, including in congressional testimony, that they now search merger documents for evidence of anticompetitive conduct.

KEY 2018 DEVELOPMENTS

THE SEC'S WHISTLEBLOWER PROGRAM

- 2018 was a record year for the SEC's whistleblower program.
 - The Commission received more whistleblower tips in fiscal year 2018 than in any other previous year. The SEC received over 5,200 whistleblower tips in fiscal year 2018—a nearly 76% increase since fiscal year 2012.
 - The Commission ordered its largest whistleblower awards to date in fiscal year 2018. In fact, the Commission awarded more dollars in fiscal year 2018 than in all prior years combined.
 - The Commission has awarded over \$326 million to 59 individuals since the beginning of the whistleblower program, and in fiscal year 2018 alone, the SEC awarded more than \$168 million in whistleblower awards to 13 individuals.
- The SEC proposed amendments to its whistleblower rules in July 2018 that clarify the requirements for anti-retaliation protection under the whistleblower statute and provide the Commission with additional discretion in making whistleblower awards.
- On February 21, the U.S. Supreme Court ruled in favor of a narrow definition of the term “whistleblower.”
 - In a 9-0 decision, the justices held that the Dodd-Frank Act protects whistleblowers from retaliation only when they have brought information relating to the violation of the securities laws to the SEC.

KEY 2018 DEVELOPMENTS

SEC CYBER ENFORCEMENT DEVELOPMENTS

- On February 21, the SEC issued the “Commission Statement and Guidance on Public Company Cybersecurity Disclosures” (the “2018 Guidance”). The 2018 Guidance goes beyond the SEC’s 2011 cybersecurity guidance in two substantive ways:
 - It stresses the importance of maintaining comprehensive policies and procedures related to cybersecurity risks and incidents; and
 - It discusses the application of insider trading prohibitions in the cybersecurity context.
- On April 24, the SEC announced that Yahoo! — now known as Altaba — agreed to pay a \$35 million penalty to settle claims that the company failed to timely disclose a 2014 data breach that compromised hundreds of millions of user accounts.
- In March, the SEC charged Voya with violating the Safeguards Rule and the Identity Theft Red Flags Rule. According to the SEC’s September 2018 order:
 - Voya’s failure to terminate intruders’ access to its systems stemmed from weaknesses in its cybersecurity procedures, some of which had been exposed during prior similar fraudulent activity; and
 - Voya also failed to apply its procedures to the systems used by its independent contractors.

WHY CONSIDERING COMPLIANCE AND GOVERNANCE TOGETHER IS IMPORTANT

An effective compliance program will:

- Drive the corporate message of acceptable and unacceptable practices deep into the corporation
- Compile data from the bottom up
- Provide multiple channels for reporting
- Train employees to issue spot
- Quickly and effectively respond to issues in a consistent manner across the organization

**Effective
Compliance
Program**

Effective corporate governance will:

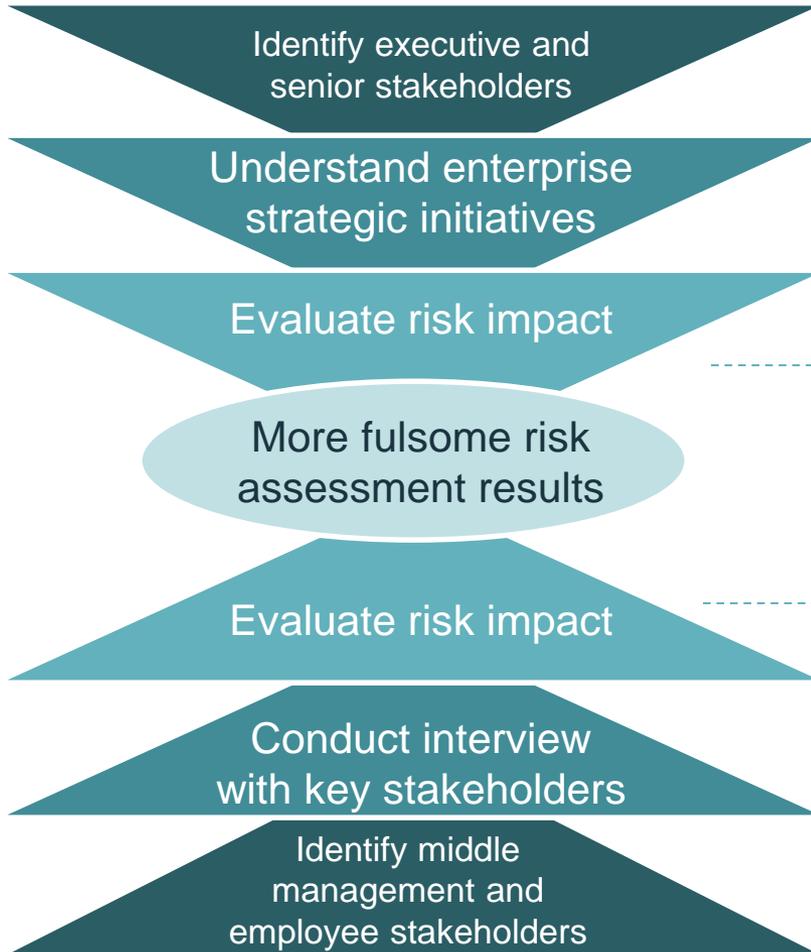
- Equip the board and senior management to appropriately prioritize areas of risk
- Protect the company and individual directors and officers by appropriately documenting compliance
- Help directors and senior management craft their communications with key stakeholders, including regulators

