DLA Piper Global Women's Leadership Summary
September 20, 2016
CLE Materials

Moderator:
Keara Gordon, Partner and Co-Chair, Class Action Litigation, DLA Piper US (LLP) (New York, NY)

Panelists:
Maureen F. Del Duca, Vice President and Deputy General Counsel, Litigation and Investigations, Northrop Grumman Corporation

Carole C. Lam, Senior Vice President and Deputy General Counsel, Qualcomm Incorporated

Erin Martin, Vice President and General Counsel, Little Caesars Enterprises

Helen Werner, General Counsel, North America, the Caribbean and Asia, LATAM Airlines Group S.A.

Panel Topic:
Legal Governance, Risk Management and Compliance in a Global Economy

I. COURSE OVERVIEW

In today's global environment, an increasing number of regulatory bodies in jurisdictions around the world are investigating and prosecuting perceived compliance failures. As a result, companies must proactively incorporate multiple (and perhaps conflicting) demands into their business and legal strategies, particularly as they expand across markets. This panel will address how global risk intelligence can provide advantages to general counsel and their companies facing these challenges in an increasingly scrutinized business environment. They will discuss opportunities to weave legal compliance into business initiatives and describe various approaches to the development and implementation of a cross-discipline and cross-border compliance program.

II. COURSE DESCRIPTION

This panel will cover key corporate compliance issues facing general counsels, particularly from the FCPA/anti-corruption perspective. The panel will be structured as an interactive, Q&A dialogue based on a mock whistleblower scenario. The panel discussion will use the initial hypothetical scenario to launch into the various issues associated with an alleged compliance breach, taking the audience through various phases of a compliance breach – from initial alert through investigation, privilege considerations, conflicts of interest, individual director/officer liability implications, and disclosure considerations.

A. Whistleblower Considerations

Companies receive compliance "alerts" from a number of different sources, with an increasing prevalence of alerts coming from individual whistleblowers. Recent governmental initiatives and incentive programs may contribute to the uptick in whistleblower alerts both nationally and internationally. Particularly with multi-national corporations, whistleblower trends in one country may differ from another, resulting in regional considerations for addressing allegations. When faced with a whistleblower, companies must react in a manner that adequately addresses the alleged violation while also maintaining the company's best interest and navigating communication with the business. While there is no one-size-fits-all response to a whistleblower allegation, there are foundational best practices that companies can and should be aware of in order to address legal issues while mitigating risk for the company. These best practices and considerations include prioritizing high and low risk allegations; implementation of policies and protocols; and how and when to involve different business functions depending on the issue at hand (e.g., HR, Legal, Internal Audit, Outside Counsel). Each allegation may differ, but all allegations must be taken seriously.

This panel will discuss current trends with whistleblowers as well as recommended best practice based on both governmental guidance and personal experience.

B. Investigation and Disclosure Considerations

When faced with a whistleblower allegation, companies must decide whether and to what extent to conduct an investigation. Myriad factors come into play when assessing whether to conduct an investigation, including resource constraints, relative risk, risk of enforcement, severity of the allegation, pervasiveness of the underlying issue, whether there exists a risk of harm to employees' well-being, financial exposure, and the underlying laws related to disclosure requirements. Taken together, a company must assess and develop internal protocols for conducting investigations. Once an investigation is deemed appropriate, counsel are faced with yet more considerations, such as how to develop the appropriate scope for an investigation that would satisfy authorities; whether to retain outside counsel or to conduct the investigation internally; the benefits and drawbacks to conducting an investigation under privilege; containment of investigation details and risk of cross-border enforcement; and potential conflicts of interest with officers and directors.

Closely associated with a decision to investigate is the issue of disclosure, both internally and externally. Internally, counsel must assess how and when to inform the business, and who within the business should be informed. Keeping the circle of knowledge small may be in the company's best interest for containment purposes, but there also exists the risk that intentionally leaving individuals out could negatively impact morale, decrease cooperation, and/or negatively impact business relationships. From an external perspective, counsel must also determine whether local law requires disclosure to relevant authorities, and if so, how such disclosure will impact not only the local jurisdiction, but whether disclosure in one jurisdiction will have a ripple effect across its national

or international locations.

This panel will discuss the various legal and strategic issues that happen throughout an investigation, how one decision may impact another, and how to best position both the company and its officers and directors.

C. Individual Liability

Along with increased risk of enforcement in the anti-corruption space, recent governmental initiatives and directives indicate an increased likelihood of individual enforcement risk as well. The combination of the U.S. Department of Justice's release of the Yates Memo in September 2015, the hiring of Compliance Counsel in November 2015, consistent high dollar settlements with companies violating the Foreign Corruption Practices Act, and specific criminal penalties against officers and directors, the risk of enforcement is apparent. As the industry comes up on a year since the Yates Memo release, this panel will discuss its perspective on the Memo's impact, how legal departments are addressing increased risk and related protections, and whether risk of individual liability has resulted impacted the willingness to accept a CCO position.

III. CONCLUSION/COURSE SUMMARY

Managing and effectively navigating a compliance breach, with an associated internal and/or external investigation, can have a significant impact on the business and must be handled strategically, but also comprehensively from a legal perspective. In-house counsel face a number of complicated questions and decisions, many of which must be made quickly and simultaneously. Implementing a compliance program, staying on top of trends, and understanding the options as well as associated risks is critical to managing the compliance function.

TRACE

Global Enforcement Report 2015

TRACE International Report

March 2016

Introduction

Almost every country in the world has statutes and regulations prohibiting the payment of bribes to their own government officials. Anti-bribery conventions sponsored by the United Nations, the Organisation for Economic Co-operation and Development ("OECD"), the Organization of American States, the Council of Europe and the African Union require signatory countries to establish binding standards for the criminalization of bribery of foreign public officials in international business transactions. Virtually every country in the world has ratified one of these international conventions and many have enacted laws that prohibit the payment of bribes to foreign government officials.

Despite the global denunciation of bribery, little information is publicly available on enforcement of these anti-bribery regulations. This can make it difficult to recognize trends concerning the extent to which countries are enforcing anti-bribery laws or where bribery is most prevalent, even though such information is critical to promoting transparency in global business. TRACE publishes the Global Enforcement Report ("GER") annually in an attempt to provide this essential information. The 2015 GER provides an updated summary of international anti-bribery enforcement trends, based primarily on the cases and investigations tracked in the TRACE Compendium, TRACE's online database of transnational corruption cases. The TRACE Compendium contains summaries of enforcement actions, investigations and declinations involving the alleged bribery of government officials that crosses at least one border. Neither the TRACE Compendium nor the 2015 GER include matters involving domestic companies bribing domestic government officials. The alleged bribe must have a cross-border component and must involve a government official or an employee of a state-owned entity.

The 2015 GER offers both graphic and textual analyses of investigations and enforcement actions concerning the bribery of government officials from the enactment of the U.S. Foreign Corrupt Practices Act ("FCPA") in 1977 through December 31, 2015. The 2015 GER reflects several updates to the data reported in earlier editions of the GER, as the data is updated whenever TRACE obtains new or improved information regarding an investigation or enforcement action, or when the status of an enforcement action changes. The 2015 GER also represents TRACE's continuing efforts to refine and improve the data utilized in the report. Neither the TRACE Compendium nor the 2015 GER can provide a precise and objective measurement of global anti-corruption enforcement. Instead, they are meant to provide general information on trends in international anti-corruption efforts on a broad scale.

The 2015 GER focuses on two distinct anti-bribery enforcement events undertaken by government authorities: investigations and enforcement actions. An **investigation** is an ongoing investigation by a government authority into allegations of bribery of government officials by a foreign company or individual. TRACE recognizes that investigations into allegations of bribery are sometimes dropped due to insufficient evidence, or for security or political considerations; they may be closed without any resolution; or they may continue indefinitely with no other action ever being taken. However, unless publicly available information indicates that action was taken, either through an enforcement action or a declination, such an investigation is considered an ongoing investigation for the purposes of the 2015 GER. An **enforcement action** is an adjudication of allegations of bribery of government officials by a foreign company or individual. That is, there must be a final resolution that involves fines or penalties, a guilty plea, a sentencing or a settlement of charges.

Earlier editions of the GER included an analysis of declinations, which occur where an investigation is terminated but there is no enforcement action. That may mean a finding after trial that a company or individual is not guilty, or an authority deciding not to bring charges. In many instances, it is difficult to ascertain whether a declination has occurred, as authorities generally do not announce

©2016 TRACE International, Inc. All rights reserved.

the closing of an investigation. In the United States, there are a number of agencies that undertake investigations, and the closing of an investigation by one agency does not necessarily mean the company is no longer under investigation. For example, in May 2015 Hyperdynamics Corporation announced that the U.S. Department of Justice had closed its investigation into the company and would not bring charges against the company. In September 2015, the company settled charges with the U.S. Securities and Exchange Commission stemming from the same allegations as the investigation closed by the U.S. Department of Justice. In light of these difficulties, we have chosen to omit any analysis of declinations from this year's report.

The TRACE Compendium and 2015 GER also track allegations of bribery against individual employees or representatives of companies (including employees of local subsidiaries of international companies). When a company and its employees or representatives face multiple enforcement actions involving substantially the same conduct, only one enforcement action is counted in the 2015 GER. If a company does not face an enforcement action but its employees or representatives do, the enforcement action is counted as one enforcement action. Finally, while multiple different authorities in one country may be responsible for enforcement actions, only one enforcement action is counted against a company or individual.

Glossary of Terms

Below is a glossary of terms used in the 2015 GER:

Investigation – An ongoing investigation by a government authority into allegations of bribery of government officials by a foreign company or individual that has not been resolved by either an enforcement action or a declination.

Enforcement Action – An adjudication of allegations of bribery of government officials by a foreign company or individual that is a final resolution of charges.

Bribery of Foreign Official – Improper payments made by a foreign company to a government official who is not a citizen of the government undertaking the enforcement event.

Bribery of Domestic Official – Improper payments made by a foreign company to a government official who is a citizen of the government undertaking the enforcement event.

©2016 TRACE International, Inc. All rights reserved.

Key Findings

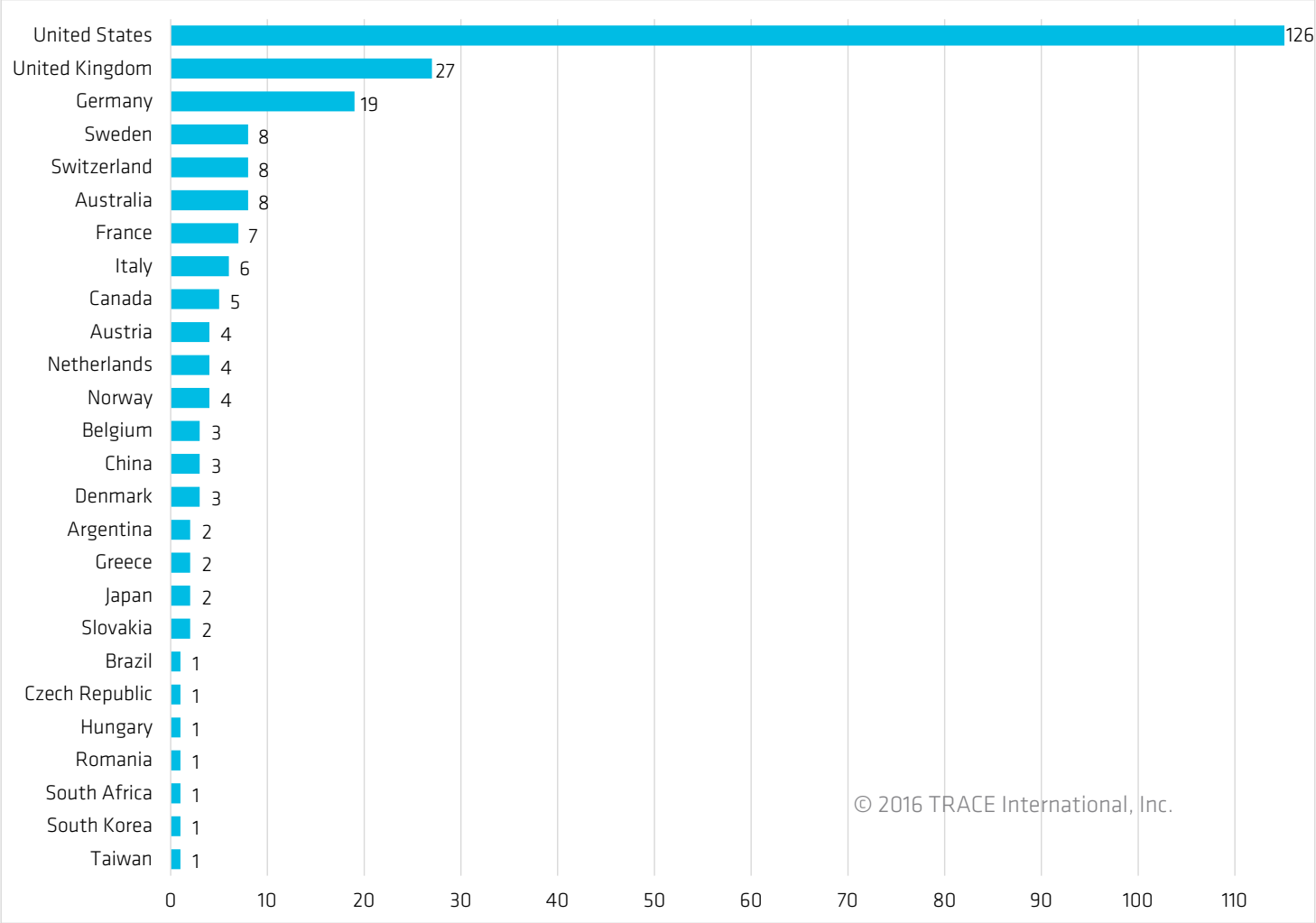
A number of developments and ongoing trends can be drawn from the 2015 GER:

- Non-U.S. enforcement actions dropped 73% from 2014, and 2015 had the lowest level of non-U.S. enforcement actions concerning bribery of foreign officials since 2007. (*See* Figure 3.)
- More than 70% of U.S. investigations and enforcement actions concerning alleged bribery of foreign officials being conducted against non-U.S. companies and individuals involved companies or individuals from Europe. (*See* Figure 4, Figure 5.)
- The vast majority of non-U.S. investigations (93%) and non-U.S. enforcement actions (97%) concerning bribery of foreign officials from 1977 to 2015 were conducted by OECD members. (*See* Figure 6, Figure 7.)
- Enforcement actions concerning alleged bribery of domestic officials are almost evenly distributed across the globe, with the same number of countries bringing such enforcement actions in Europe, Asia, and Africa. (*See* Figure 9.)
- While the Extractive Industries faces the brunt of enforcement actions concerning bribery of domestic and foreign officials, (*see* Figure 12, Figure 14), the Manufacturer/Service Provider industry faces more U.S. investigations. (*See* Figure 13.)

©2016 TRACE International, Inc. All rights reserved.

Figures and Analysis

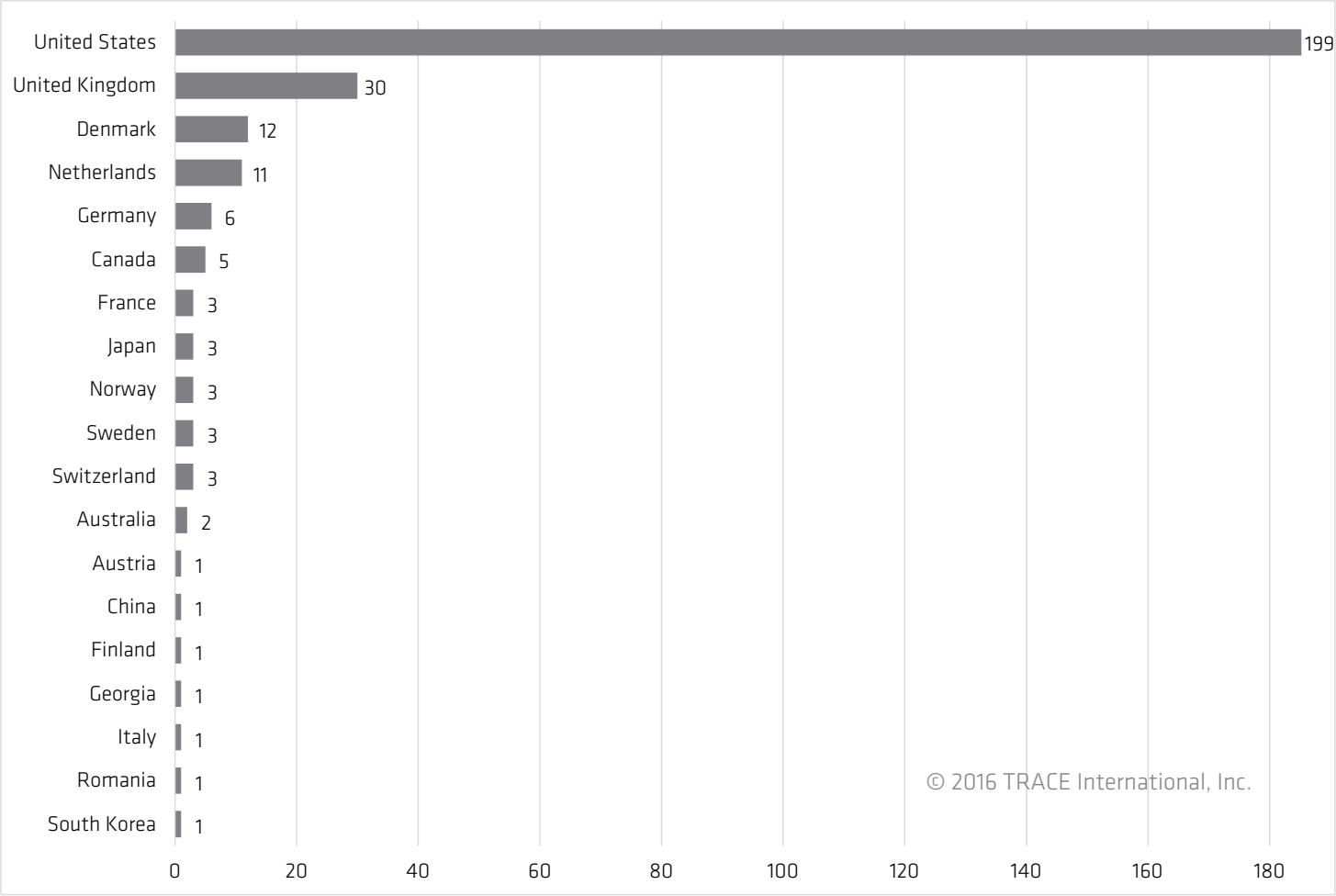
Figure 1: Investigations Concerning Bribery of Foreign Official by Country



There were 251 investigations concerning alleged bribery of foreign officials being conducted by authorities in 27 countries as of December 31, 2015. The United States was conducting 126 investigations, which was 50% of all ongoing investigations concerning alleged bribery of foreign officials and almost five (5) times as many as the United Kingdom, which was conducting the next-highest number of investigations. However, there was not as much disparity between the United States and Europe as a whole, which was conducting 101 investigations.

©2016 TRACE International, Inc. All rights reserved.

Figure 2: Enforcement Actions Concerning Bribery of Foreign Officials by Country



From 1977 through 2015, 19 countries pursued 287 enforcement actions concerning alleged bribery of foreign officials. The United States maintained the strongest enforcement record during this period, with 199 enforcement actions. This is approximately 70% of the total enforcement actions concerning alleged bribery of foreign officials taken to date, and almost seven (7) times as many as the country with the next highest total (the United Kingdom).

©2016 TRACE International, Inc. All rights reserved.

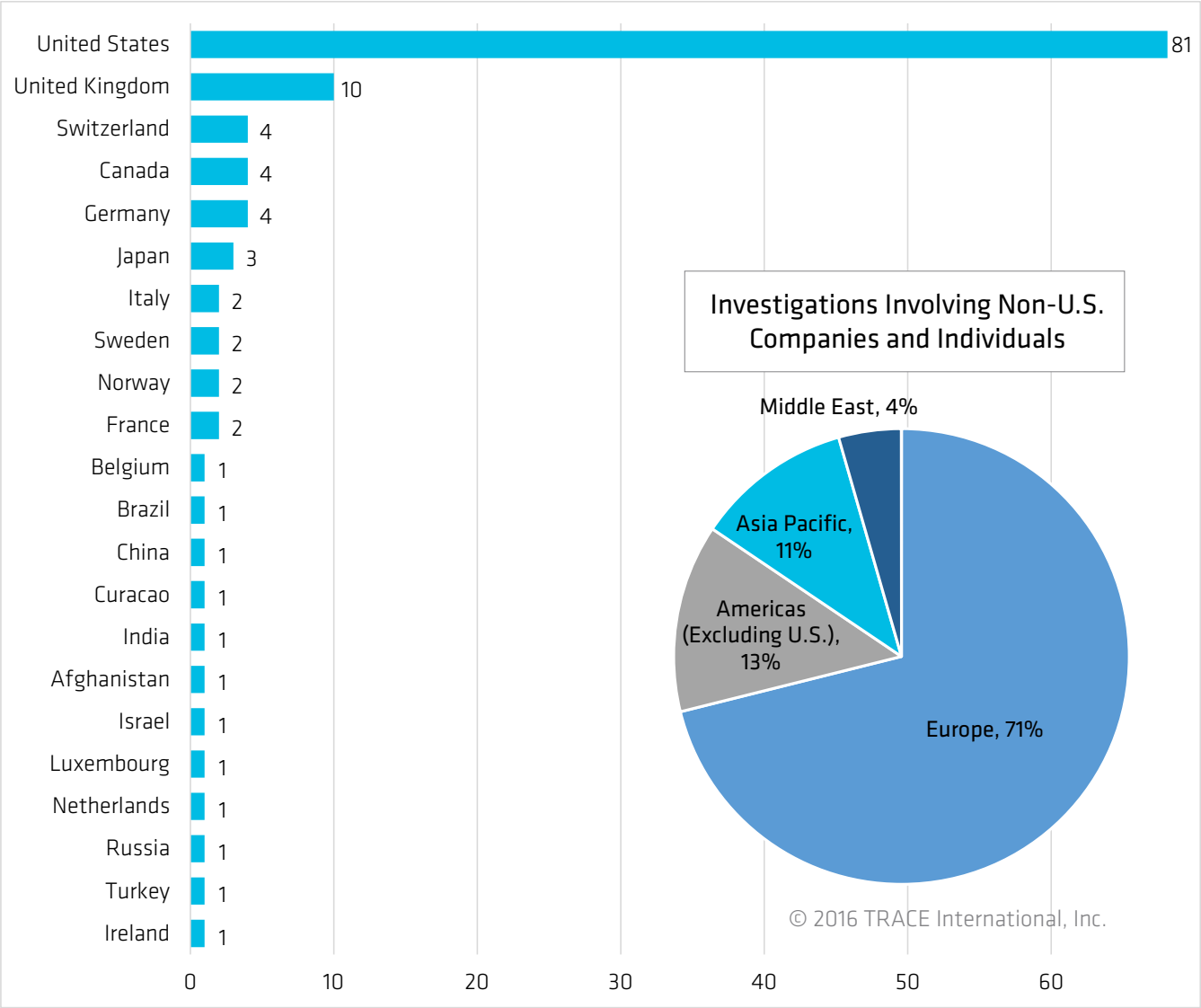
Figure 3: Enforcement Actions Concerning Bribery of Foreign Officials 2005 – 2015

	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
US Enforcement Actions	5	6	18	12	17	24	15	13	10	13	16
Non-US Enforcement Actions	1	2	1	11	16	6	16	6	8	15	4

Figure 3 modifies the analysis in Figure 2 to examine enforcement actions concerning alleged bribery of foreign officials undertaken from 2005 through 2015. The number of such enforcement actions brought by the United States increased slightly in 2015, but did not significantly differ from the past four years. Non-U.S. enforcement actions decreased 73% from 2014, and was the lowest number of non-U.S. enforcement actions since 2007.

©2016 TRACE International, Inc. All rights reserved.

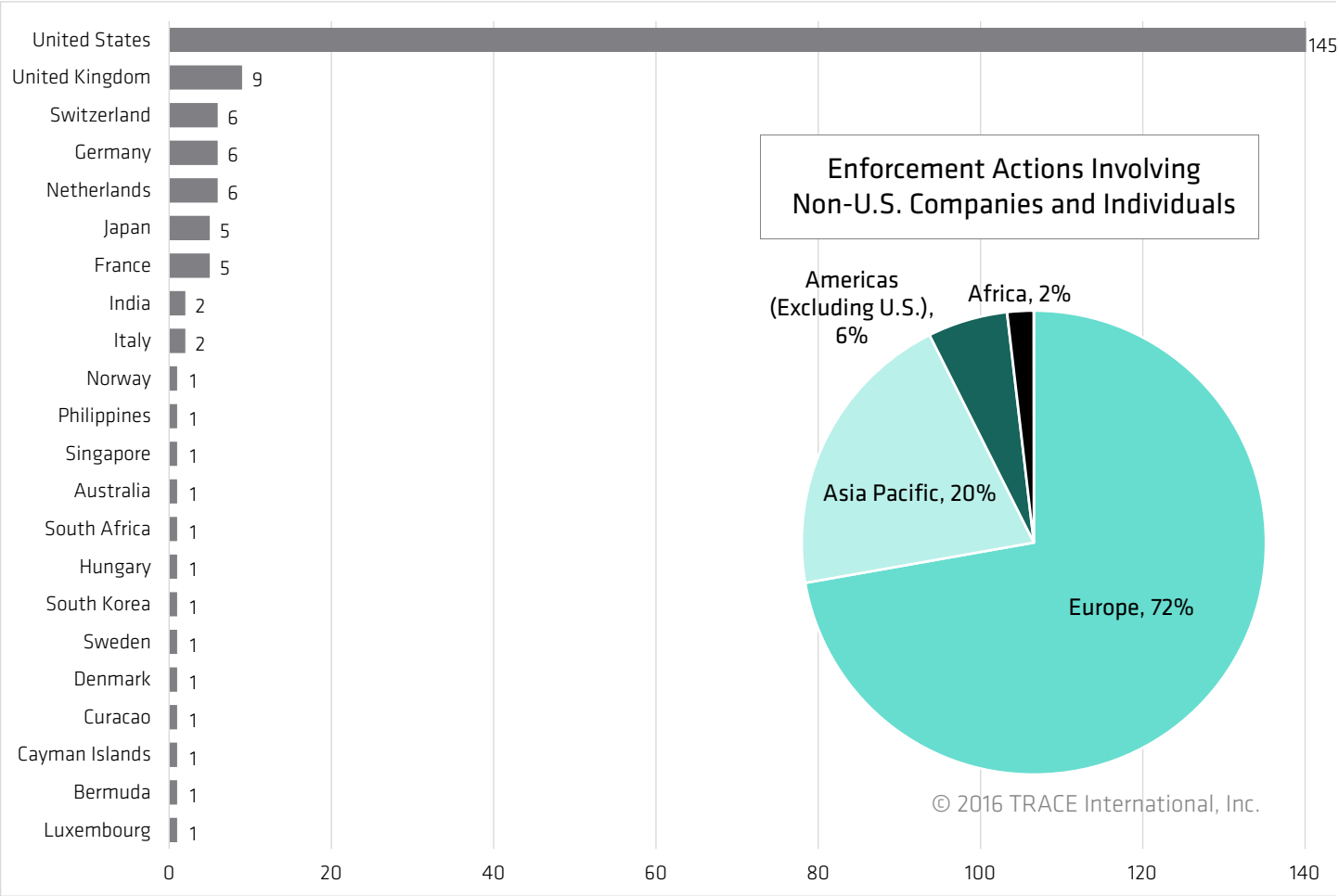
Figure 4: U.S. Investigations Concerning Bribery of Foreign Officials by Company Headquarters or Individual Citizenship



The United States was conducting 126 investigations concerning alleged bribery of foreign officials as of December 31, 2015. There were 45 investigations concerning alleged bribery of foreign officials involving companies headquartered outside of the United States or individuals with non-U.S. citizenship, representing approximately 36% of all such investigations being conducted by the United States. Of the investigations concerning alleged bribery of foreign officials being conducted against non-U.S. companies and individuals, the highest number involved companies or individuals in the United Kingdom, followed by Switzerland and Canada. Companies or individuals from Europe made up approximately 71% of U.S. investigations concerning alleged bribery of foreign officials being conducted against non-U.S. companies and individuals, followed by the Americas with approximately 13%, Asia Pacific with approximately 11%, and the Middle East with approximately 4%.

©2016 TRACE International, Inc. All rights reserved.

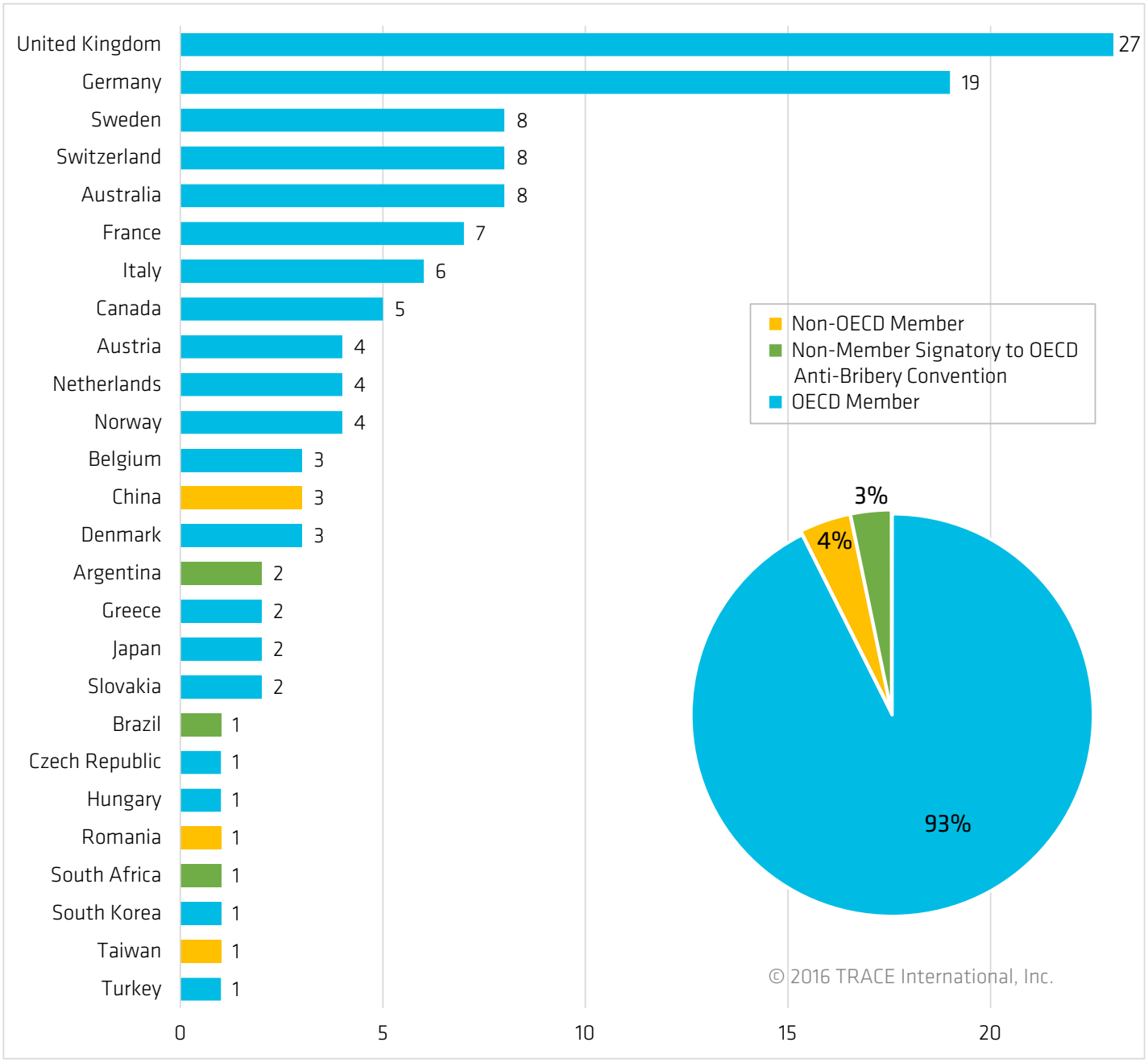
Figure 5: U.S. Enforcement Actions Concerning Bribery of Foreign Officials by Company Headquarters or Individual Citizenship



The United States has undertaken 199 enforcement actions concerning alleged bribery of foreign officials, from 1977 – 2015. A total of 54 of these enforcement actions have involved companies headquartered outside of the United States or individuals with non-U.S. citizenship, representing 27% of all foreign bribery enforcement actions initiated by the United States. Of the enforcement actions concerning alleged bribery of foreign officials undertaken against non-U.S. companies and individuals, the highest number involved companies or individuals in the United Kingdom, followed by Switzerland, Germany and the Netherlands. Companies or individuals from Europe make up approximately 72% of U.S. enforcement actions concerning alleged bribery of foreign officials undertaken against non-U.S. companies and individuals, followed by Asia Pacific with 20%, the Americas (excluding the United States) with 6% and Africa with 2%.

©2016 TRACE International, Inc. All rights reserved.

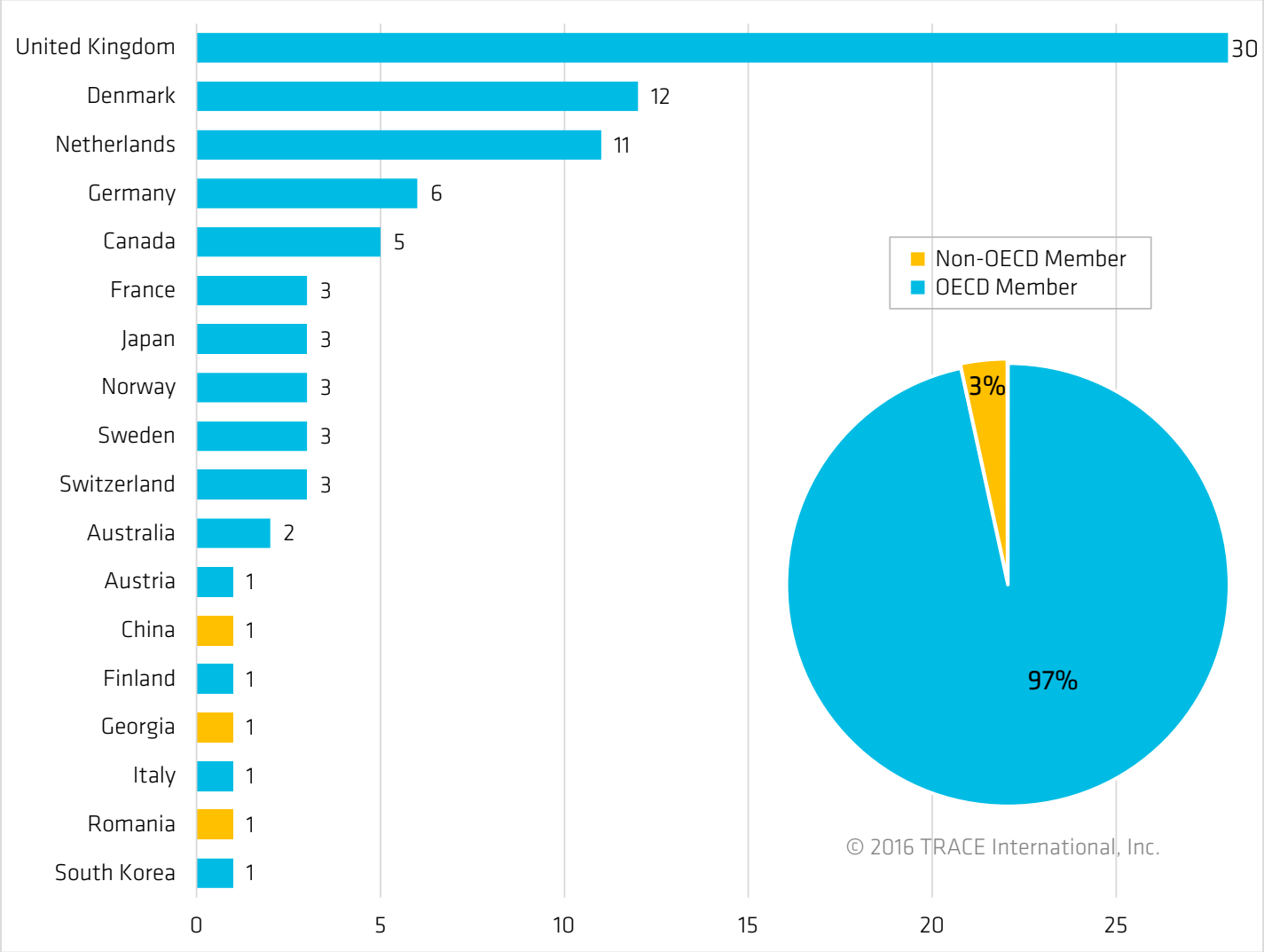
Figure 6: Investigations Concerning Bribery of Foreign Officials by Membership in the OECD (Excluding the United States)



There were 125 investigations concerning alleged bribery of foreign officials being conducted by 26 countries (excluding the United States) as of December 31, 2015. A total of twenty (20) of these countries are members of the Organisation for Economic Co-operation and Development ("OECD"), three (3) are non-member signatories to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "Anti-Bribery Convention"), and three (3) are not members of the OECD. Approximately 93% of ongoing investigations concerning alleged bribery of foreign officials were being conducted by OECD members, with the United Kingdom conducting approximately 22% of such investigations, followed by Germany with 15% and Sweden, Switzerland and Australia with 6% each. Non-OECD members were conducting 4% of ongoing investigations concerning alleged bribery of foreign officials and non-member signatories to the Anti-Bribery Convention were conducting 3% of such investigations.

©2016 TRACE International, Inc. All rights reserved.