**Effective
Corporate
Governance**

ELEMENTS OF AN EFFECTIVE COMPLIANCE PROGRAM



ASSESSING COMPLIANCE RISK



Traditional approach

Traditional “top-down” approach where risk coverage should be driven by issues that directly impact business value, with clear and explicit linkage to strategic issues of the organization.

Combined approach

Use of information from both the top and the bottom of the organization and increases the likelihood of accurately reflecting corporate risks.

“Bottom-up” approach

“Bottom-up” approach is based on information gathered from other stakeholders who are “on the line” and “in the trenches.”

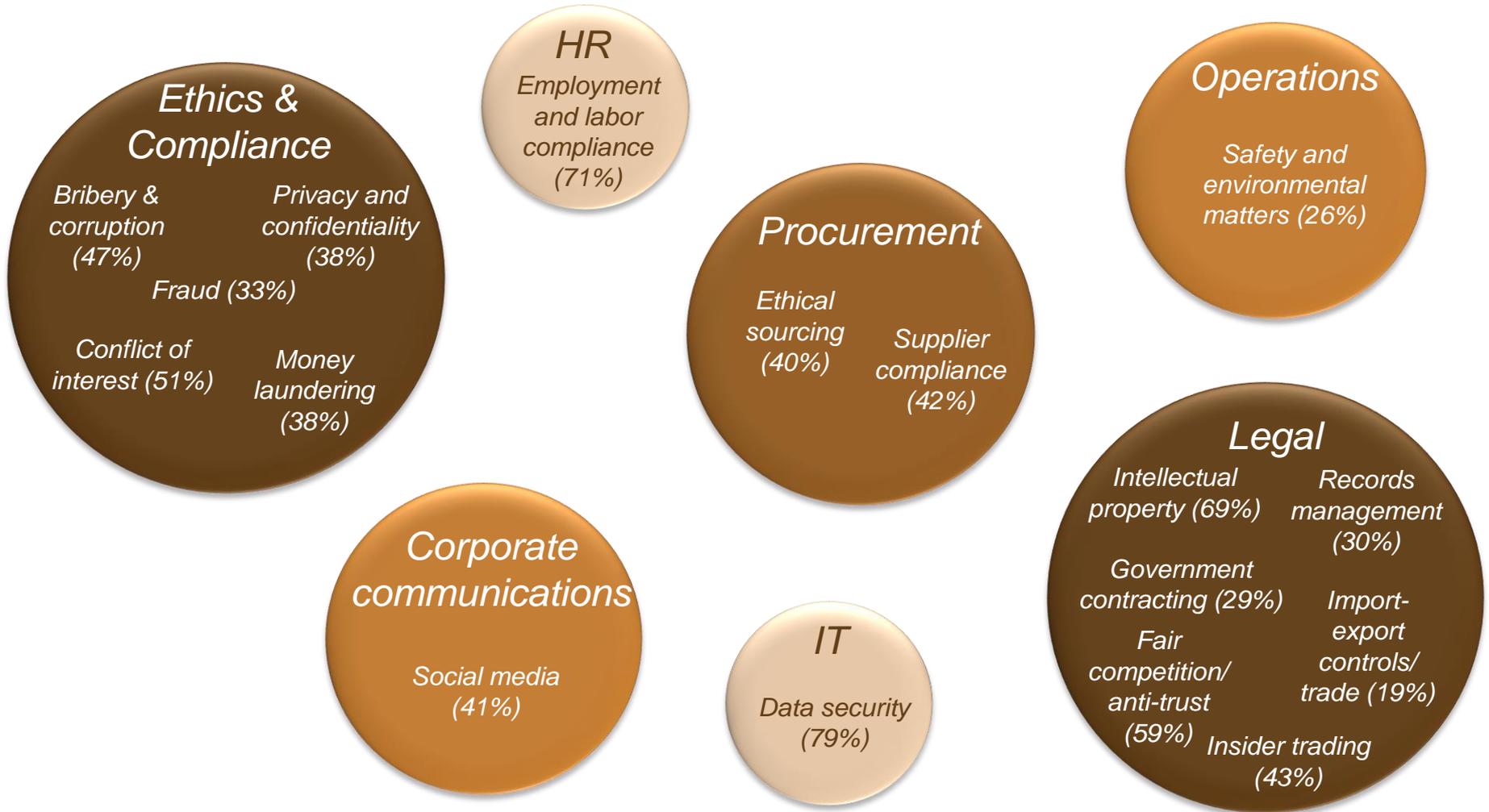
MANAGING THE EXPANDING COMPLEXITY AND SCOPE OF COMPLIANCE

- Heightened regulatory enforcement, growing pressures from socio-political movements, whistleblowers, activist campaigns and social media “journalism” fuels the importance of a strong and responsive ethical and compliance culture and transparent internal reporting channels.
- The responsibilities of compliance and governance professionals continue to expand, and managing the growing complexity and scope of compliance and governance is more challenging than ever.
- Managing the expanding scope of compliance while maintaining consolidated oversight requires developing a clear understanding of responsibilities, including where responsibilities sit in the organization.
- In part because of the expanding scope of compliance, it remains important for compliance professionals to be free of conflicts of interest, and, while integrated into the business, focused on the tasks of compliance.



MANAGING THE EXPANDING COMPLEXITY AND SCOPE OF COMPLIANCE

COORDINATING TO SHARE THE LOAD



Each risk has been attributed to the department which was most frequently selected as the “owner” in the survey. PWC State of Compliance (2016).

BUILDING EFFECTIVE COMPLIANCE CONTROLS

TECHNOLOGY TAKEAWAYS

“How has the company assessed whether . . . policies and procedures have been effectively implemented?”

“Has the company reviewed and audited its compliance program . . . including testing of relevant controls, collection and analysis of compliance data, and interviews of employees and third parties?”

“How often has the company updated its risk assessments and reviewed its compliance policies, procedures, and practices?”

-U.S. Department of Justice, Criminal Division, Fraud “Evaluation of Corporate Compliance Programs” (Feb. 2017)

- Technology is a primary means by which compliance functions can get ahead of new threat sources, yet most companies lack the more sophisticated infrastructure required to support a modern compliance function.
- Investing in tech-enabled infrastructure enables:
 - Rapid emerging risk identification
 - Real-time effective monitoring through analytics
 - Up-to date training