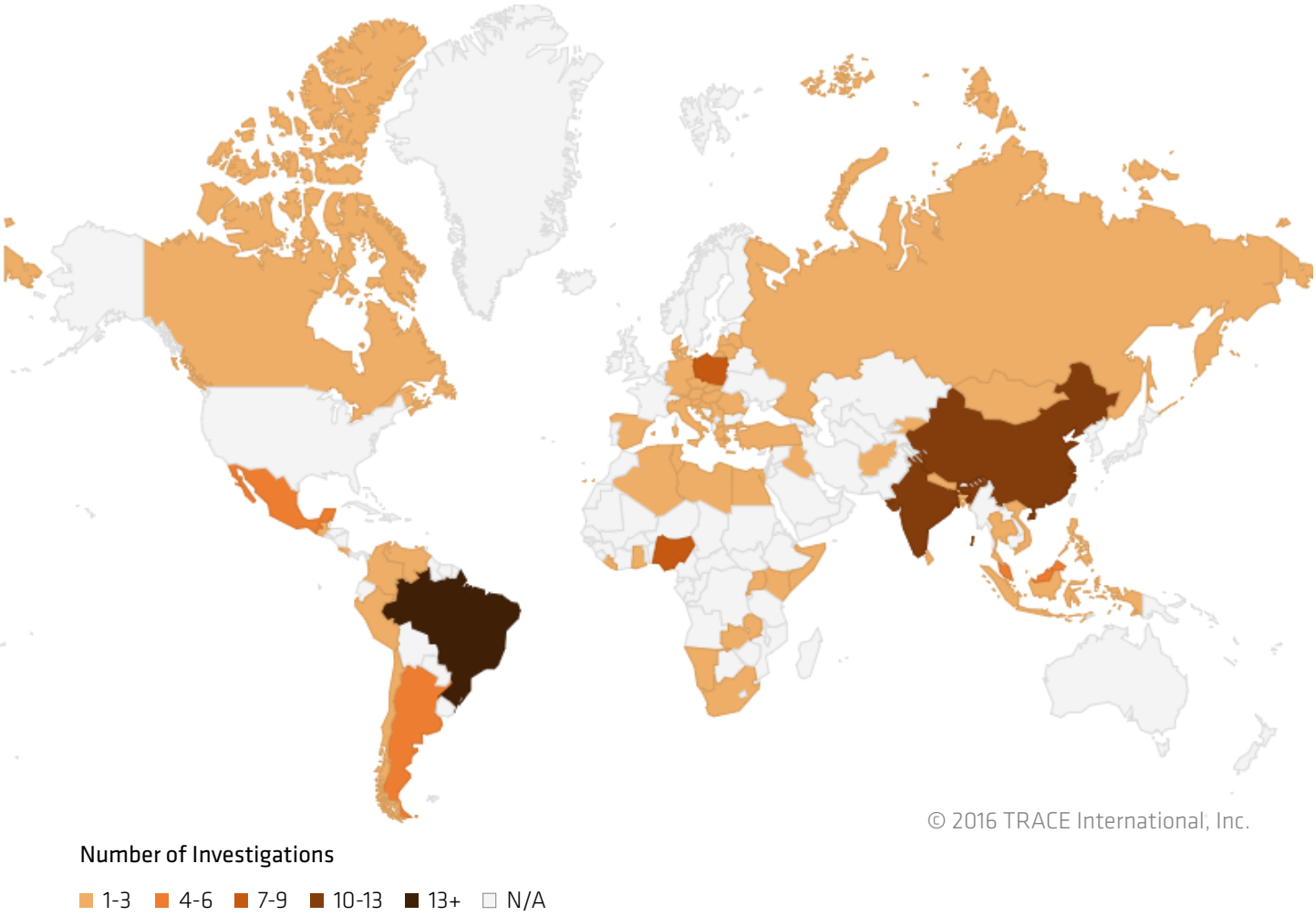
Figure 7: Enforcement Actions Concerning Bribery of Foreign Officials by Membership in the OECD (Excluding the United States)



There have been 88 enforcement actions concerning alleged bribery of foreign officials undertaken by 18 countries (excluding the United States) from 1977 – 2015. OECD members constitute 15 of the countries; three (3) are not members of the OECD. More than 96% of enforcement actions concerning alleged bribery of foreign officials have been undertaken by OECD members, with the United Kingdom having brought 34% of such enforcement actions, followed by Denmark with almost 14% and the Netherlands with approximately 13%. Non-OECD members have brought 3% of all non-U.S. enforcement actions concerning alleged bribery of foreign officials.

© 2016 TRACE International, Inc. All rights reserved.

Figure 8: Investigations Concerning Bribery of Domestic Officials by Country
(Excluding the United States)

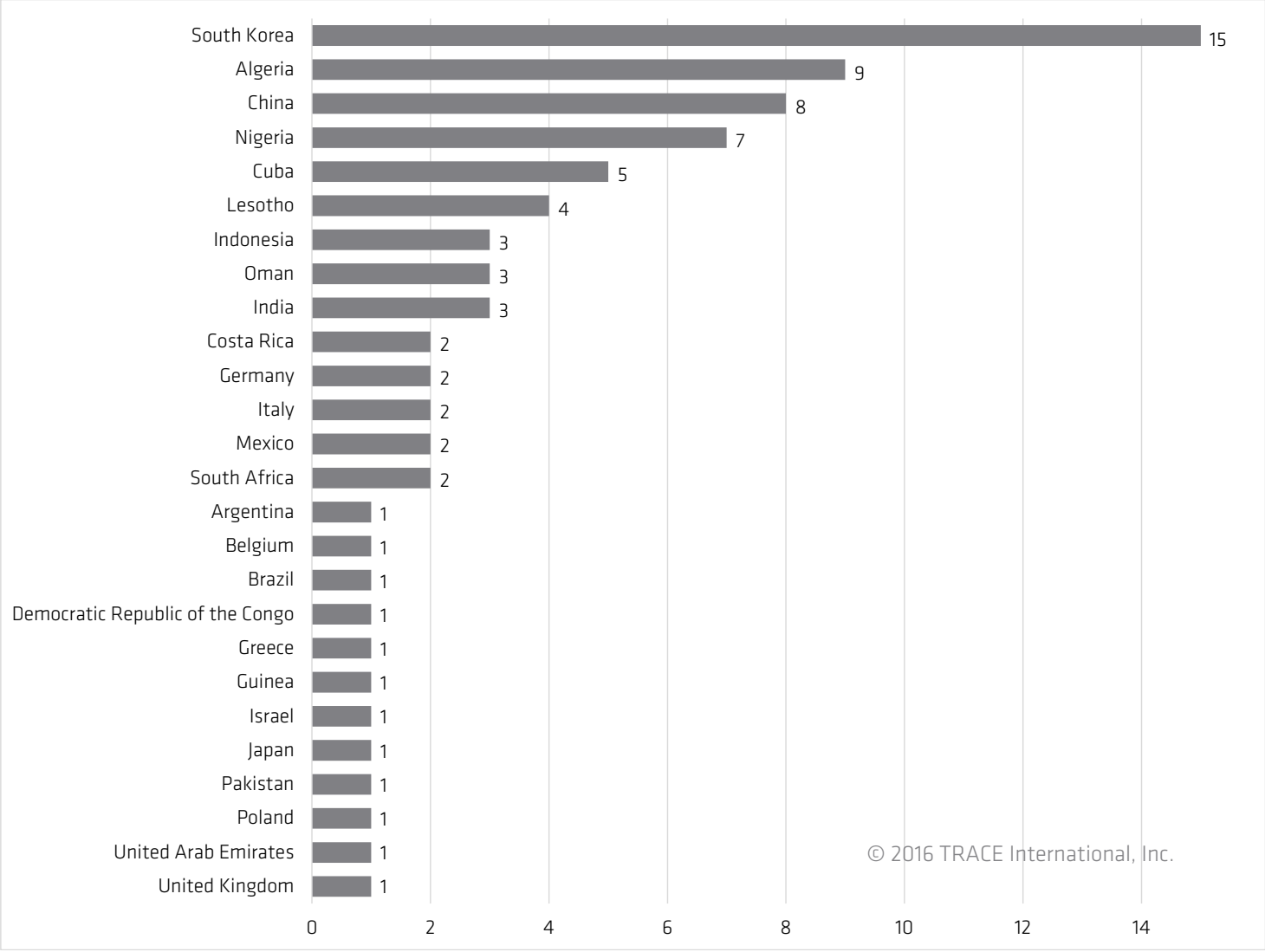


Brazil was conducting the most investigations concerning alleged bribery of domestic officials, followed by India, China and Nigeria as of December 31, 2015. Of the eight (8) countries conducting four (4) or more investigations concerning alleged bribery of domestic officials, three (3) are in Asia, three (3) in Latin America and there is one (1) each from Europe and Africa. Of the 51 countries conducting one (1) to three (3) investigations concerning alleged bribery of domestic officials, 20 are in Europe, 11 are in Africa, ten (10) in Asia, seven (7) in the Americas (excluding the United States) and three (3) in the Middle East.

This data does not include U.S. investigations concerning alleged bribery of U.S. officials or investigations involving citizens or domestic companies alleged to have bribed their own government officials. Please note that there may be investigations that are not included in the data as the data on investigations is derived from publicly available sources. Countries that require less disclosure of government investigations by companies may be underrepresented.

©2016 TRACE International, Inc. All rights reserved.

Figure 9: Enforcement Actions Concerning Bribery of Domestic Officials by Country (Excluding the United States)

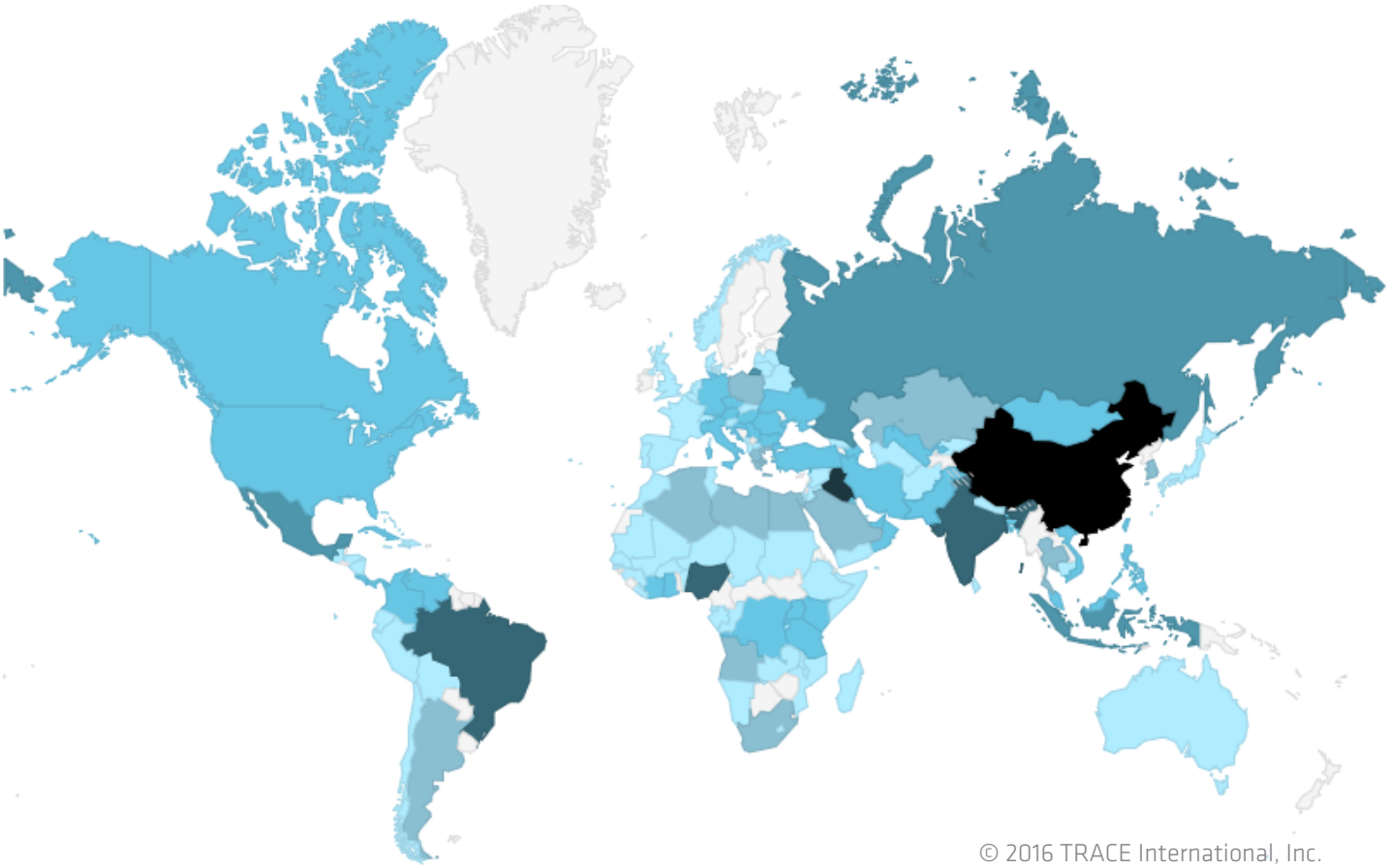


There were almost twice as many investigations as of December 31, 2015 as there have been enforcement actions concerning alleged bribery of domestic officials from 1977 – 2015. South Korea has brought the most enforcement actions concerning alleged bribery of domestic officials, followed by Algeria, China and Nigeria. The regional distribution of enforcement actions concerning alleged bribery of domestic officials is quite similar, with six (6) of the 26 countries that have brought such enforcement actions located in Europe, six (6) in Asia, six (6) in Africa, five (5) in the Americas (excluding the United States) and three (3) in the Middle East.

This data does not include U.S. enforcement actions concerning alleged bribery of U.S. officials or enforcement actions involving citizens or domestic companies alleged to have bribed their own government officials. Please note that there may be enforcement actions concerning alleged bribery of domestic officials that are not included in the data as data on enforcement actions is derived from publicly available sources. Countries that require less disclosure of government enforcement actions by companies may be underrepresented.

©2016 TRACE International, Inc. All rights reserved.

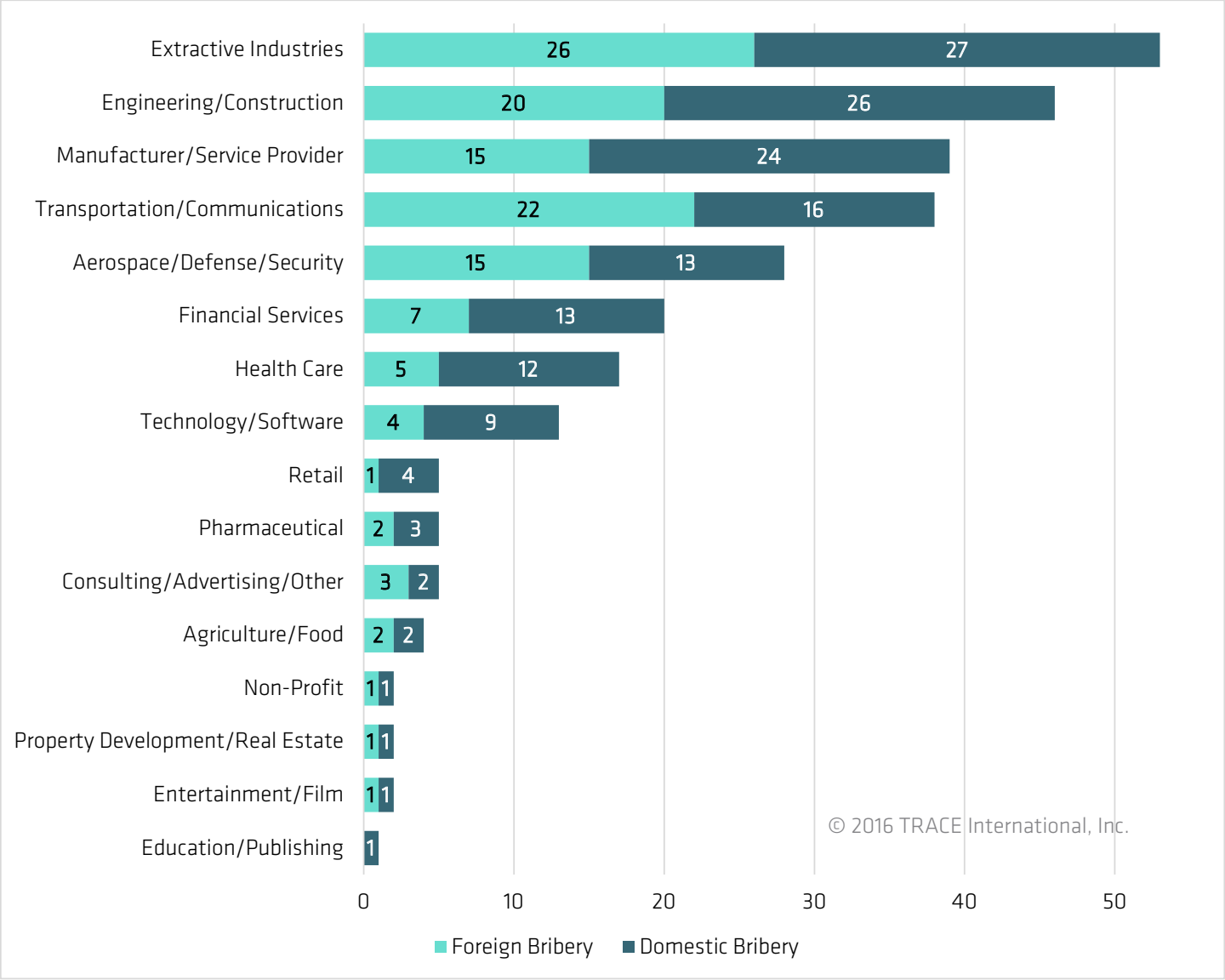
Figure 10: Prevalence of Bribery
1977 - 2015



This Figure shows the prevalence of alleged bribery of government officials. Each country indicated on the map has a corresponding number of enforcement events concerning the alleged bribery of that country's government officials. China surpasses every other country, with Chinese officials being the alleged recipients of bribes in almost 100 different enforcement events. Iraq has the next-highest number of enforcement events, followed by Nigeria, Brazil, India, Russia, and Indonesia. For countries with more than 15 enforcement events, six (6) are in Asia, six (6) are in Africa, three (3) are in Europe, three (3) are in Latin America, and two (2) are in the Middle East. There were 65 enforcement events where the nationality of the government officials who were allegedly bribed is unspecified. This is because the information is taken from publicly available resources, and there may be instances where companies do not specify information about where any alleged bribery took place.

©2016 TRACE International, Inc. All rights reserved.

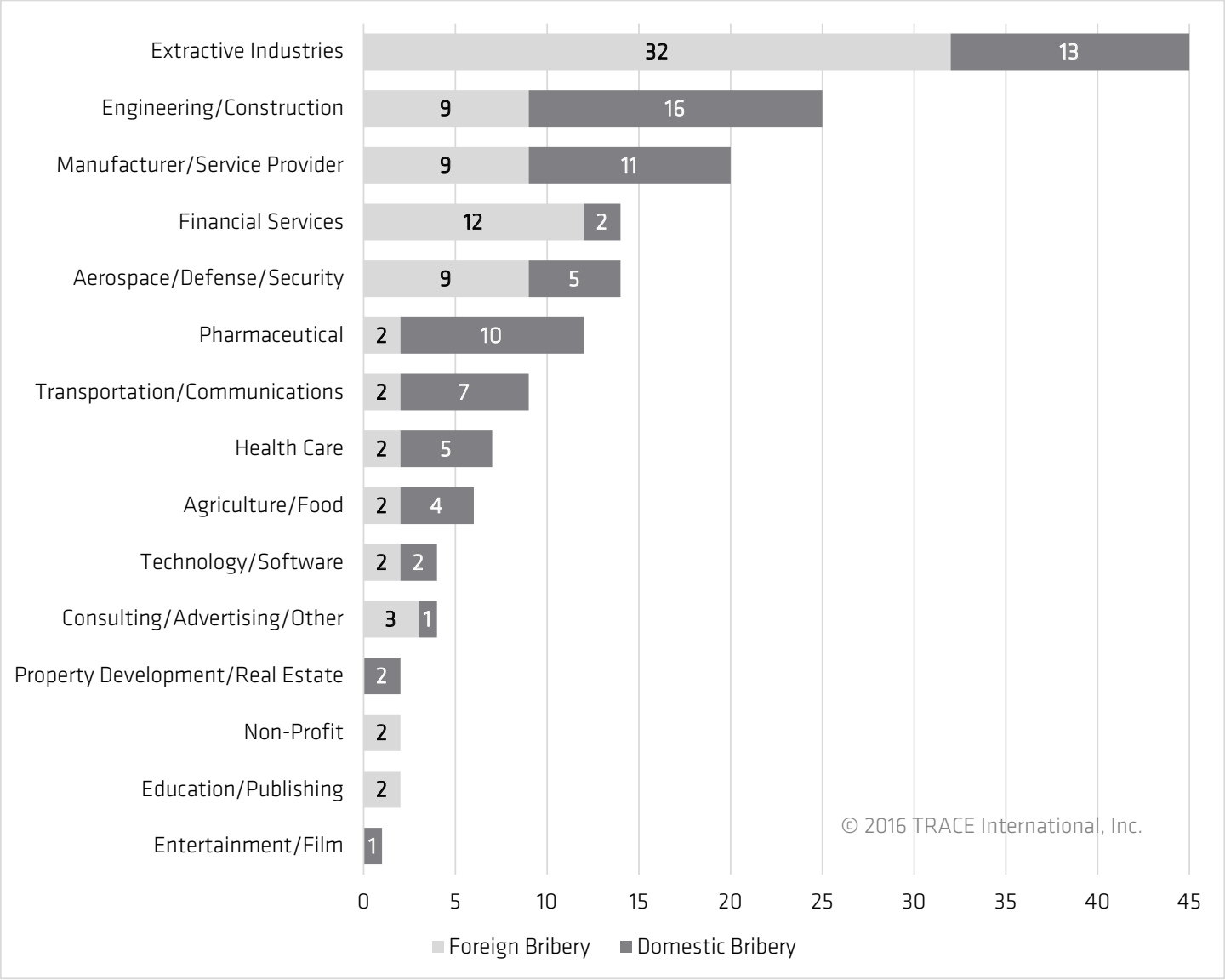
Figure 11: Total Investigations Concerning Bribery of Domestic and Foreign Officials by Industry (Excluding the United States)



This Figure shows the industries that have experienced the most investigations of alleged bribery of foreign or domestic officials, excluding investigations being conducted by the United States, as of December 31, 2015. The Extractive Industries represent the highest number of bribery investigations, with approximately 19% of all non-U.S. investigations, followed by Engineering/Construction with 16% and Manufacturer/Service Provider and Transportation/Communications with approximately 14% each. Non-U.S. investigations concerning alleged bribery of domestic officials have outnumbered non-U.S. investigations concerning alleged bribery of foreign officials by approximately 25%.