 - Increased responsiveness and policy and procedure effectiveness
 - More effective and complete updates to the Board and senior management

PWC State of Compliance (2018).

COMPLIANCE AND STRATEGY

- A close link between business strategy and the compliance function sets the foundation for a culture of compliance, and ethics that keep pace with the organization's business structure.
- The compliance program can help inform: (1) the types of expertise the Board and senior management should have access to; (2) the cost/benefit of pursuing business in certain jurisdictions; (3) the types of expertise the company should have access to in particular jurisdictions; (4) the Board's review of the performance of senior management; and (5) the company's options for business partners.
- Considering an organization's strategy when building the compliance function can help inform: (1) the degree to which the compliance function will need to scale quickly; (2) the categories of risk that the compliance function should prioritize; and (3) the metrics and data sources the compliance function should consider using.
- Beyond improving a company's ability to manage global enforcement trends as the organization evolves, compliance that works hand-in-hand with strategy can be a part of how a company distinguishes itself in the marketplace.

COMPLIANCE DUE DILIGENCE IN STRATEGIC TRANSACTIONS

KEY CONSIDERATIONS

- ***When should the compliance team be brought into the deal process?*** There may be tension between the timeline for the deal, and the time needed to complete effective due diligence. The compliance team generally should be first in, last out.
 - Compliance personnel should be included in negotiations of key deal documents. Note that merger documents may be a source of evidence of anticompetitive conduct.
- ***How should the company think about compliance due diligence?*** Due diligence is the first step toward mitigating corruption and steering clear of liability. Compliance due diligence should be risk-based, which means it needs to be informed by a risk assessment process.
- ***Do investors, including private equity and venture capital, think about compliance?*** Increasingly, investors, including PE and VC investors, are interested in understanding a company's compliance history and protocols. Compliance can have an impact on a company's access to capital.
- ***When is the compliance due diligence done?*** Don't forget post-closing due diligence. The integration process can hold key opportunities to mitigate risk.

COMPLIANCE DUE DILIGENCE IN STRATEGIC TRANSACTIONS

“Due Diligence Process – Was the misconduct or the risk of misconduct identified during due diligence? Who conducted the risk review for the acquired/merged entities and how was it done? What has been the M&A due diligence process generally?