© 2016 TRACE International, Inc. All rights reserved.

Figure 12: Total Enforcement Actions Concerning Bribery of Domestic and Foreign Officials by Industry (Excluding the United States)

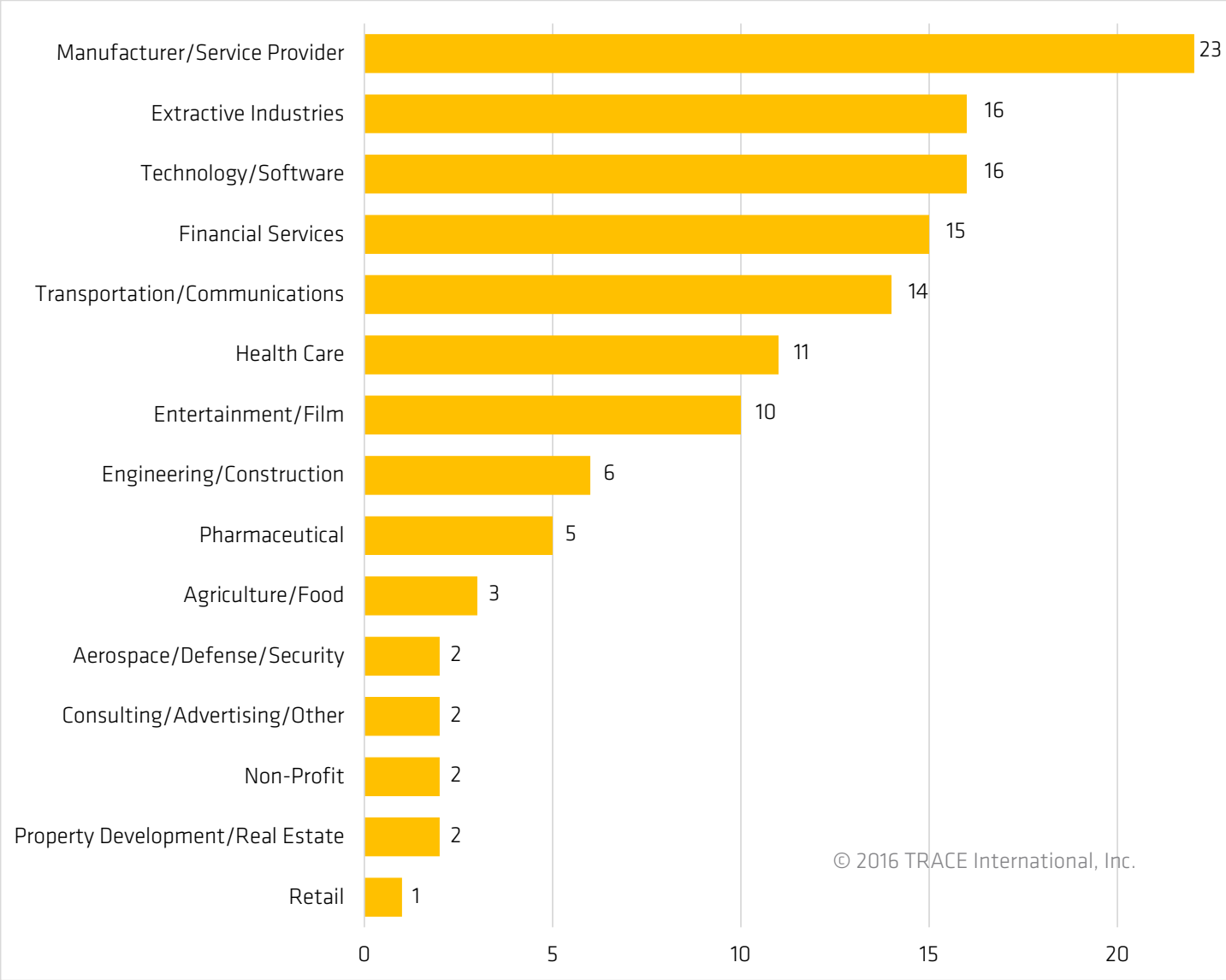


This Figure shows the industries that have experienced the most enforcement actions concerning alleged bribery of domestic or foreign officials, excluding enforcement actions brought by the United States, from 1977 – 2015. The Extractive Industries represent the highest number of bribery enforcement actions, with approximately 27% of all non-U.S. bribery enforcement actions, followed by Engineering/Construction with approximately 15% and Manufacturer/Service Provider with approximately 12%.

There have been more non-U.S. enforcement actions concerning alleged bribery of foreign officials than domestic officials. However, some industries face a higher risk of enforcement actions concerning alleged bribery of domestic officials, including Engineering/Construction, Manufacturer/Service Provider, Pharmaceutical, Transportation/Communications, Health Care, Agriculture/Food, Property Development/Real Estate and Entertainment/Film.

©2016 TRACE International, Inc. All rights reserved.

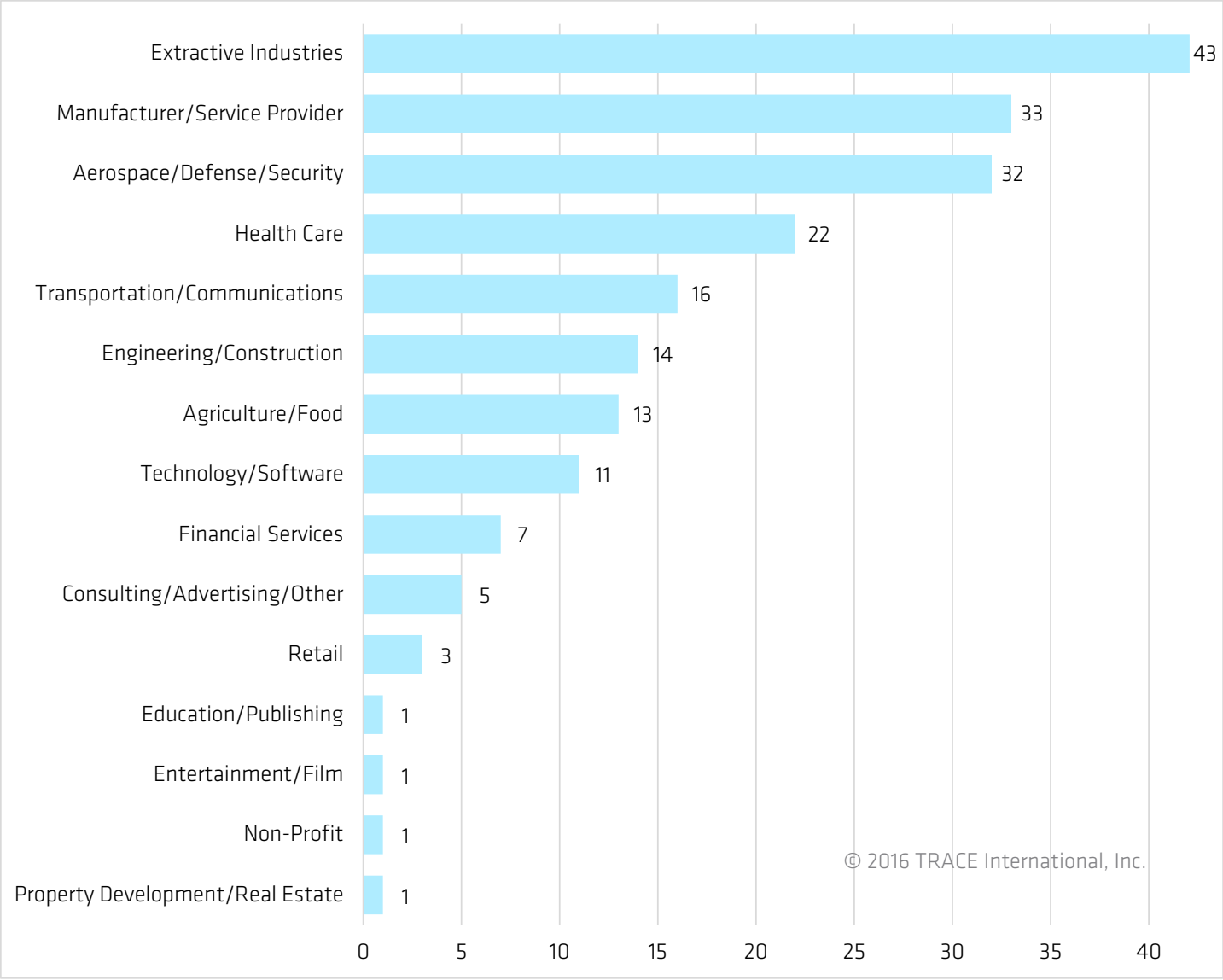
Figure 13: U.S. Investigations Concerning Bribery of Domestic and Foreign Officials by Industry



This Figure shows U.S. investigations concerning alleged bribery of domestic and foreign officials as of December 31, 2015, separated by industry. The Manufacturer/Service Provider industry faced the most investigations, with approximately 18% of all U.S. investigations, followed by Extractive Industries and Technology/Software with 12.5% each.

© 2016 TRACE International, Inc. All rights reserved.

Figure 14: U.S. Enforcement Actions Concerning Bribery of Domestic and Foreign Officials by Industry



This Figure shows U.S. enforcement actions concerning alleged bribery of domestic and foreign officials from 1977 – 2015, separated by industry. The Extractive Industries have seen the most enforcement actions, with 21% of all such U.S. enforcement actions. That is followed by Manufacturer/Service Provider and Aerospace/Defense/Security with approximately 16% each.

©2016 TRACE International, Inc. All rights reserved.

About the Global Enforcement Report

TRACE's annual Global Enforcement Report provides graphic and textual analyses of all known enforcement events—including investigations, enforcement actions and declinations—since the first bribery cases were prosecuted in the United States following the enactment of the U.S. Foreign Corrupt Practices Act. Data from the GER is based primarily on the cases and investigations tracked in the TRACE Compendium, TRACE's online database of transnational corruption cases. TRACE cannot know or accurately estimate how many enforcement events may be underway but not made public or not included in a major international publication. The analyses exclude purely domestic matters involving local companies bribing local government officials, reflecting only enforcement events for an alleged bribe with an international component that involve an alleged payment to a government official or an employee of a state-owned entity.

The GER 2015, TRACE's sixth annual compilation, provides anti-bribery enforcement data from 2015 and provides a summary of 39 years of anti-bribery enforcement activity. The complete GER 2015 is available for download online at: www.TRACEinternational.org/publications.

About TRACE

TRACE International and TRACE Incorporated are two distinct entities with a common mission to advance commercial transparency worldwide by supporting the compliance efforts of multinational companies and their third party intermediaries. TRACE International is a non-profit business association that pools resources to provide members with anti-bribery compliance support while TRACE Incorporated offers both members and non-members customizable risk-based due diligence, anti-bribery training and advisory services. Working alongside one another, TRACE International and TRACE Incorporated offer an end-to-end, cost-effective and innovative solution for anti-bribery and third party compliance.

For more information, visit www.TRACEinternational.org. Follow TRACE:

EMAIL:
info@TRACEinternational.org

WEBSITE:
www.TRACEinternational.org

TEL: +1 410.990.0076
FAX: +1 410.990.0707

TRACE International, Inc.
151 West Street
Annapolis, MD 21401

WORLDWIDE OFFICES:
Dubai
Houston
London
Manila
New Delhi
New York
Paris

©2016 TRACE International, Inc. All rights reserved.

Top 5 Compliance Trends Around the Globe in 2016

Creating a culture of compliance | Increased investment in compliance operations | Keeping pace with a changing regulatory landscape | Monitoring third party risk | Encouraging whistleblower activity

Creating a Culture of Compliance

Corporate integrity at an organization helps productivity, profitability, employee engagement and overall risk reduction.

of businesses surveyed viewed promoting a corporate culture of integrity to be the ultimate goal of their compliance and ethics programs

Competitive advantages of investing in organizational culture:

Increases bottom line
Accounting scandals typically take a reputation-related toll equal to 27% of a company's pre-scandal price

Strong brand reputation and awareness
Bolstering awareness around a company's culture can help build trust and differentiate it from competitors

Reduced fines
Sentencing credit may be awarded to companies leveraging compliance to benefit the company and stakeholders

Steps to Building a Culture of Compliance

Communication - Tone from the Top
Fostering a culture of compliance starts at the top with the support of stakeholders, Board of Directors, C-Level executives, senior executives, and business leaders

Education
Actively train - invest in training to teach employees how to recognize and address compliance issues; training should be an ongoing process with employees revisiting topics regularly

Assessment
Evaluate current efforts in supporting a culture of compliance; recognize areas of oversight and discuss how policies can be adapted to encourage compliance

Increased Investment in Compliance Operations

Last year, 71% of firms expected the cost of senior compliance professionals to increase due to the demand for skilled/ knowledgeable staff.

This trend continues in 2016 with a high proportion of Boards predicting a 'significant increase' in compliance spending:

North America

Europe

Middle East

75% of compliance leaders expect management will require more/much more attention

Organizations expect to commit an increased amount of resources (time/staff) to processing compliance policies and procedures:

59% expect to commit up to 3 hours per week (60% in 2013)

20% expect to commit between 4 and 7 hours (19% in 2013)

21% expect to commit more than 7 hours (18% in 2013)

More than 1/3 of organizations surveyed **spend at least an entire day per week** tracking and analyzing regulatory change

Steps to Maximize Investment in Compliance Operations

Invest in skilled compliance professionals to help moderate risk

Empower compliance teams with the tools necessary to streamline the tracking of regulatory changes

Implement compliance training programs to build the in-depth strength needed for compliance and risk skills

Automate employee supervision and code of conduct compliance processes to help open resources for other compliance activities

Continue to **build** a strong culture and positive attitude towards compliance to retain compliance officers

70% of organizations are expecting regulators to publish even more regulatory information, with 28% expecting significantly more

Keeping Pace with a Changing Regulatory Landscape

Regulators are intensifying their attention and reach across regional, national, and international borders.

This past year has seen a steady increase in regulatory initiatives, including:

Global
- Basel III

European Union
- Alternative Investment Fund Manager's Directive (AIFMD)
- Data Protection Directive
- European Market Infrastructure Regulation (EMIR)
- Markets in Financial Instruments Directive II (MiFID II)
- Solvency II

Australia
- Future of Financial Advice

United Kingdom
- Senior Managers and Certification Regime

United States
- Foreign Account Tax Compliance Act (FATCA)
- Foreign Corrupt Practices Act (FCPA)

Regulatory focus:

Personal Liability
93% of practitioners voting at the Thomson Reuters New York customer summit expected the personal liability of compliance professionals to increase in 2016

64% of respondents to the Thomson Reuters personal liability survey expected that individual accountability would be replicated around the world

Behavioral-Based Regulations
Conduct-related infractions are projected to exceed **$20B** globally

Steps to Stay Ahead

Create a system that can monitor multiple regulatory sources and provide a focused view of regulatory changes important to your organization

Construct a communication strategy to ensure staff are aware of new developments

Develop a method to incorporate new regulations into your existing compliance program

50,000+
REGULATORY AND COMPLIANCE UPDATES IN 2015

Personal liability is here to stay. Compliance officers appear to be feeling unduly vulnerable, but the reality is that firms will look to their compliance function to determine what good looks like in the management of their own regulatory risk, which can then, in turn, become the blueprint for everyone else.

Monitoring Third Party Risk

Three quarters of 427 corruption cases analyzed by the Foreign Bribery Report of the intergovernmental OECD involved third parties.

Exposure to risk:

6,000+ names of companies/ individuals on OFAC's Specially Designated Nationals and Blocked Persons List

Fines of up to US $20M and imprisonment up to 30 years for OFAC violations

U.S. Securities & Exchange Commission collected $114.8 million in 2015 Foreign Corrupt Practices Act enforcement actions

Steps to a Comprehensive Third Party Management Framework

Develop your program - define and establish policies, procedures and controls in all levels of the business, with owners for each

Build and operate controls - implement the policies into business operations

Detect the risks - screen against your third parties to ensure legitimacy and sustainability

Evaluate - remediate the results and carry out further investigation when necessary

Monitor and report - extract reports for proof of due diligence and continuously monitor to detect future risks

Review and align - take timely corrective and disciplinary action for violations of the program, continually evaluate and adjust to ensure alignment with changes in risk profile

Train and educate - educate and raise awareness about the threats posed by bribery and corruption

Encouraging Whistleblower Activity

US SEC received 4,000 whistleblower tips and paid $37M in whistleblower rewards in 2015.

Whistleblowing protections are increasing:

US
OSHA drafts guidelines for organizations to establish effective whistleblower programs

UK
FCA and PRA issues new whistleblowing protections

Canada
Proposes new protection for whistleblowers

Steps to Improve Whistleblower Protection Rights

Review current whistleblowing intiatives within your organization

Create a 'Speak Up' policy and implement an independent concern reporting and case management system such as a helpline to mediate and monitor reports

Provide whistleblowing and anti-retaliation training to help employees understand the protections given to them to avoid carrying out activities seen as retaliation

Keep Your Organization Up-to-Date

Stay informed of the latest regulatory updates, navigate the global regulatory landscape with ease, and make well-informed decisions to manage regulatory risk with confidence.
THOMSON REUTERS REGULATORY INTELLIGENCE »

Strengthen corporate culture by **training your employees** on your policies so they can recognize and respond appropriately to real-world compliance issues.
THOMSON REUTERS COMPLIANCE LEARNING »

Manage and screen for possible third party risk exposure to minimize your organization's contact to risks.
THOMSON REUTERS THIRD PARTY RISK »

Manage conflicts of interest and demonstrate supervision of employee conduct to help create a more visible culture of compliance.
THOMSON REUTERS CONFLICTS COMPLIANCE »

SOURCES:
Thomson Reuters Cost of Compliance Survey2015
Thomson Reuters Rising Personal Liability - Perception and Reality: How Best to Manage Personal Regulatory Risk
Thomson Reuters Whitepaper - What's Compliance Worth?
Thomson Reuters Whitepaper - How to Manage Conflicts of Interest: A Question of Culture
Thomson Reuters Regulatory Intelligence
KPMG Anti-Bribery and Corruption Survey

Learn how Thomson Reuters can further help mitigate risk:
risk.thomsonreuters.com

THOMSON REUTERS
Legal Governance, Risk Management & Compliance is a trade of Thomson Reuters and its subsidiaries. © 2016 Thomson Reuters. All rights reserved.

COMPLIANCE WEEK

THE LEADING INFORMATION SERVICE ON CORPORATE GOVERNANCE, RISK, AND COMPLIANCE

July 2016 | www.complianceweek.com

ALSO INSIDE:

Practical implications of the Yates Memo

'Significant deficiency' versus 'material weakness'

Accounting leaders need wake-up call on revenue

#BXBBYXM ********FIRM**CAR-RT LOT**C-021

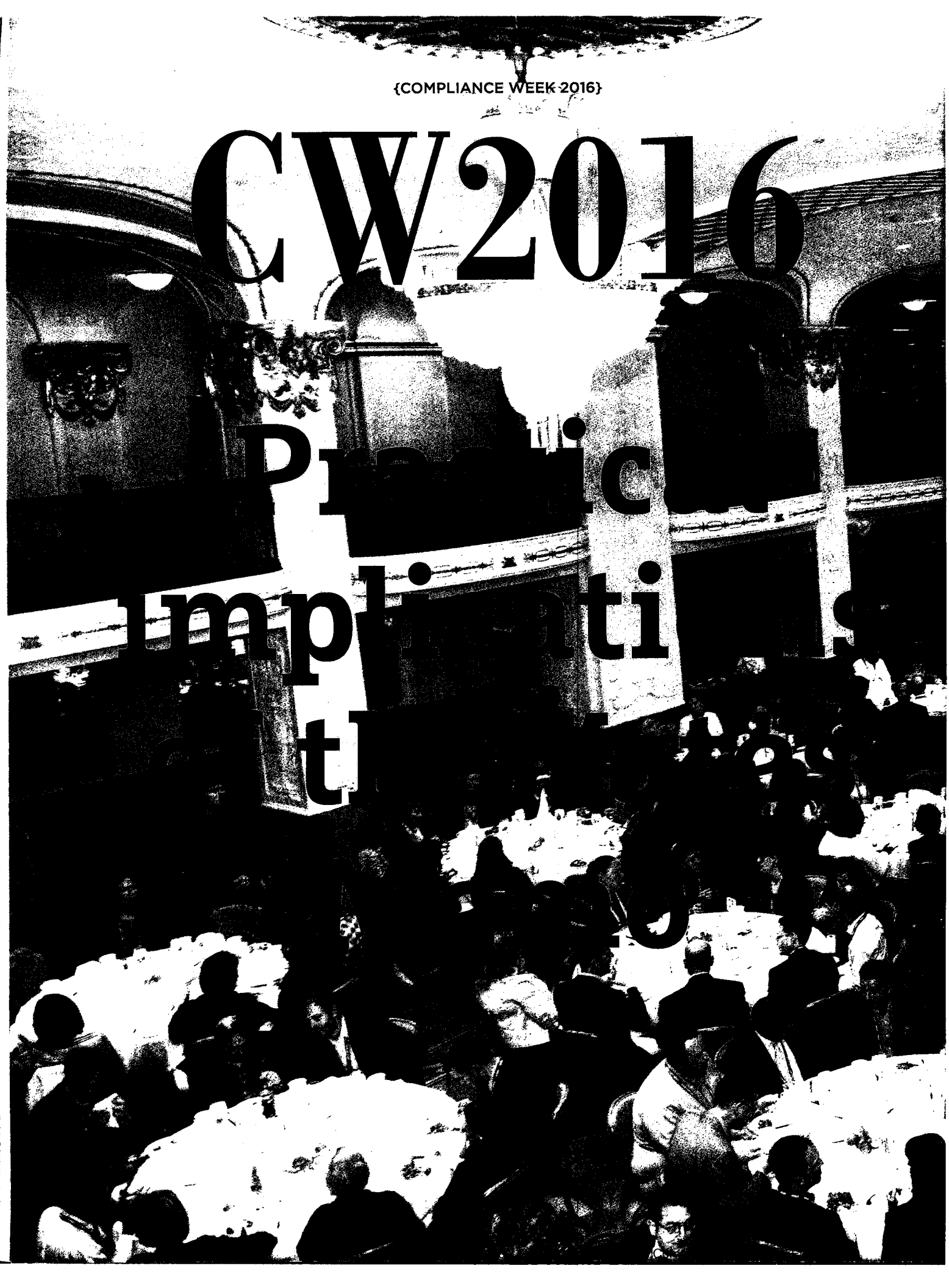
JONATHAN HARAY
PARTNER
DLA PIPER
500 8TH ST NW
WASHINGTON DC 20004-2131

0001
000161
P00002
002041

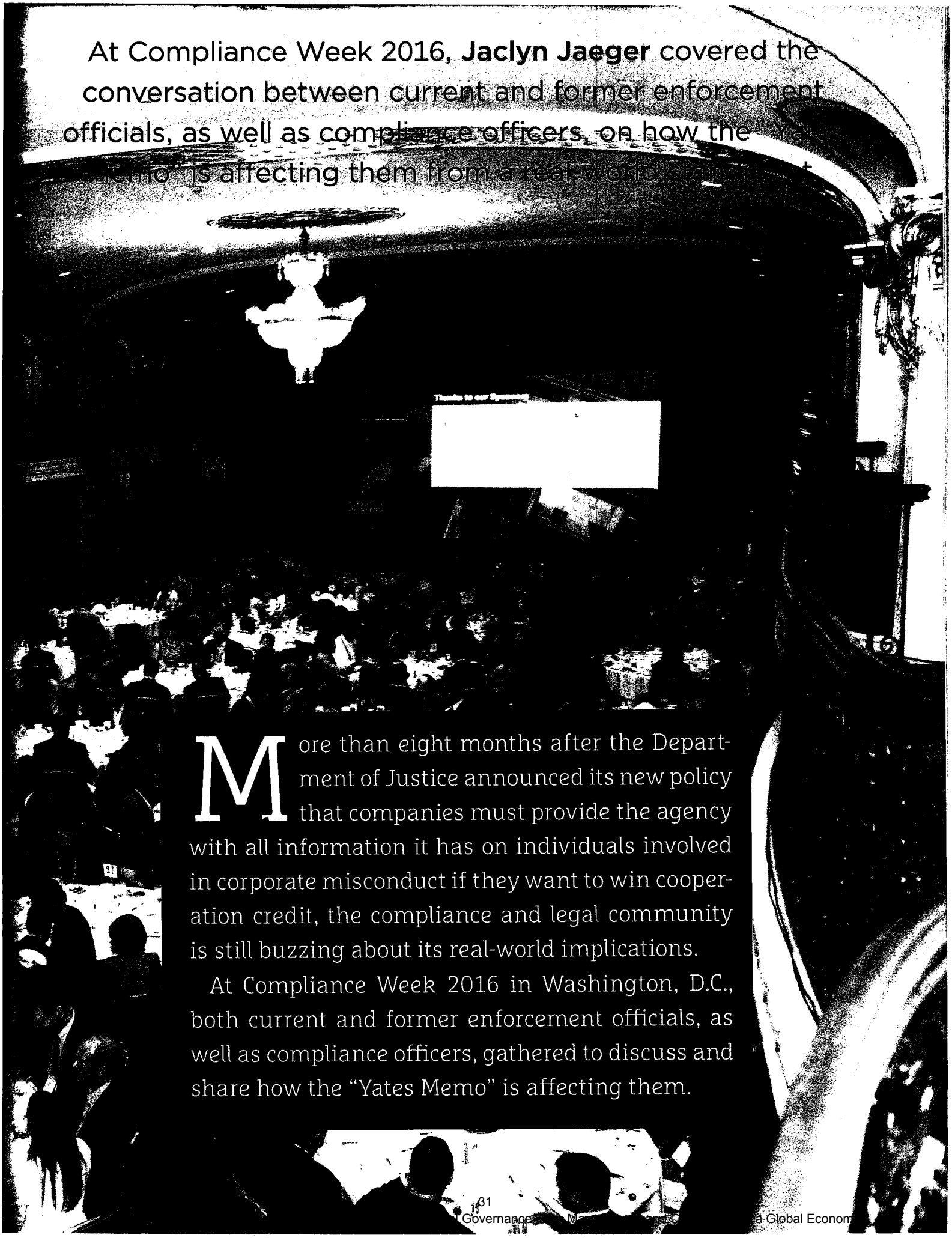
{COMPLIANCE WEEK 2016}

CW2016

Practical Implications of the

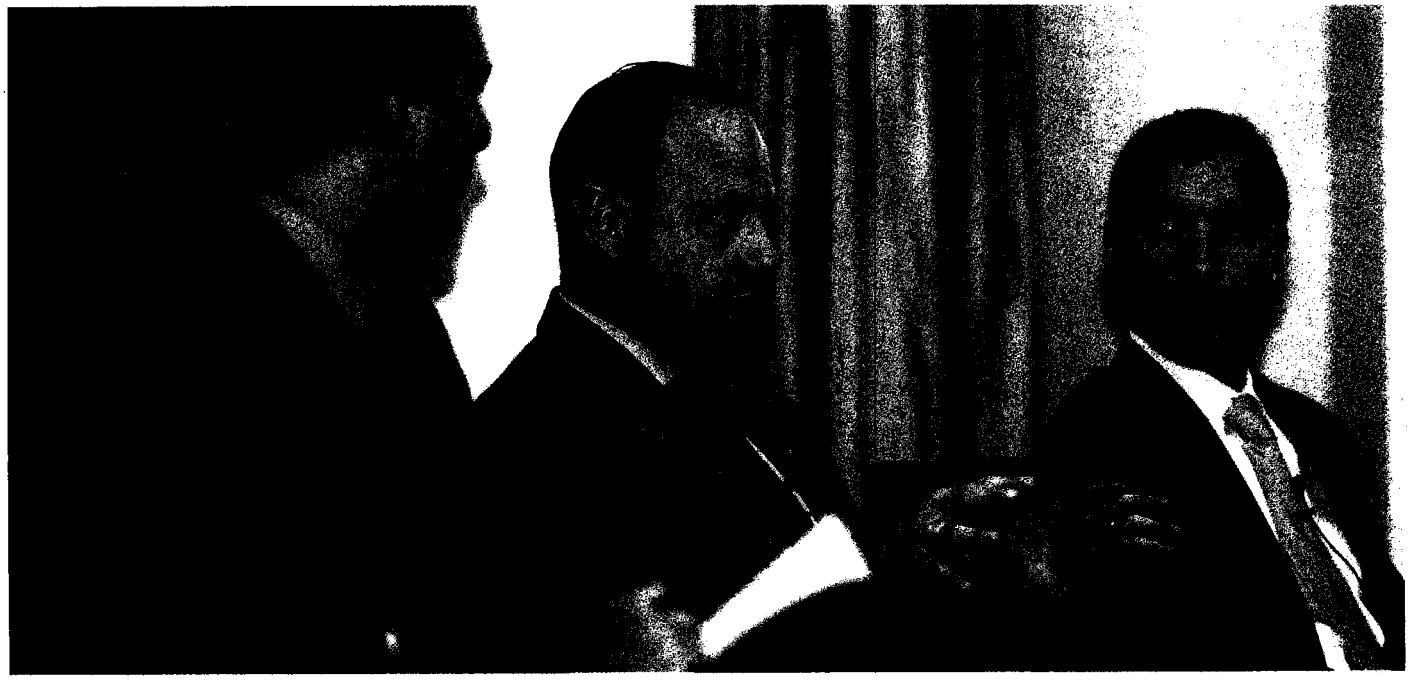


At Compliance Week 2016, **Jaclyn Jaeger** covered the conversation between current and former enforcement officials, as well as compliance officers, on how the "Yates Memo" is affecting them from a real-world standpoint.



More than eight months after the Department of Justice announced its new policy that companies must provide the agency with all information it has on individuals involved in corporate misconduct if they want to win cooperation credit, the compliance and legal community is still buzzing about its real-world implications.

At Compliance Week 2016 in Washington, D.C., both current and former enforcement officials, as well as compliance officers, gathered to discuss and share how the "Yates Memo" is affecting them.



Pedro de la Torre of Chemours (left) advised companies to be "a little more diligent." At right is Stephen Cohen, associate director of the SEC's Division of Enforcement.

As Compliance Week previously reported, the crux of the FCPA Unit's "Yates Memo," announced in September 2015, is this: "If a company wants any consideration for its cooperation, it must give up the individuals, no matter where they sit within the company." Furthermore, to qualify for any cooperation credit, corporations must provide "all relevant facts" relating to the individuals responsible for the misconduct.

That the Justice Department is focusing its investigations on individuals is not a new policy. "Why everyone is talking about the Yates Memo is that it sets some important markers about how the government is going to go after individuals," said Jonathan Haray, former assistant chief litigation counsel for the SEC and now a partner at law firm DLA Piper. "It's leveraging companies to try to do more of the work."

Similar to the Justice Department, the SEC has always focused its investigations on individuals. "The majority of our cases are against individuals," said Stephen Cohen, associate director of the SEC's Division of Enforcement.

"Why everyone is talking about the Yates Memo is that it sets some important markers about how the government is going to go after individuals."

Jonathan Haray, Partner, DLA Piper

Employee investigations

In the United States, corporate lawyers typically invoke an "Upjohn" warning, reminding employees during an investigation that corporate counsel works in the best interest of the company, rather than the employee personally. In light of the Yates Memo, however, "you have to be a little more diligent and give a more enhanced Upjohn warning," said Pedro de la Torre, global compliance officer and corporate counsel for Chemours, a $6 billion global chemical company.

It may be necessary, for example, to warn individuals that the company has an obligation to cooperate with the government and that any information the employee gives could, thus, be turned over to the government. The implications of this may drive employees to get their own separate counsel.

Many employees tend to be cooperative during internal investigations, "and this does stand to run the risk of getting in the way of that," Haray said. "You are going to have people resist cooperating with investigations."

In civil investigations that run parallel to the Department of Justice, a lack of employee cooperation could pose an issue for the SEC. From a "high-level, big picture perspective," however, Cohen said he doesn't see that scenario happening very often.

Pedro de la Torre, Stephen Cohen CW 2016Furthermore, it's not always in the best interest of individuals to be represented by company counsel, Cohen added. In some cases, people have information they want to share with the government, but feel that they can't because of a conflict of interest between the employee and the company. "Sometimes the lawyers don't know that and, often times, we don't know that," he said, "and we want them to be able to come to us."

FCPA Pilot Program

The panelists also discussed best practices for coordinating civil and criminal investigations in light of the new FCPA Pilot Program launched within the FCPA Unit of the Justice Department's Fraud Section. Under the Pilot Program, companies that voluntarily self-disclose, fully cooperate—including satisfying the requirements of the Yates Memo—and timely remediate can receive up to 50 percent off the bottom end of the U.S. Sentencing Guidelines fine range.

During remarks at the New York City Bar Association White Collar Crime Conference on May 18, Deputy Attorney General Sally Yates said that the Pilot Program helps put into practice not only the Yates Memo, but also the revisions to the U.S. Attorney's Manual announced in November 2015 that separates the concept of self-disclosure from that of cooperation.

"Those revisions account for the difference between a company raising its hand and voluntarily disclosing misconduct and a company simply agreeing to cooperate once it gets caught," Yates said. "We made this change to emphasize that while the concepts of voluntary disclosure and cooperation are related, they are distinct factors to be given separate consideration in charging decisions."

Even with the opportunity to receive a reduction in any final penalty amount, the Department of Justice is always going to weigh the facts and circumstances of each case. As a result, the difficult question faced by a company of whether and when to self-report is still a difficult question doesn't just disappear with the FCPA Pilot Program in place. "[I]t doesn't really change the clarity that companies have," said Haray.

In a similar vein, the SEC formally began granting cooperation credit to companies since 2001 under its so-called Seaboard report. In that report, the SEC identified four broad factors to be considered in evaluating a company's cooperation when determining appropriate charges and remedies: self-policing (compliance, effectively); self-reporting; remediation; and cooperation.

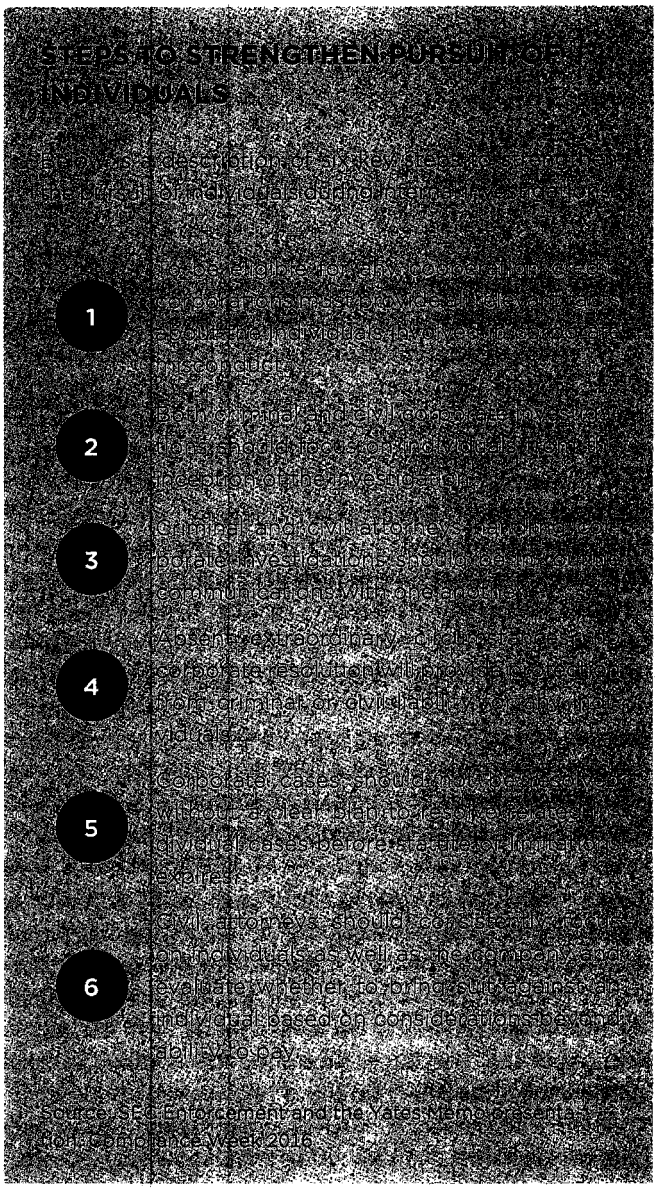
Unlike the Department of Justice, however, all of the SEC's statutes allow the Commission to bring charges for recklessness, at the very least. "We don't require actual knowledge, so the charging calculus is different for the SEC than the Department of Justice." Cohen said.

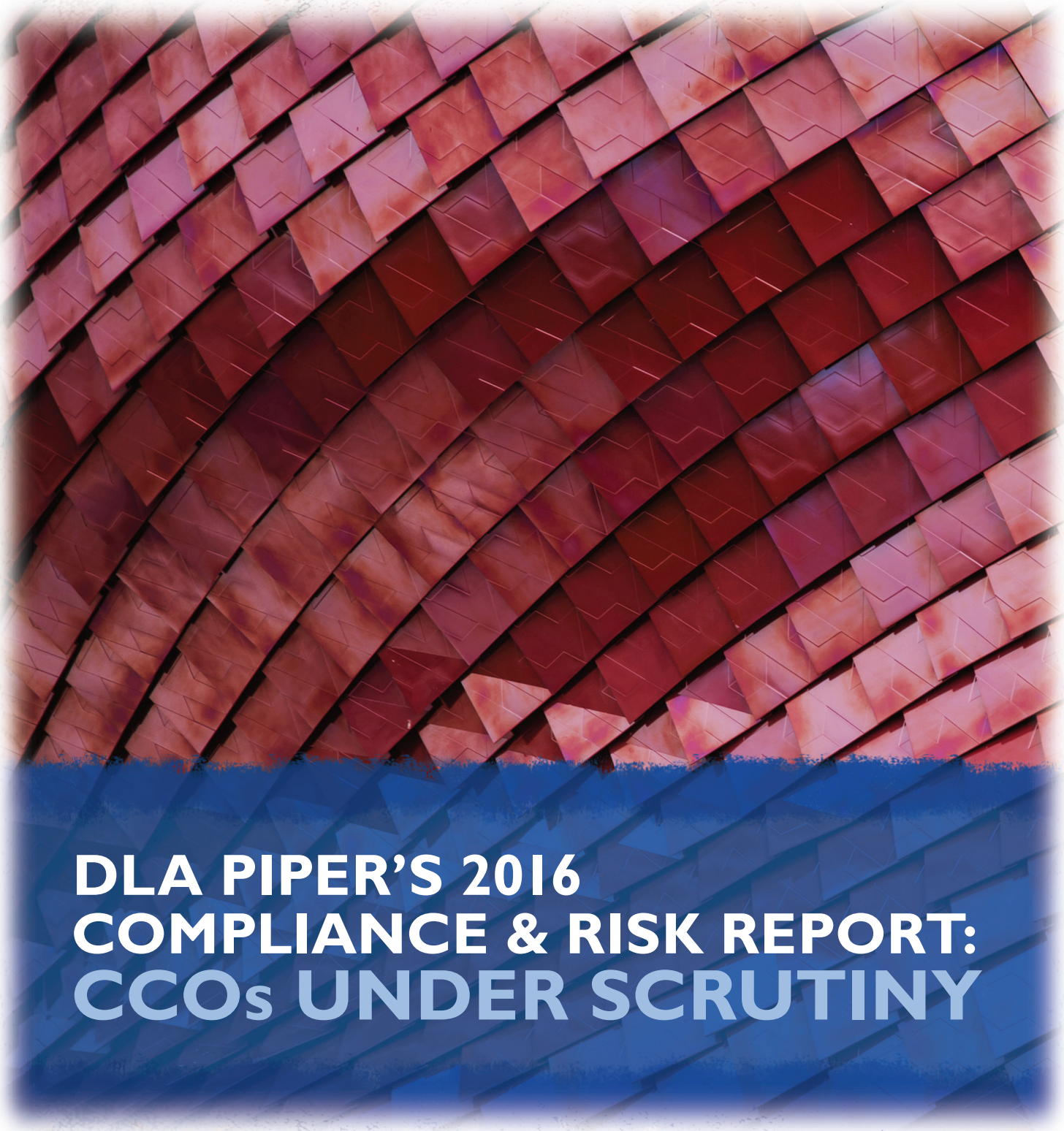
Nonetheless, the SEC and Department of Justice often investigate a matter together, particularly concerning violations of the Foreign Corrupt Practices Act. Thus, no matter whether the company is dealing with the SEC or Justice Department, Cohen said it's a smart idea to talk about the company's compliance program—that is, if it has one worth talking about—at the outset of an investigation.