Integration in the M&A Process – How has the compliance function been integrated into the merger, acquisition, and integration process?

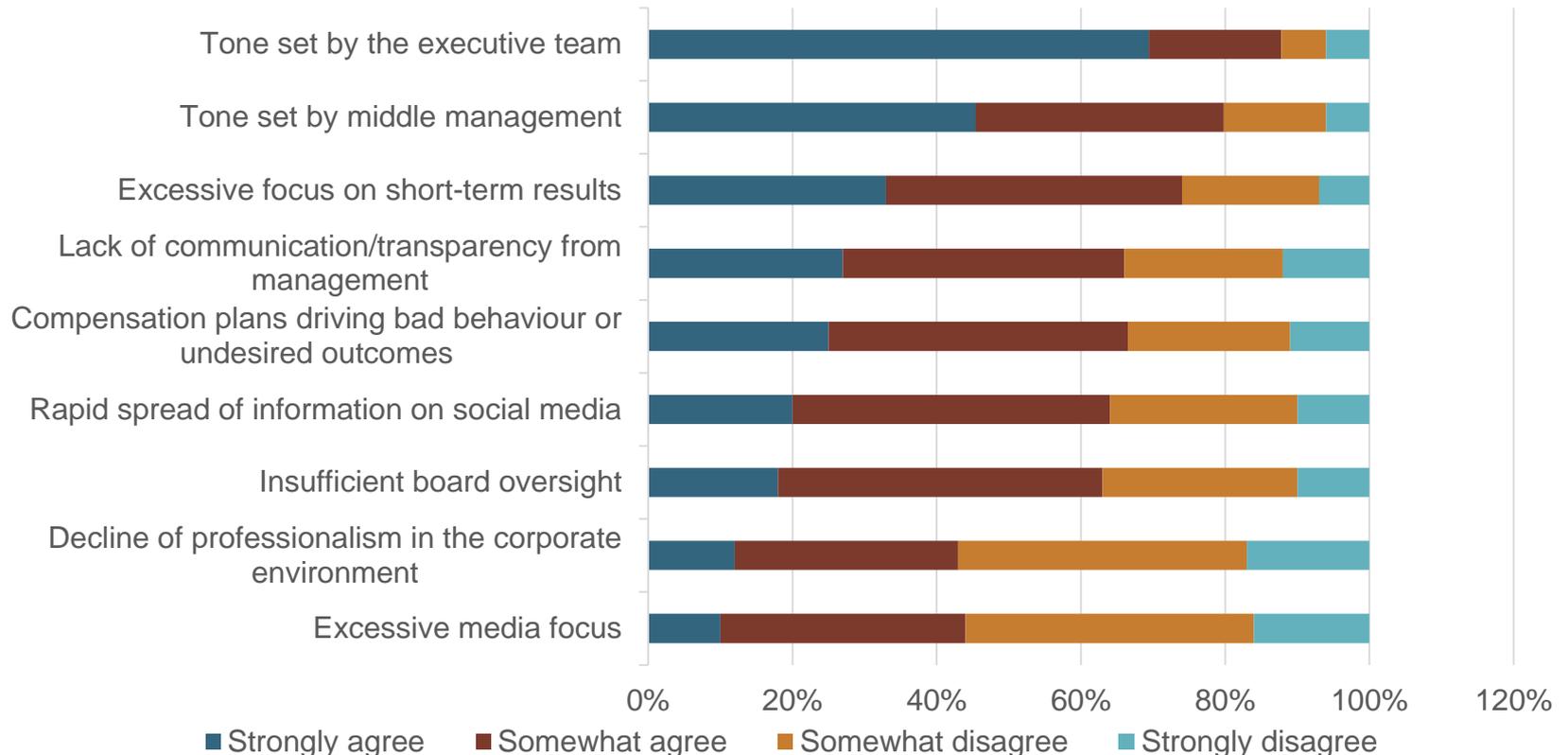
Process Connecting Due Diligence to Implementation – What has been the company’s process for tracking and remediating misconduct or misconduct risks identified during the due diligence process? What has been the company’s process for implementing compliance policies and procedures at new entities?”

-U.S. Department of Justice, Criminal Division, Fraud “Evaluation of Corporate Compliance Programs” (Feb. 2017)

COMPLIANCE, GOVERNANCE AND CULTURE

WHERE DO PROBLEMS BEGIN?

- According to a recent survey of over 700 U.S. public company directors,¹ in response to the question “to what extent do you agree or disagree that the following factors contribute to problems with corporate culture?”



1: PWC Annual Directors Survey (2018).

COMPLIANCE, GOVERNANCE AND CULTURE

- Without a culture of compliance, an organization is constantly at risk.
- While organizations may view a “culture of compliance” as aspirational, culture is referenced in the U.S. Federal Sentencing Guidelines, which include expectations for companies to promote an “organizational culture that encourages ethical conduct” and “compliance with the law.”

The elements of a culture of compliance

Organizational values

Tone at the top

Consistency of messaging

Middle managers who carry the banner

Comfort speaking up

Accountability

Hire-to-retire cycle

Incentives and rewards

Procedural justice

Reciprocal trust

FIVE QUESTIONS TO CONSIDER

1

Does your organization's senior leadership make the delivery of compliance and ethics messages a priority?

2

Is your organization's senior leadership measured in any way on its commitment to compliance and ethics?

3

Does your organization's existing risk assessment process capture the current state of compliance and ethics risk management with sufficient detail so as to power your planning and execution of necessary mitigation activities?

4

Does the structure of your organization's compliance and ethics function truly enable and support key activities to address prioritized risk areas?

5

Do your organization's Board and senior leadership provide meaningful oversight and support of the compliance and ethics function?

APPENDIX

MANAGING THE EXPANDING COMPLEXITY AND SCOPE OF COMPLIANCE

PRIORITIZING KEY AREAS OF RISK

Manage

- Government contracting
- Product claims
- Workplace safety/OSHA
- Insider trading
- Social media and technology
- Competition
- Product safety and compliance
- Third-party due diligence
- Customs and trade compliance

Monitor

- M&A diligence/integration
- Product labeling
- Records management
- IP/Confidentiality
- Contracts and strategic agreements
- Business continuity
- Labor and employment

Own

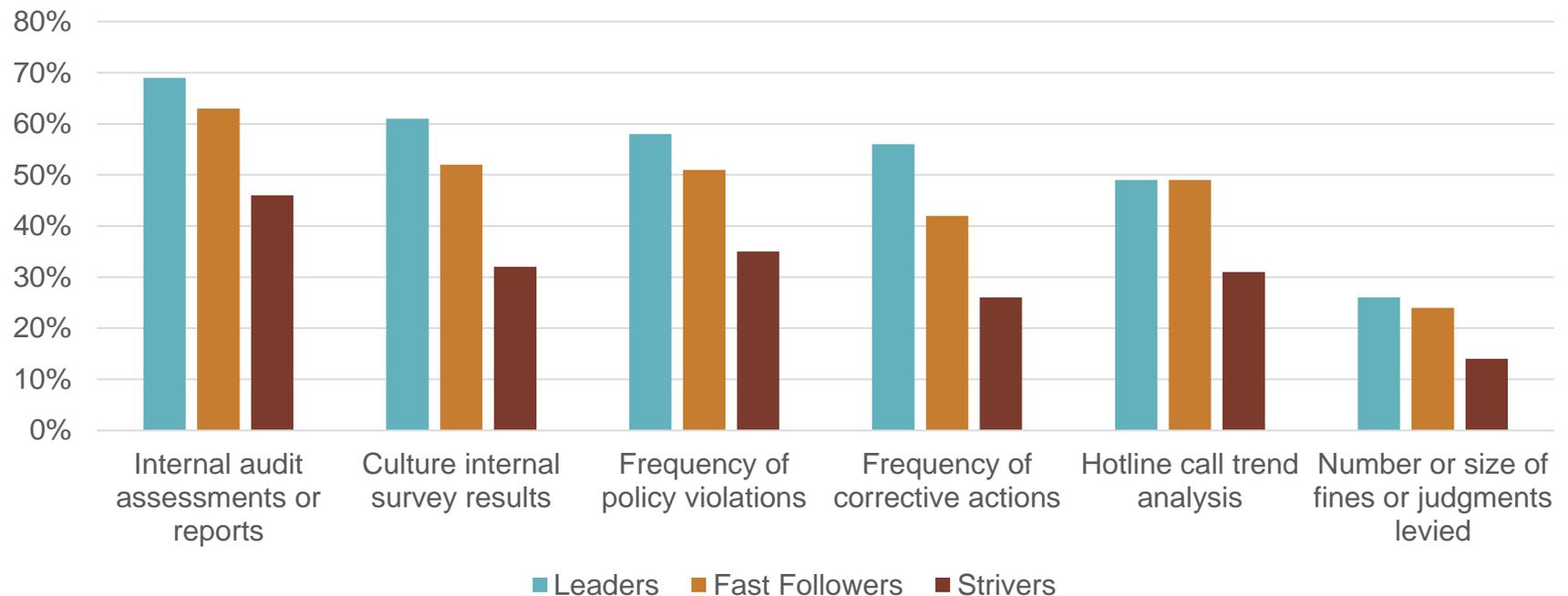
- Code of conduct/ethics
- Anti-bribery
- Corporate policy management
- Data privacy
- Conflicts of interest