What problem did the company find? What have they done since they found it? "That's a really important meeting," Cohen said. "That sets the stage for everything."

A lot of subtext comes out of that meeting, Cohen added. The SEC can gauge a lot about a company based not just on the facts it presents, but also by who comes in and shares that information—the audit committee, the board, management? "All of those things, to me, set a really critical tone for what's coming," he said.

At the end of the day, both the SEC and the Justice Department view compliance as a shared responsibility. Equally important, enforcement authorities always stress that tone-at-the top means walking the talk: "We are looking for a tone built on actions, not words," Cohen said. "I want to see tangible benefits." ■





DLA PIPER'S 2016 COMPLIANCE & RISK REPORT: CCOs UNDER SCRUTINY

DLA PIPER

A CHANGING LANDSCAPE

The first DLA Piper compliance survey arrives at a crucial hour, with regulators and enforcement authorities increasingly viewing the establishment of ethical and compliant business cultures as one of the most important tasks for corporate boards and C-suite executives.

In this environment, companies must create sustainable cultures of integrity that empower personnel at all levels to make the right decisions. This is often the most difficult job for CCOs. Our survey results demonstrate that CCOs are worried about personal liability and that companies are still struggling with monitoring and auditing their compliance programs.

Building on the success of our inaugural examination of compliance programs, we already are at work on our second annual compliance survey, which will include a special focus on directors – their views of compliance and how best to engage and educate a firm's governing body about compliance issues – and on the unique issues confronting both foreign and domestic multinational businesses.

Senator George Mitchell
Partner
Chairman Emeritus

In my career as General Counsel and Chief Compliance Officer at global Fortune 500 companies, and more recently as a director of publicly traded companies, I have seen the best and the worst of how compliance can affect a company's financial performance, reputation and culture. And so, through that lens, we at DLA Piper set out to conduct a survey that would produce meaningful and practical direction for compliance professionals in companies big and small, public and private.

More than simply a collection of data, this survey provides insights, analysis and actionable guidance to help ensure that your compliance program is working to protect not only your company, but also yourself and all of the individuals charged with developing and implementing the program.

And with that, I am proud to introduce the first annual DLA Piper compliance survey.

Stasia Kelly
Co-chair of DLA Piper's Global Governance and Compliance practice
Co-managing Partner (Americas)

EXECUTIVE SUMMARY

"One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing."

— U.S. Deputy Attorney General Sally Q. Yates, Sept. 9, 2015

Contained in what is now commonly referred to as the Yates Memo, those words sent waves of apprehension through the corporate compliance world last fall. Coupled with the appointment of Hui Chen as the Justice Department's first-ever compliance counsel and accompanied by a steady drumbeat of guidance from Andrew Ceresney, Securities and Exchange Commission director of enforcement, the memo seemed to signal a new era of scrutiny and personal liability for senior executives and compliance officers.

That apprehension hasn't subsided among the vast majority of compliance officers and CEOs, according to DLA Piper's **2016 Compliance & Risk Report: CCOs Under Scrutiny**. More than eight in 10 respondents to our survey said they were at least somewhat concerned about the change in tone and tactics from Washington. Ninety-one percent predicted greater scrutiny now that Hui Chen has been appointed compliance counsel. And nearly two-thirds said the recent developments would affect their decisions to remain or accept positions as CCOs.

Potentially exacerbating the situation, compliance resources aren't keeping pace with increasing oversight, respondents said. Only about a third were confident that they had sufficient resources to do their jobs – and the vast majority said they have not changed their compliance programs in the wake of the recent saber rattling from Washington.

The tension between heightened personal liability and stunted resources could have multiple negative implications for the compliance industry. It could drain the industry's talent pool, for instance, acting as a deterrent for early-to-mid career professionals. "If you have another 25 years to work, do you really need this kind of risk?" one experienced compliance officer told us.

8 out of **10** at least somewhat concerned about the change in tone and tactics from Washington

91% predicted greater scrutiny now that Hui Chen has been appointed compliance counsel

2/3 said the recent developments would affect their decision to remain or accept positions as CCOs

With this as a backdrop – and with no indication that federal oversight will diminish any time soon – the following report aims to provide an insightful picture on the state of compliance: What are the greatest risks companies face, how are employees being trained, what is the status of the compliance chain of command and what actions should companies take in this new landscape?

More external pressure, but little change – so far

Despite the change in tone from Washington, 79 percent of survey respondents said they had not altered their compliance programs in response. This could be a timing issue – Chen's appointment and the Yates Memo are both fairly fresh – but other factors could be at play.

Many respondents don't seem to think they have the resources necessary to build and maintain strong compliance programs. When asked if they had sufficient resources to do their jobs, only about a third (30 percent) answered "to a great extent." This could be a function of CCOs' continuous drive to improve, and of senior managers' general reluctance to allocate resources to non-revenue-generating functions and exclusive focus on measuring the return on investment for any expenditure. But clearly some CCOs feel they're not getting what they need – nearly a quarter said they only had sufficient resources "to a small extent" (12 percent) or "not at all" (12 percent). That group is likely to experience particularly acute anxiety as regulators turn up the heat.

"You sit in this role and you always think of more that could be done if you had more people or more resources," one seasoned CCO told us. "But if you're being held accountable and you don't feel you have sufficient resources – and you've asked for them – that's very problematic."

47% encountered resistance when requesting budget increases

Respondents were about evenly split on whether they encountered resistance when requesting budget increases, though some said pointing to the consequences of violations helped their cause. In that sense, the new scrutiny from Washington could help shake loose the resources they need. Sometimes, one CCO said, senior executives and board members need to be "scared straight."

But in post-survey interviews, several CCOs said some companies likely haven't changed their programs simply because they don't feel they need to. These CCOs said the recent changes from Washington, while significant, merely add clarity to the guidelines that companies were – or should have been – following already.

"For companies that have not taken compliance responsibilities seriously in the past, I guess having a compliance counsel in the DOJ to ask questions is frightening," said another CCO. "But, you know what? Compliance responsibilities have been out there for a long time."

Still, as the survey results demonstrate, the majority of compliance officers are deeply concerned. In certain industries, that concern may be justified even if they believed their houses were in order prior to fall 2015. The most heavily regulated industries, such as financial services, healthcare and chemicals, already face the most scrutiny, and compliance executives in those organizations are more likely to be unnerved by increases in scrutiny. One CCO told us that financial services – which he described as "about as popular as Congress" – stands to feel the most heat.

65% said increased scrutiny would have an impact on their decisions to remain CCOs

Concern about growing personal liability will also enter into career choices for many compliance professionals, according to the survey. Sixty-five percent of respondents said the increased scrutiny would have an impact on their decisions to remain CCOs or to accept new CCO positions.

"If it's a higher-risk company or one with a prosecutorial history, you're going to weigh the risk of whether it could destroy your career and your personal life," said one CCO we spoke to.

Greatest risks, preparedness and training

Not surprisingly, cybersecurity, data privacy and regulatory risk were respondents' greatest compliance concerns, and their compliance spending tracked closely with those concerns. Interestingly, though cybersecurity topped the list, only 50 percent of respondents said they had cybersecurity insurance policies and only 10 percent had ever filed a related claim.

77% said they had business continuity and disaster recovery programs and crisis response teams in place

More than three-quarters (77 percent) said they had business continuity and disaster recovery programs and crisis response teams in place. Seventy-three percent said they had formal, written crisis management protocols.

Respondents said they considered monitoring to be the weakest aspect of their compliance programs and also the aspect (along with training) that took up the most time. Audits were respondents' tools of choice for measuring the effectiveness of compliance programs, along with training data and online assessments. Sixty-five percent said they used online, interactive training – and public companies were more likely to use those methods.

Chain of Command and Board Reporting

Forty-four percent of respondents said the compliance officer at their company reports to the chief legal officer, while 25 percent of respondents said the compliance officer reports to the CEO. When asked about optimal reporting structures, however, respondents were more evenly split between these two reporting lines – 28 percent believed a direct report to the chief legal officer was best while 29 percent preferred a direct line to the CEO. Also interesting, whereas 11 percent of respondents said their compliance officer reports to the board, more than two times as many respondents (29 percent) preferred a direct report to the board.

44% said the compliance officer at their company reports to the CLO

Reporting to the board has the clear advantage of creating a direct line to the ultimate decision makers and would satisfy the oversight requirement in the federal sentencing guidelines. Given the current environment, that advantage may be increasing, particularly for CCOs who foresee increased scrutiny without a corresponding increase in resources. Directors also often bring broader perspectives than senior executives. In addition, regulators expect CCOs to have access to senior decision makers, including the board.

"A lot of our board members sit on other boards," one CCO told us. "They bring that learning to the boardroom, and from that standpoint, the board has helped a lot – getting educated on the outside or through their own reading."

About two-thirds of respondents said they report metrics to their board of directors or an audit committee. Increased exposure to the board and/or audit committee can help CCOs and directors alike. Directors become more informed about the organization's greatest risks while CCOs become more informed about how to best reach and communicate with directors.

"What's happening is corporate America is seeing that the position they once thought might be more of a mid-level is more of a higher level," Roy Snell, CEO of the Society of Corporate Compliance and Ethics, told *The Wall Street Journal* in October.

Amid this shifting compliance landscape, we present the following results. When informative, we've provided a comparison of results by respondents from public and private companies.

WHAT CCOs NEED TO KNOW

As scrutiny from Washington increases, and organizations become more global and complex, compliance officers must protect their companies and themselves. And while that's easier said than done – and while every organization is different, with unique compliance needs – there are certain fundamental steps that nearly every compliance officer should take.

This list should serve as a starting point. As always, execution and persistence are key.

MITIGATING CCO RISK

- **Track effectiveness:** Assess your compliance program and carefully document its development and maintenance to demonstrate that it works.
- **Get covered:** Ensure that your company obtains adequate D&O insurance and provides CCO indemnification rights in employment contracts or corporate bylaws.
- **Wear one hat:** Clarify reporting lines and your roles and responsibilities to avoid taking the fall for actions in a business unit not under your purview.
- **Raise the alarm:** Escalate red flags as soon as they arise and do not suspend regular compliance reviews and activities during a crisis.

TRAINING

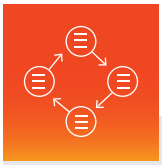
- **Train everyone:** From the board room to the supply room, everyone must be informed on key risks and issues, using materials in employees' native languages. Create a training plan to avoid training fatigue.
- **Survey says:** Determine how employees learn effectively to develop and deliver content that will address their needs and increase information retained.
- **Make it relevant, accessible:** Promote training and keep content fresh by periodically reviewing curriculum and incorporating real-life scenarios, including issues from hotline complaints.
- **Mix it up:** Vary formats with a mix of online modules, games, and live, in-person presentations. Develop a short refresher course and deliver it at varying intervals.

CYBER-INSURANCE

- **Cover your bases:** Make sure you meet customer, client, partner or other counterparty requirements, and work with your cybersecurity team and outside counsel to ensure top insurable risks, to an expected extent, are covered.
- **Annual assessment:** Evaluate your cyber-insurance at least once a year (whether to purchase it or whether your program is enough). Keep good records and report them to your board.
- **Outside expertise:** Retain a trusted broker with extensive experience, and perhaps market leverage, in the cyber-insurance market.
- **Don't forget vendors:** Ensure vendor insurance requirements are market-reasonable, that vendors have necessary coverage and that you are covered for losses if your operations are suspended due to a cyber event at a critical vendor.

WHAT CCOs NEED TO KNOW

DLA PIPER



CCO REPORTING

- **Proper channels:** Ensure that you have formal access to the CEO and board of directors when there is not a direct reporting relationship.
- **GC access, when appropriate:** If you are responsible for legal-oriented functions, such as investigations, strongly consider regular reporting to the general counsel.
- **Sector specifics:** Take into account regulator expectations and industry-specific considerations (i.e., CCO reporting for medical device companies may be very different than for retailers).

MONITORING

- **First-hand observations:** Site visits are the best way to improve monitoring. By getting out in the field and visiting different business units, you can evaluate controls that are in place along with awareness of compliance programs and the on-site compliance culture.
- **Embedded compliance:** Larger organizations, when resources allow, should consider placing compliance representatives within business units.
- **Ask the right questions:** Companies should consider all avenues when gathering monitoring data. It's especially important to include queries about compliance in employee surveys and exit interviews.

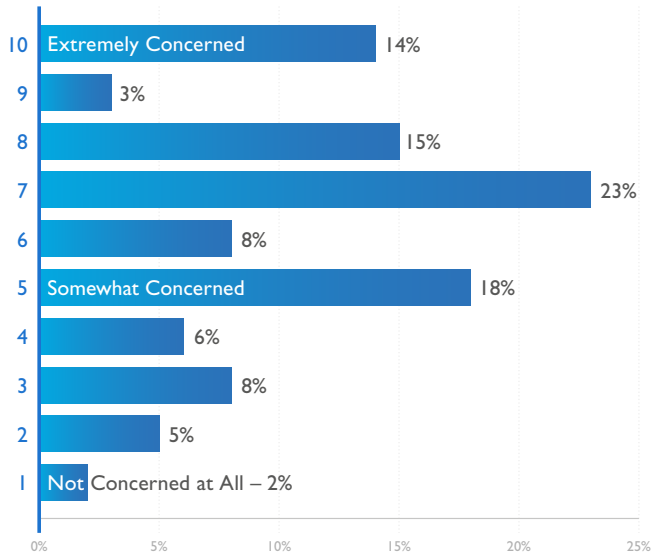
REGULAR RISK ASSESSMENT

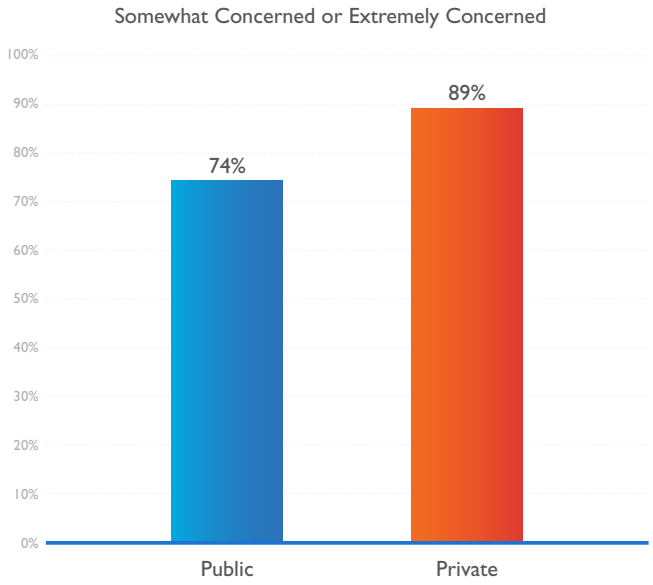
- **Draw the line:** Understand and express in writing your organization's risk tolerance.
- **Stay current:** Conduct risk assessments on a set frequency (e.g., annually) and off-cycle as needed to address significant intervening regulatory changes, organizational changes or the introduction of a new company policy or procedure.
- **Diagnose:** If assessment reveals noncompliance, be sure to identify the root cause as well as the consequences of the noncompliance and their severity.
- **Link it and compare:** Relate identified risks to business operations and compare the level of risk with your organization's stated risk tolerance.

REPORTING TO THE BOARD

- **Analyze this:** CCOs should collect all relevant data, look for evolving trends and provide context and pertinent information and analysis when reporting to boards. Sector-specific information is important, especially if some board members don't have a deep background in a particular industry.
- **Importance of qualitative:** Quantitative stats are important, but from a CCO perspective, they only provide one dimension of the picture. CCOs also should report on initiatives, regulatory developments and emerging risks.
- **Private company considerations:** CCOs for private organizations should remember that their chief goals when reporting are to protect investors, strengthen the company in the eyes of the financial markets, clear hurdles to any potential transaction and make the company less vulnerable to criticism from regulators.

Q1. On a scale of 1 to 10 (with 10 being greatest), how concerned are you about your personal liability as a CCO or the personal liability of your company's CEO?

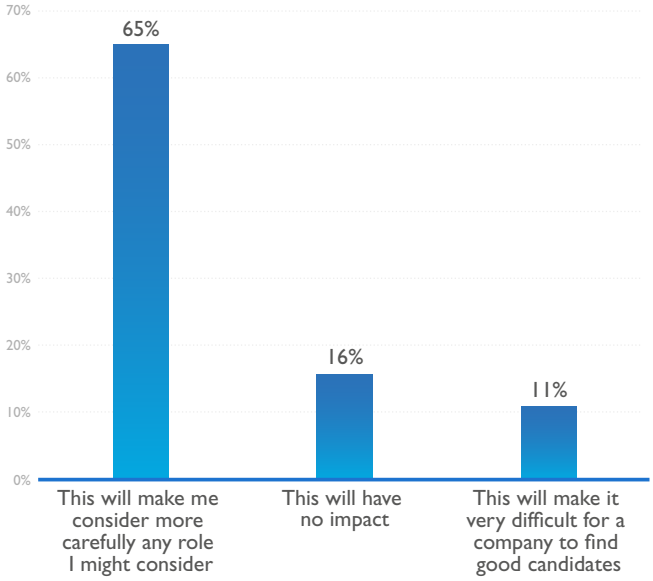


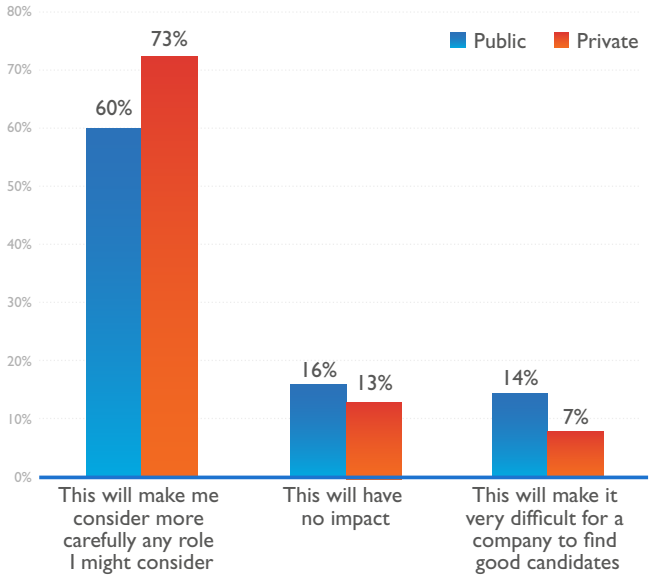


- As noted above, 81 percent of respondents were at least somewhat concerned, with nearly a third (32 percent) rating increased personal liability as extremely concerning.
- Concern was higher (89 percent) among respondents from private companies.
- The concern seems justified given the DOJ's clear intent to prosecute more individuals in corporate malfeasance cases. *The Washington Business Journal* in January 2016 noted that the Yates Memo requires corporations to assist in the prosecution of employees "in essence, requiring 'scalps' before it grants a corporation favorable treatment in plea negotiations," adding, "the goal is more people in prison."[1]
- Heightened concern could have its benefits. Compliance officers may be more likely to get the resources and authority they need if CEOs and boards fear for their personal liability. One compliance expert noted that "the compliance function will move to become much more integrated into and a more important corporate discipline within every organization of significant size going forward into 2016 and beyond."[2]
- Respondents from private companies were much more concerned, with 89 percent saying they were somewhat or extremely concerned, compared with 74 percent for respondents from public companies. This likely reflects the reality that private companies have traditionally faced less all-around scrutiny than their publicly traded counterparts.