EXAMPLE

BUILDING EFFECTIVE COMPLIANCE CONTROLS

DATA SOURCES

- According to a recent survey of over 800 compliance professionals worldwide,¹ in response to the question “*What data points do you use to measure the effectiveness of your ethics- and compliance-related policies and procedures?*”



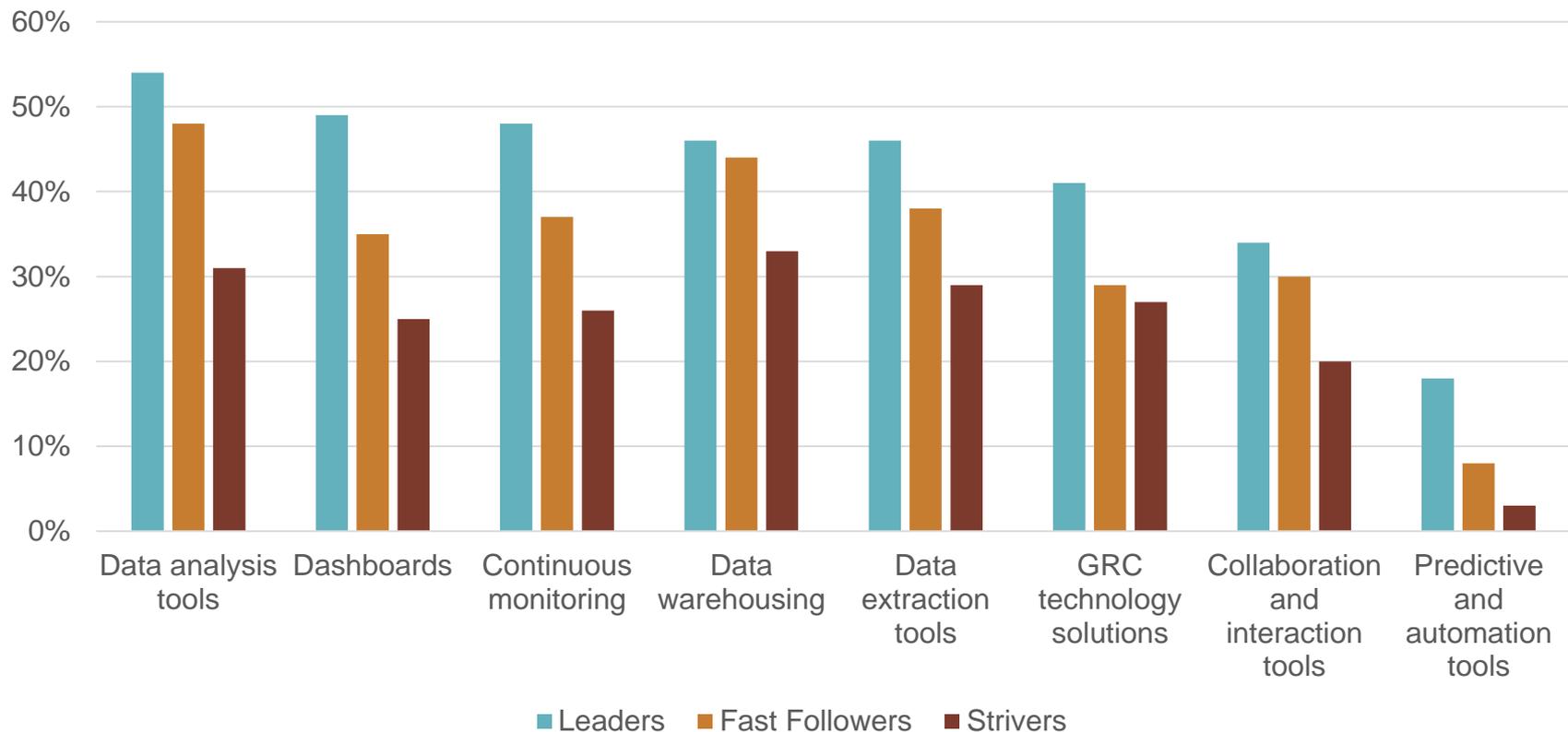
“Leaders” are those survey respondents who indicated that were “very satisfied” with the effectiveness of their compliance programs (17%). “Fast followers” are those respondents who reported that they were “somewhat satisfied” with the effectiveness of their compliance programs (45%). “Strivers” are those who were neutral or dissatisfied with compliance effectiveness (38%).

1: PWC State of Compliance (2018).

BUILDING EFFECTIVE COMPLIANCE CONTROLS

INFORMATION TECHNOLOGY

- According to a recent survey of over 800 compliance professionals worldwide,¹ in response to the question “Which of the following components of IT infrastructure are in place at your organization to support a modern, data-drive compliance function?”



1: PWC State of Compliance (2018).

COMPLIANCE AND STRATEGY



THANK YOU

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Education

- Yale Law School, J.D., 2010 (Editor, *Yale Journal on Regulation*)

Sarah's principal areas of practice are corporate governance, board representation and securities law. She advises clients, including public companies and their boards of directors, on corporate governance, securities law and regulatory matters, including exchange listing standards, and investor outreach and relations. Representative matters include advising clients on Securities and Exchange Commission reporting requirements, board and committee procedures and governance documents, board and senior management succession planning, shareholder engagement and corporate governance activism, proxy and periodic disclosures, director independence and qualification matters, proxy advisory firm voting policies, and internal and disclosure controls and procedures. Sarah's areas of practice also include board-level crisis preparedness, cybersecurity and cyber-risk considerations, and environmental and social governance matters and disclosures, including climate change-related disclosures.

Select Experience

- Presentations to S&P 500 boards of directors on corporate governance best practices and key governance developments, including insights regarding crisis management, succession planning, risk oversight, executive compensation, board communications and materials, and shareholder relations
- Support to companies ranging from the newly public to Fortune 100 in their preparation for their annual shareholders' meetings, including addressing shareholder activism and proposals, drafting and reviewing proxy statement disclosure and assisting with shareholder engagement efforts
- Policy statements for trade groups and thought leaders regarding corporate governance and comment letters to the Securities and Exchange Commission on key governance developments
- Ongoing governance support for dozens of corporations, including conflict of interest considerations, director independence analysis and implementation of governance policies and procedures
- Detailed analyses of current practices and compilation of governance recommendations for nonprofit and charitable organizations

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Education

- University of Virginia School of Law, J.D., 2004 (Articles Development Editor, *Virginia Journal of Law and Politics*, 2003–2004)
- Rice University, B.A., 2001
- Admitted to practice: Texas

Recognition

- *Legal 500 U.S.*, Capital Markets: High-Yield Debt Offerings, 2016
- Selected to the Texas Rising Stars list, *Super Lawyers* (Thomson Reuters), 2010–2012, 2014–2017
- Selected to the BTI Client Service All-Stars list, 2016

Sarah's primary areas of practice are capital markets, mergers and acquisitions, private equity, and advising public and private companies on governance, and general corporate and securities matters.

Her capital markets experience includes representation of both issuers and underwriters in initial public offerings, as well as public and private offerings of equity and debt securities, with a particular emphasis on the energy industry. Sarah has also advised private equity investors, as well as public and private companies, on mergers, acquisitions, and dispositions in the oil and gas exploration, pipeline, and oilfield services industries.

Select Experience

- Berry Petroleum Corporation in its \$183 million initial public offering of common stock
- BP Midstream Partners LP in its \$765 million initial public offering of common units
- Nine Energy Service, Inc. in its \$161 million initial public offering of common stock
- Venator Materials PLC in its \$522 million initial public offering of ordinary shares by a selling shareholder
- KLR Energy Acquisition Corp. in the \$445 million combination with Tema Oil and Gas Company to form Rosehill Resources
- Nexeo Solutions, a chemicals and plastics distributor and TPG Capital portfolio company, in its \$1.575 billion merger with WL Ross Holdings Corp., a special purpose acquisition company formed by WL Ross
- Underwriters to Tallgrass Energy GP, LP in its \$1.4 billion initial public offering of common units
- Occidental Petroleum Corporation in the spin-off of its California oil and gas business into an independent and separately traded company, California Resources Corporation
- Susser Petroleum Partners LP in its \$224 million initial public offering of common units
- Forum Energy Technologies, Inc. in its \$436 million initial public offering of common stock
- Caiman Energy in the \$2.5 billion sale of Caiman Eastern Midstream, LLC, a gas and liquids processing company focused in the Marcellus Shale, to Williams Partners
- Energy XXI in its \$2.3 billion acquisition of EPL Oil & Gas Inc., creating the largest publicly traded independent oil and gas producer on the Gulf of Mexico Shelf

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Education

- William & Mary School of Law, J.D., 2002
- Davidson College, B.A., Political Science, 1999

Recognition

- *Euromoney's Benchmark Litigation*, "Future Star" in District of Columbia, 2012–2018
- *Euromoney's Benchmark Litigation*, Under 40 Hot List, 2016

As a member of the firm's Government Investigations and White Collar Criminal defense practice, Amy's practice focuses on conducting internal investigations and defending clients in investigations and enforcement actions brought by U.S. and international regulators and in related litigation.