1. *Washington Business Journal*, "Viewpoint: DOJ edict muddies roles," January 8, 2016
2. *FCPA Compliance & Ethics blog*, "The Year 2016 in Compliance," January 11, 2016

Q2. What impact will statements from regulators about increased scrutiny on compliance departments and SEC or DOJ actions against CCOs have on your decision to remain or accept a position as a CCO?



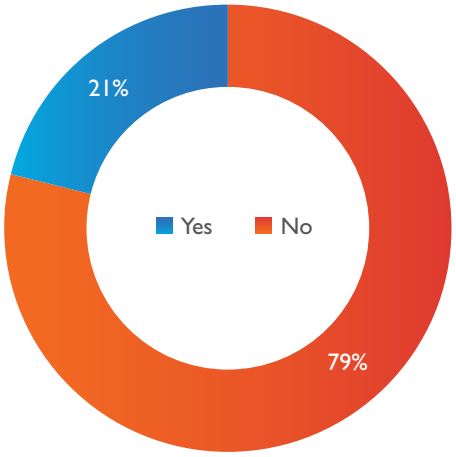


- The implication is that it could become more difficult to find qualified candidates willing to take on compliance roles, or that CCO candidates will require greater compensation, or both.
- A survey released by the Society of Corporate Compliance and Ethics in October 2015 showed average CCO salary was $150,207, up from $139,582 in 2013.[3]
- Again, CCOs from private companies had a stronger reaction than their public-company counterparts. Seventy-three percent of respondents from private companies said they would think more carefully about roles they might consider, compared with 60 percent from public companies.
- Interestingly, 14 percent of respondents from public companies said the moves from Washington will make it more difficult to find good candidates, compared with just 7 percent from private companies.
- The result is that companies may have to be more creative in attracting talent to compliance roles. Offering competitive compensation and benefits was the primary approach companies used before last year. Few had considered innovative ways to attract and retain talent to make programs effective, such as offering D&O insurance coverage and providing indemnification rights.

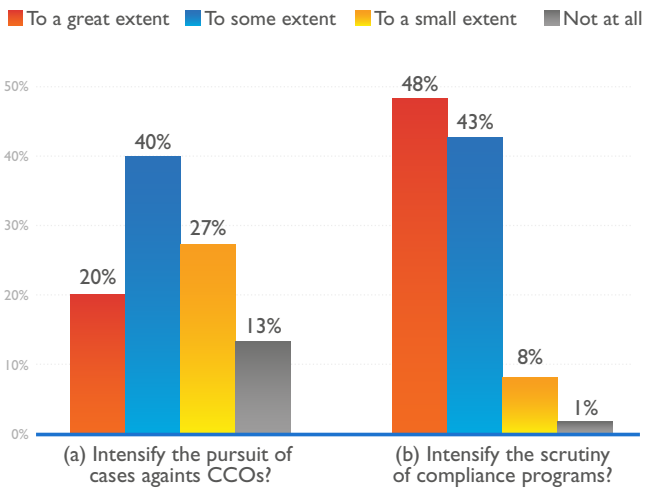
3. *The Wall Street Journal Risk & Compliance Report*, "Compliance Officers Well Paid, New Survey Shows," October 6, 2015

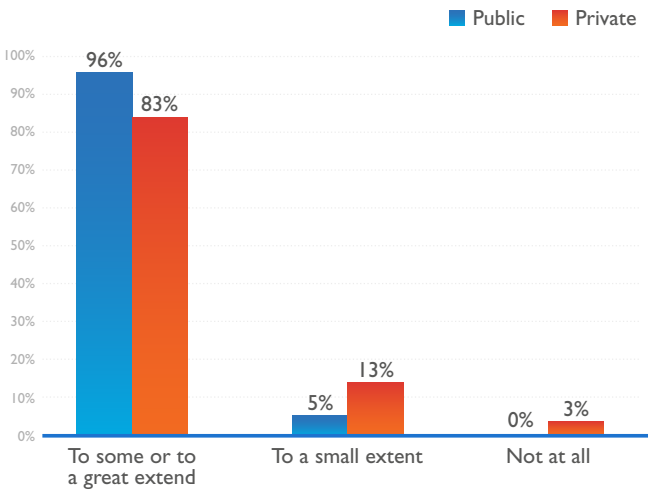
Q3. Have you made changes to your company's compliance program based on recent SEC or DOJ actions or statements?

- This seeming inertia could stem from a lack of adequate resources (see Question 5). But some of the CCOs who answered "no" likely feel their programs were already in good shape when Washington turned up the heat.
- One CCO said he and most of his colleagues in the field already make routine changes to their program. "As a practical matter I think that CCOs are thinking about their program on a daily basis. In terms of program elements, I think about mine all the time."



Q4. To what extent do you believe the DOJ's recent appointment of Hui Chen in the new position of compliance counsel will:

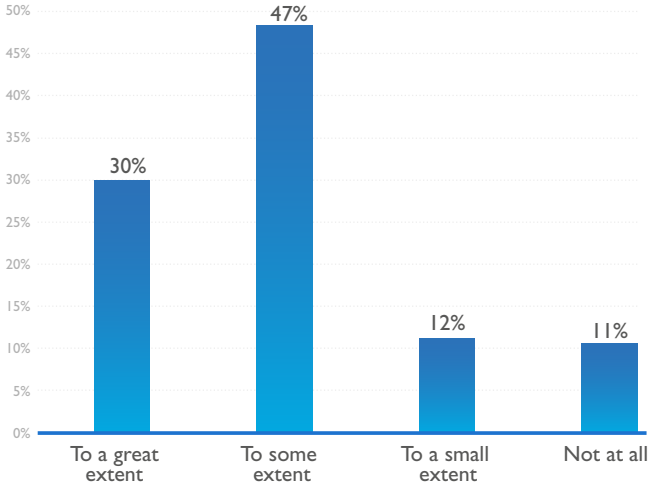


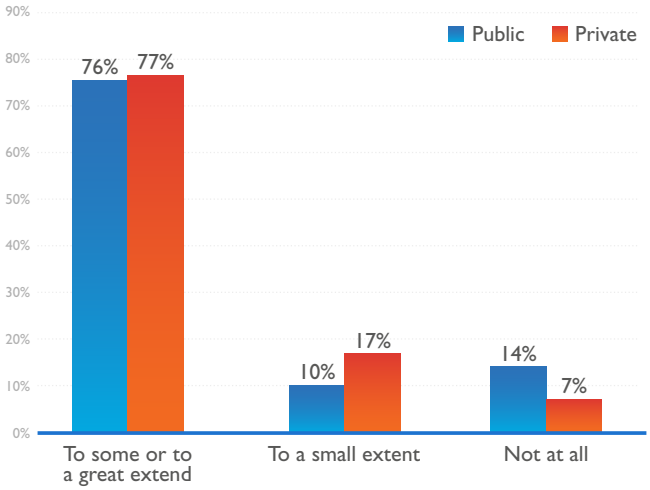


- The inaction reflected in Question 3 is disquieting, given the overwhelming expectation that the DOJ will pursue more CCO prosecutions and increase its scrutiny of corporate compliance. It is possible that companies are still in the process of making changes, given that Chen's appointment and other moves from Washington occurred relatively recently.
- Chen has said she will in particular evaluate compliance programs for companies under Foreign Corrupt Practices Act investigations. She will use "articulated metrics to evaluate the state of a company's compliance program, at the time the incident occurred." This can be problematic: the incident under investigation could have occurred years in the past, when standards were different.[4]
- Respondents from public companies were more concerned here, with 96 percent saying they believed Chen's appointment would increase scrutiny to some or a great extent, compared with 83 percent for respondents from private companies.

4. *FCPA Compliance & Ethics blog*, "The Year in 2016 Compliance," January 11, 2016

Q5. To what extent do you believe you have sufficient resources, clout and board access to support your ability to effectively perform your job?

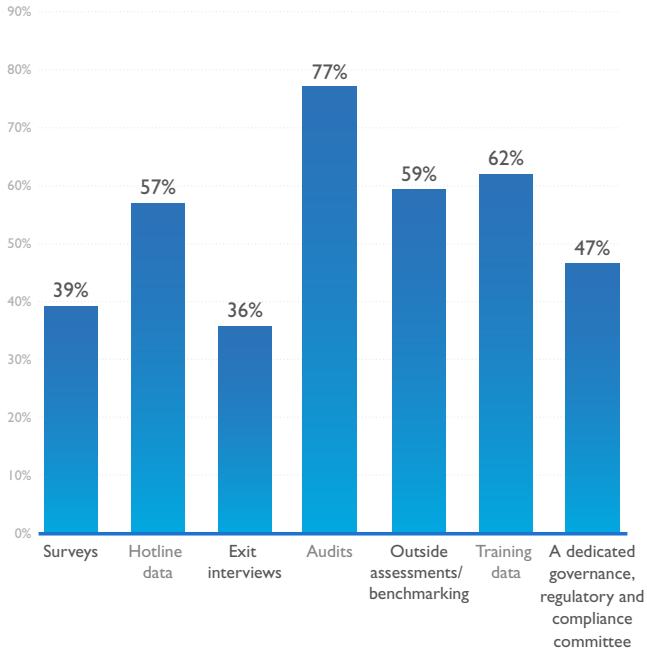


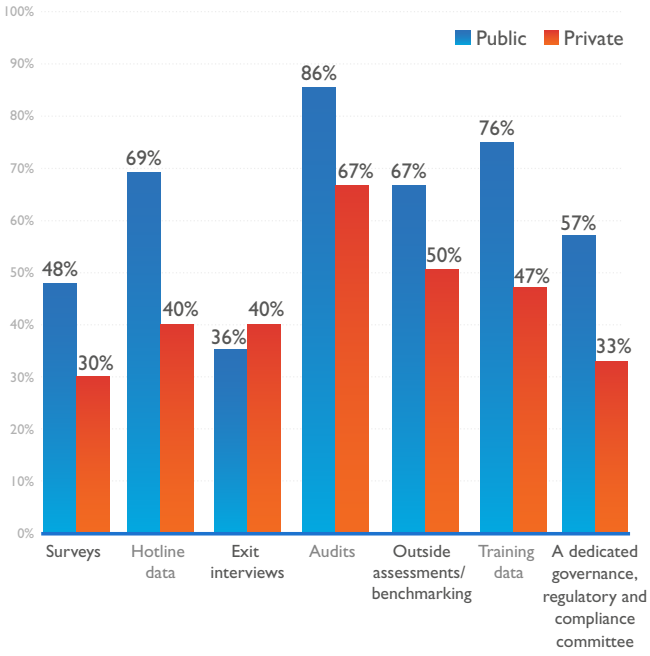


- We'll be monitoring this finding as the ramifications of increased regulatory and prosecutorial scrutiny work their way into compliance budgets, reporting relationships and compliance-officer status.
- One 2015 study found that only a third of compliance departments saw budget increases from the previous year, with about half of respondents (48 percent) saying they had the same budget.[5]
- Interestingly, 14 percent of respondents from public companies said "not at all" when asked whether they had sufficient resources, compared with 7 percent for private companies.
- One CCO who believes he has the necessary resources said it is incumbent on compliance officers to tell their superiors if they feel they don't have what they need. "I would think, if I didn't have the resources, that the board and management would expect me to come to them and say, 'This is what I think I need.' If I didn't do that, shame on me for not raising the point."
- In an interview, one CCO said the most common motivation for increasing the compliance budget is a major scandal. "Companies are like people," he said. "You close the barn door after the horse is racing down the sidewalk."

5. Ethisphere and Convercent, "Compliance Strategy and Performance," https://www.convercent.com/lp/compliance-strategy-report

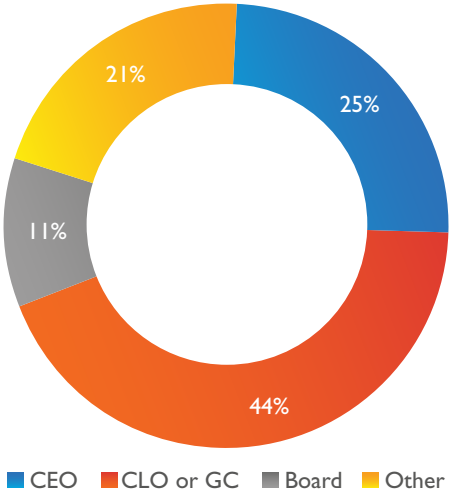
Q6. What tools do you have and use to evaluate the effectiveness of your compliance program? (Check all that apply)

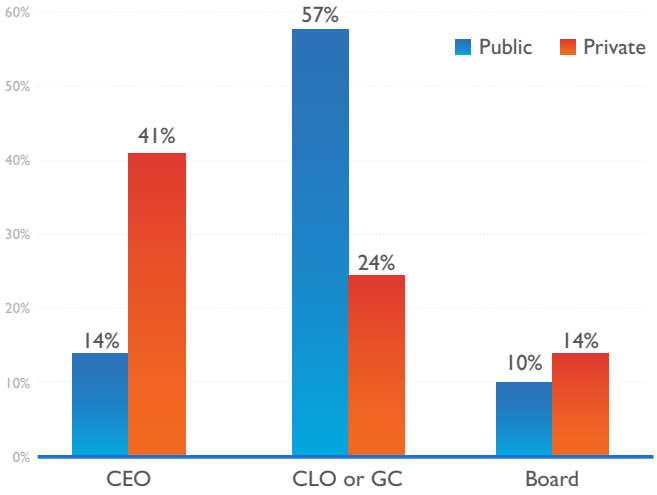




- It's important for companies to leverage training and hotline data, two of the top methods selected by respondents for checking effectiveness.
- One CCO explained measuring effectiveness: "You've got to break down the compliance function, risk assessment, training and education, hotline escalation, communication – then you have to look for objective things you can measure and subjective things you can ask." He also noted that it's important to solicit employee feedback on training – i.e., what they learned from specific activities.
- Public companies use almost all of these tools more than private companies, according to respondents.

Q7. At your company, to whom does the compliance function report?

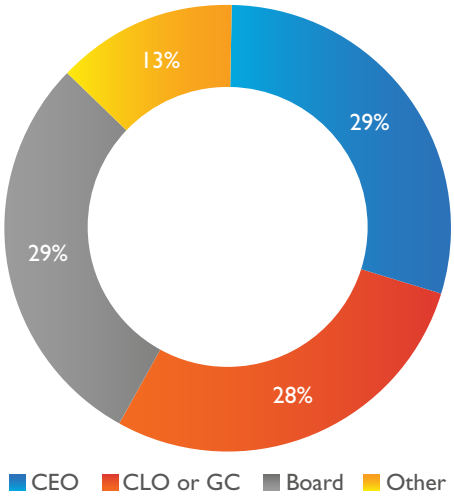




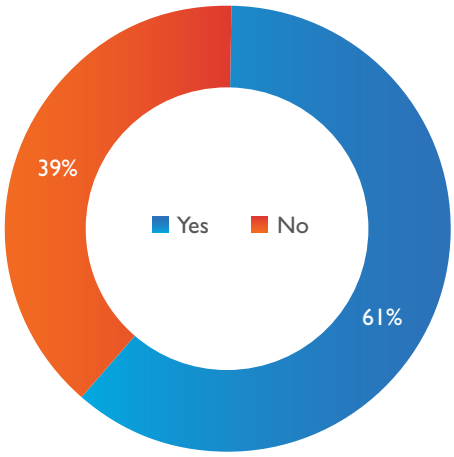
- While reporting to the senior legal officer is the most common management structure, there is clearly no consensus on this question. In our experience, any of these arrangements has its benefits and can be effective so long as the compliance function has what is needed to do the job.
- One CCO who reports to the general counsel told us the relationship works, but it's important that he feels free to speak to the board of directors – with the GC's support and permission – when necessary.
- In an interesting split, public company CCOs were far more likely to report to CLOs and GCs, while private company CCOs usually report directly to the CEO. Both types report to boards at about the same rate.
- CCO reporting can be driven by regulator guidance in particular sectors

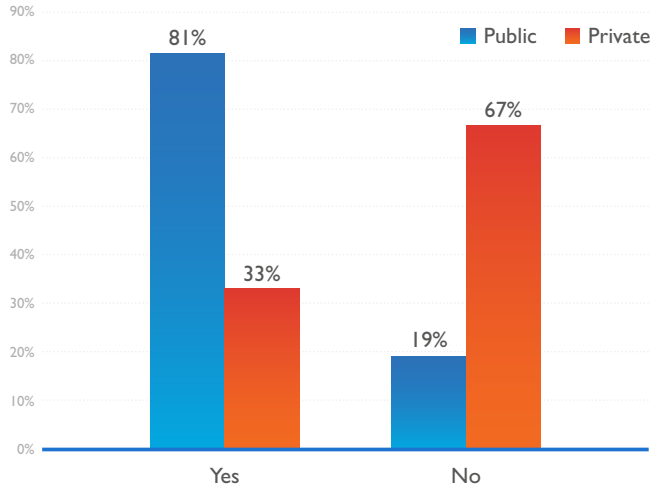
Q8. Where do you believe the compliance function should report?

- Many of the compliance officers who report to legal functions (44 percent of respondents) believe they ought to be reporting to the CEO or the board – only 28 percent say the legal function is the proper boss.
- In an interview, one CCO said reporting to the board might have its benefits, but it leaves the CCO without a manager to provide career guidance and performance feedback.



Q9. Do you report metrics to your company's board of directors and/or audit committee?

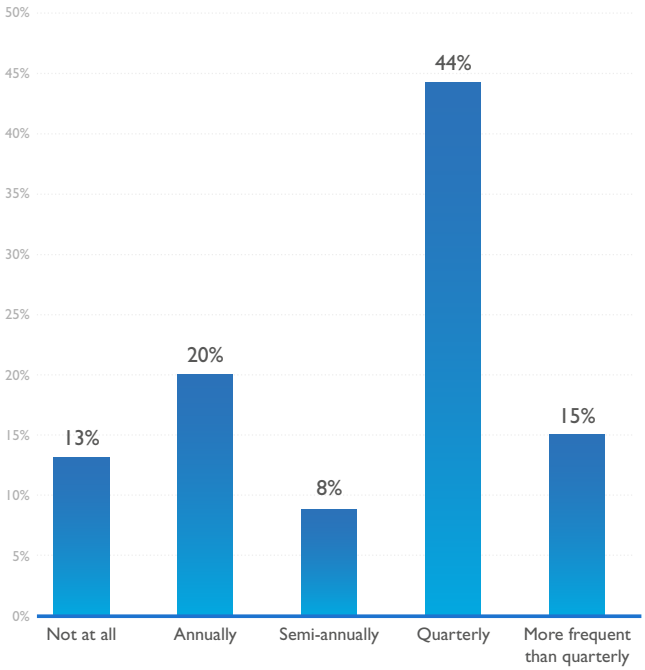




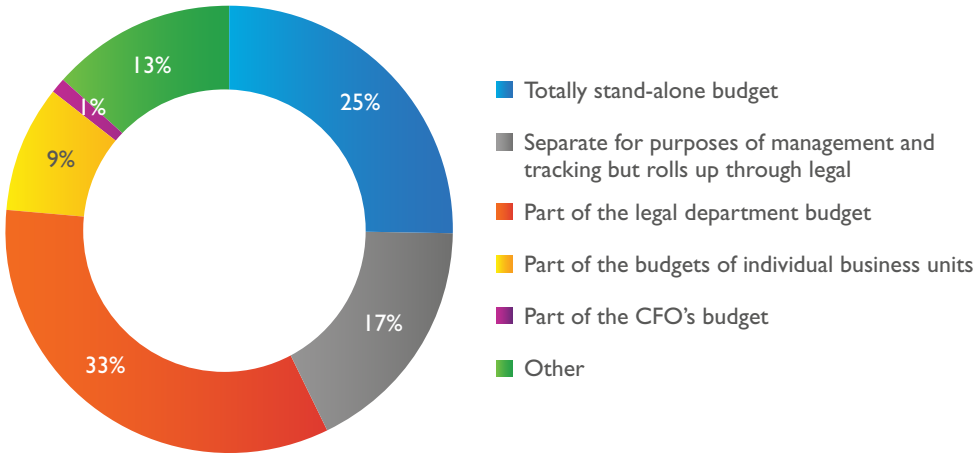
- Notably, 81 percent of respondents from public companies report metrics to the board.
- Respondents said hotline data, training completion rates and reporting statistics were commonly reported to boards.
- Respondents from public companies were far more likely to report to boards and/or audit committees than compliance officials at privately held businesses.