Amy routinely defends clients in complex, high-stakes government inquiries and investigations, prosecutions, and other proceedings related to compliance with federal and state regulations, including the U.S. Foreign Corrupt Practices Act, False Claims Act, Federal Election Campaign Act, securities, antitrust, and trades secrets laws, and procurement fraud. She regularly represents clients before the Department of Justice (DOJ), the Securities and Exchange Commission (SEC), and other enforcement bodies.

Amy's practice also involves a wide range of compliance counseling, including assisting clients to conduct risk assessments, develop, implement, and enhance compliance programs, train relevant stake holders including directors, and test existing programs for effectiveness. Amy advises clients on compliance risks associated with investments, acquisitions, and financings and provides contractual safeguards and remedial actions to mitigate against risks. Amy has counseled clients in numerous industries, with particular focus on energy and energy services, defense contracting, and private equity.

Select Experience

- Represents the Audit Committee of a public multinational technology company involved in an ongoing investigation before the SEC and DOJ to conduct an independent investigation into the company's compliance with the FCPA in Russia and four other countries
- Represents U.S. energy services, technology, and research company in connection with DOJ and SEC investigation concerning Monaco-based company Unaoil; following internal investigation and presentations to regulators on company's behalf, both DOJ and SEC closed their investigations with no action taken against client
- Conducted an internal review of the due diligence procedures performed by a private equity firm's portfolio asset in connection with a partnership and investment in Ghana; helped firm enhance its diligence process, and interview and train partners on compliance with anticorruption laws
- Representing U.S. and foreign companies in creating new anticorruption compliance programs to reflect changes in law and enforcement trends, and reviewing and revising existing programs and policies; conducting anticorruption compliance training, and directing due diligence on prospective agents and business partners

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Education

- College of William & Mary School of Law, J.D., 2008 (Notes Editor, William and Mary Law Review)
- New York University, M.A., 2003
- Davidson College, B.A., 2002

Recognition

- Selected to the Washington, D.C. Rising Stars list, *Super Lawyers* (Thomson Reuters), 2015–2018
- Selected for D.C. Bar John Payton Leadership Academy, Class of 2014
- Vinson & Elkins Pro Bono Award Recipient, Family Law, 2012
- Vinson & Elkins Pro Bono Law Award Recipient, Disability Rights, 2013

Lindsey is a counsel in the complex commercial litigation practice group. Her principal areas of practice include civil litigation, investigations and criminal defense with an emphasis on antitrust matters.

Lindsey represents companies and individuals in a variety of government and congressional investigations. Her area of practice includes class actions and other civil litigation matters, and defending clients in government investigations, grand jury subpoenas, and other proceedings. She also has handled several pro bono litigation matters, including a contested child custody dispute in D.C. Superior Court, and co-chaired a jury trial in a disability discrimination case brought in federal court in the District of Columbia. Lindsey currently co-chairs the ABA Antitrust Section's Cartel & Criminal Practice Committee and is very involved in ABA Antitrust Section events and programming.

Select Experience

- (E.D. Mich.) — Defending a leading automobile parts supplier and its affiliates in class action multi-district litigation pending in the Eastern District of Michigan
- (N.D. Cal.) — Defending a foreign supplier and its U.S.-based affiliate in class action multi-district litigation related to allegations of price-fixing in the lithium ion batteries industry
- Represented a leading automobile parts supplier and its affiliates in a series of criminal grand jury investigations and civil litigation involving semiconductors and consumer products
- (C.D. Cal.) — Defended a large Kuwait-based logistics company in false claims qui tam action alleging fraudulent billing in connection with contracts with the U.S. military for logistics services
- Assisted in the representation of a former senior banking executive in connection with an investigation and hearings by a Senate investigations subcommittee into the 2008 U.S. financial crisis and role of high-risk home loans
- Assisted in the successful defense of a U.S. affiliate of a foreign corporation in a criminal antitrust investigation conducted by the U.S. Department of Justice Antitrust Division involving the secondary battery market
- (D. Md.) — Represented a biotech company's officers and directors in defense against shareholder derivative litigation
- (U.S. Attorney's Office for Eastern District of Virginia (Norfolk Division)) — Conducted an internal investigation for an international distribution company in connection with a grand jury investigation into sales practices (lead associate)
- Represented a large Kuwait-based logistics services company in defense of a criminal indictment (N.D. Ga.) involving the company's prime vendor contracts to provide food for the U.S. Army in Iraq
- Defended an owner of an electronic components brokerage company in connection with charges of criminal trademark infringement and fraud regarding sales to the military