Q10. What frequency of reporting is expected from the compliance group?

- Training data, helpline information and investigation updates were commonly reported to boards, according to respondents. But data points aren't enough, said one respondent. "I also report on key matters. More importantly, I report on developments in the program. The word 'metrics' has become all important, but I think that leadership and the board need more than simple numbers to understand the effectiveness of the program."
- Here again, increased scrutiny from Washington could change the shape of things. As one CCO put it, the DOJ and SEC want to see that compliance officers have access to the board. "Our GRC (Governance, Risk Management and Compliance) presents to the board governance committee every quarter," he said. "We also prepare a compliance deck twice a year. And there's an opportunity for 15-minute private sessions every quarter, if I need it."

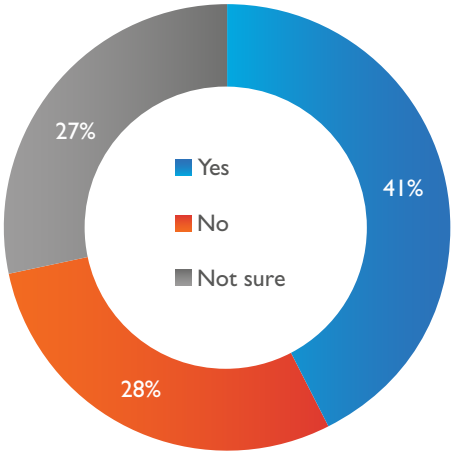


Q11. Does the compliance function have its own budget or is it part of another department?



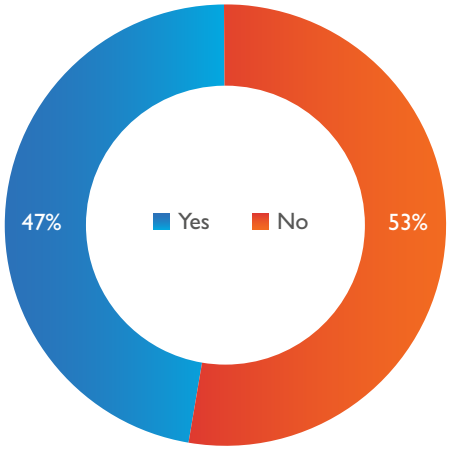
Q12. In your opinion, is your budget sufficient to accomplish the goals you believe are needed for an adequate compliance program at your company?

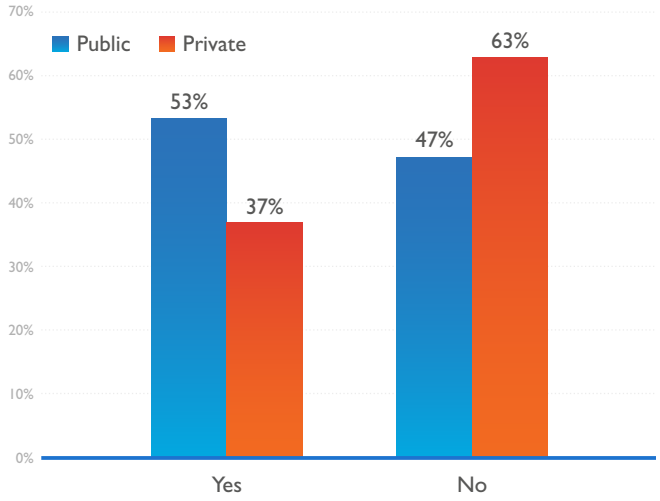
- Even more troublesome than the fact that more than a quarter of respondents (28 percent) think they don't have a sufficient budget is the finding that 27 percent (more than one in four) don't know whether they do or not.
- One former CCO said it was "always a fight" to get necessary resources at his former employer – with some justification. CEOs' primary duties are to maximize shareholder returns, and compliance is a cost center. "That doesn't make them unethical," he says. "But they view it as, 'I want to have the minimum amount of resources I can allocate to keep us on the level and keep me out of jail.'"
- Of course, keeping them out of jail might require dedicating more resources under the new requirements from Washington. "[O]ne of the specific metrics is resources, so any corporate claim that 'we spent all we could' will be very closely scrutinized," according to compliance expert Fox.[6]



6. Ibid.

Q13. Do you encounter resistance from the C-suite, the board or the audit committee when requesting annual budget increases?

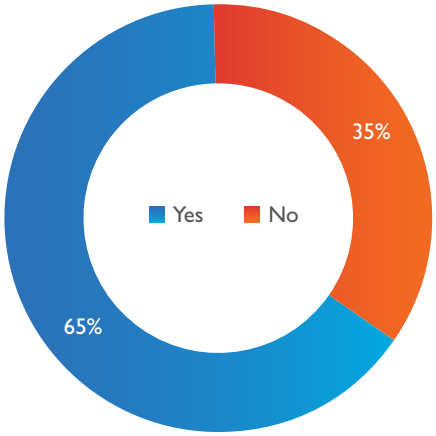


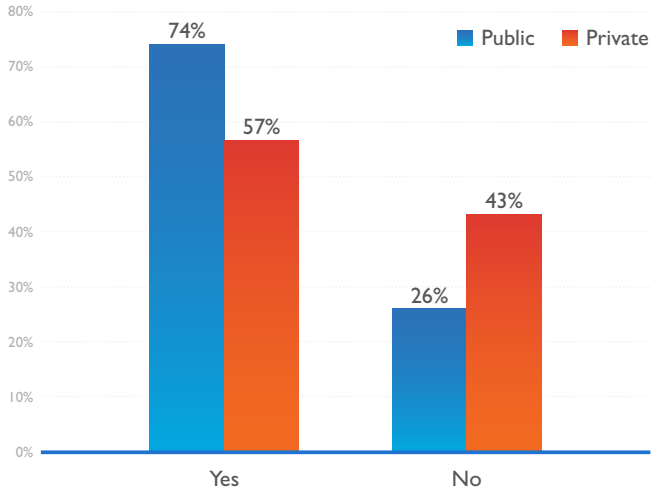


- Respondents from private companies are far less likely to encounter resistance, with just 37 percent saying the C-suite fought them on budget increases compared with 53 percent at public companies.
- There wasn't a pattern as to what respondents said worked in overcoming the resistance. One said hard numbers worked best: "Showing the cost of even one violation, compared to the cost of preventative measures."
- The SEC's Ceresney, in a November speech, said his agency's actions should serve to bolster the CCO's role by demonstrating the need for, among other things, more compliance resources.[7]

7. *Pensions & Investments*, "Chief Compliance Officers Prepare for Closer SEC Scrutiny," January 11, 2016

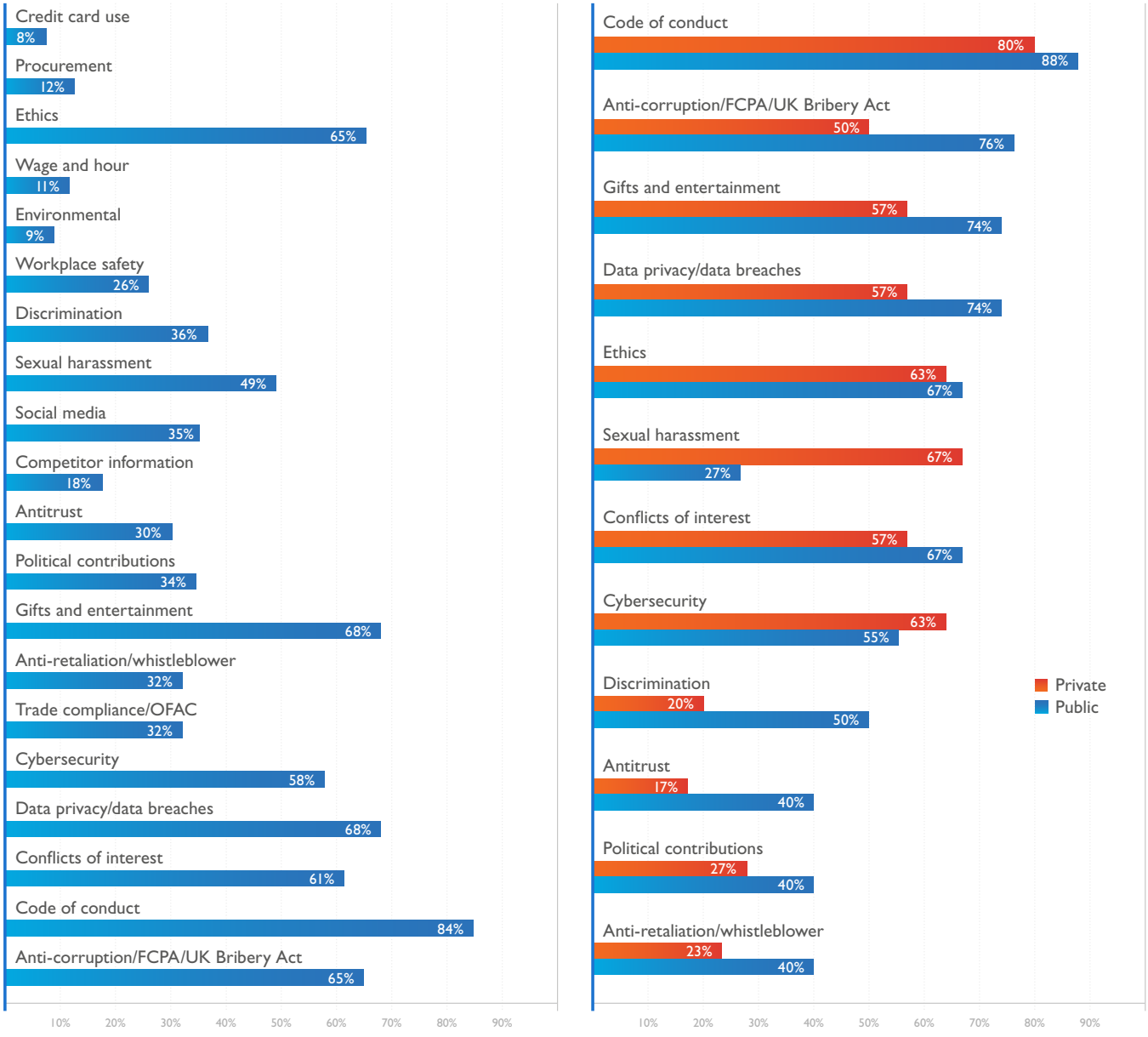
Q14. Have you used online interactive training techniques or programs to engage employees and other stakeholders (e.g., gamification)?



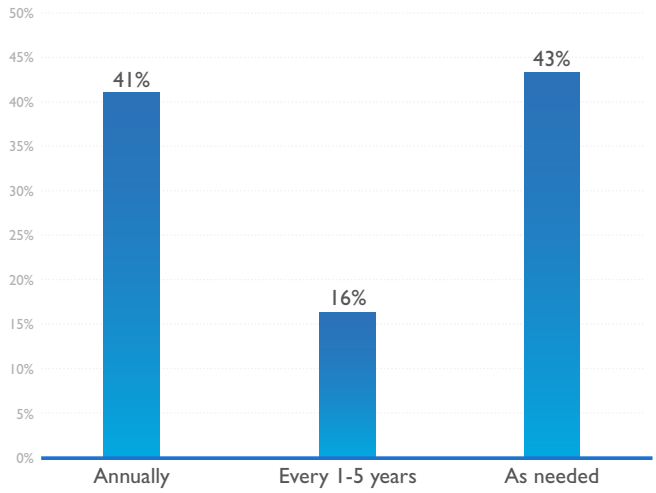


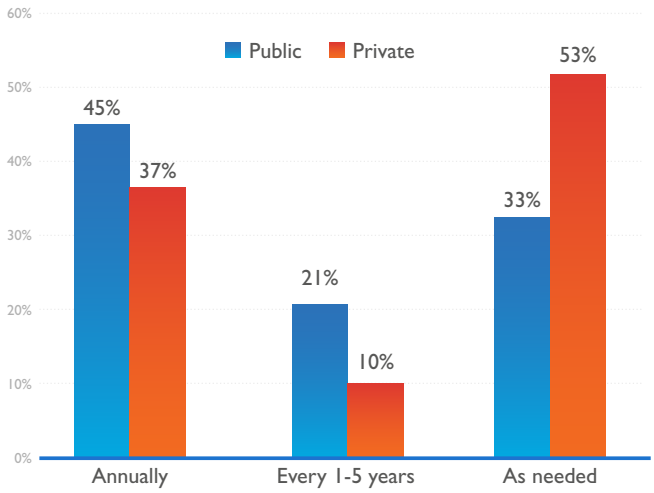
- Public companies were far more likely to use these techniques, at 74 percent, compared with 57 percent for private companies.
- Many respondents said they were adopting interactive techniques. One said, "We created an interactive board game-style training on travel expense management."

Q15. In terms of subject matter, what training programs in the last 12 months has your compliance program focused on? (Select all that apply)



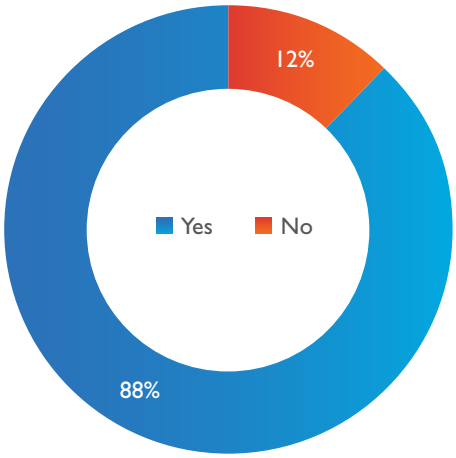
Q16. How frequently do you update or change your training programs?





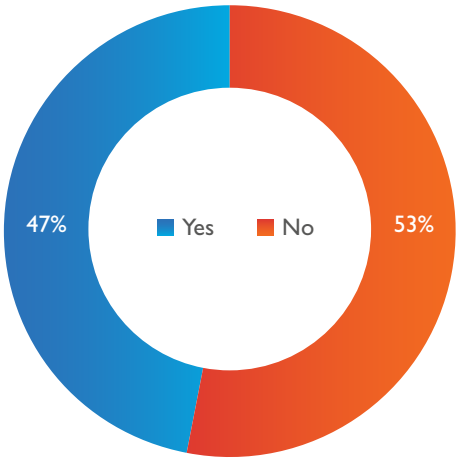
- Private companies were far more likely to make changes only as needed.

Q17. Are employees required to certify completion of, and adherence to, any policies at the completion of training, such as Code of Conduct training?

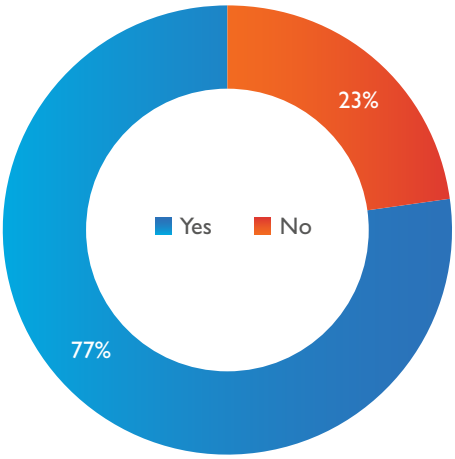


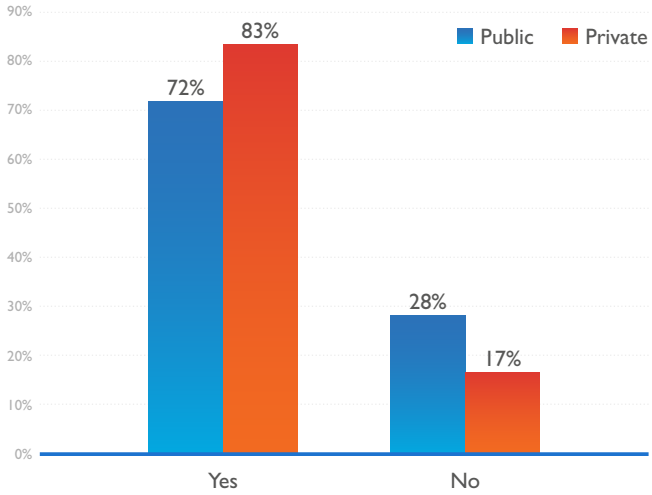
Q18. Are employees penalized for failure to complete training or certifications to policies?

- The gap between the overwhelming majority who require employees to complete trainings or certifications and the minority who enforce those requirements is striking – and likely to close as law enforcement looks more closely at compliance programs.



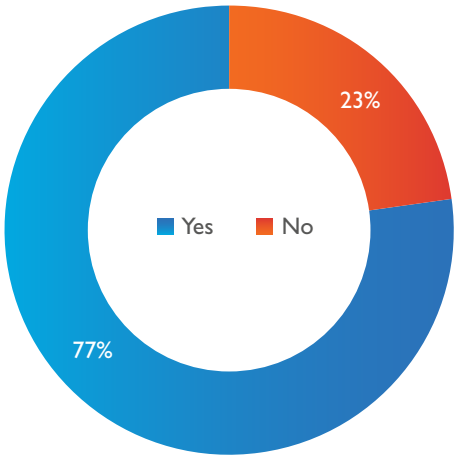
Q19. Do you have business continuity and disaster recovery programs in place as part of your compliance programs?



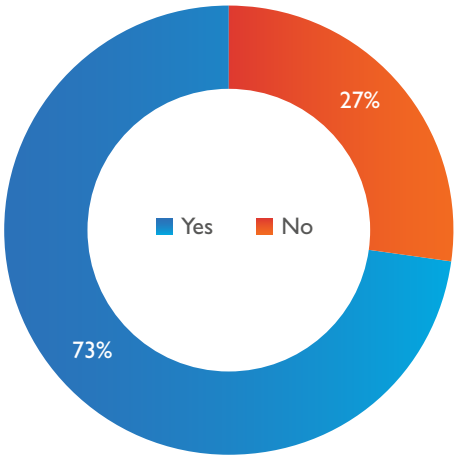


- Interestingly, 83 percent of respondents from private companies said they had BCDR programs, compared with 72 percent from public companies.

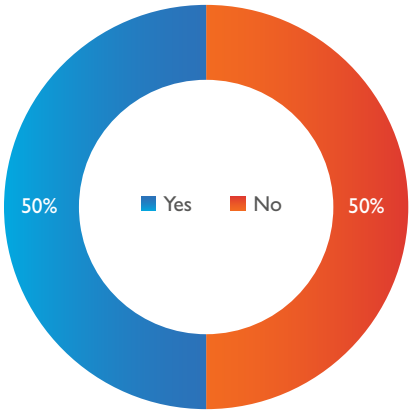
Q20. Do you have a Crisis Response Team identified in the event of a crisis?



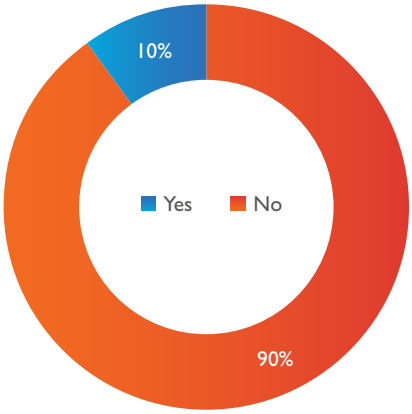
Q21. Have you established a formal, written crisis management protocol to guide you in the event of a crisis?



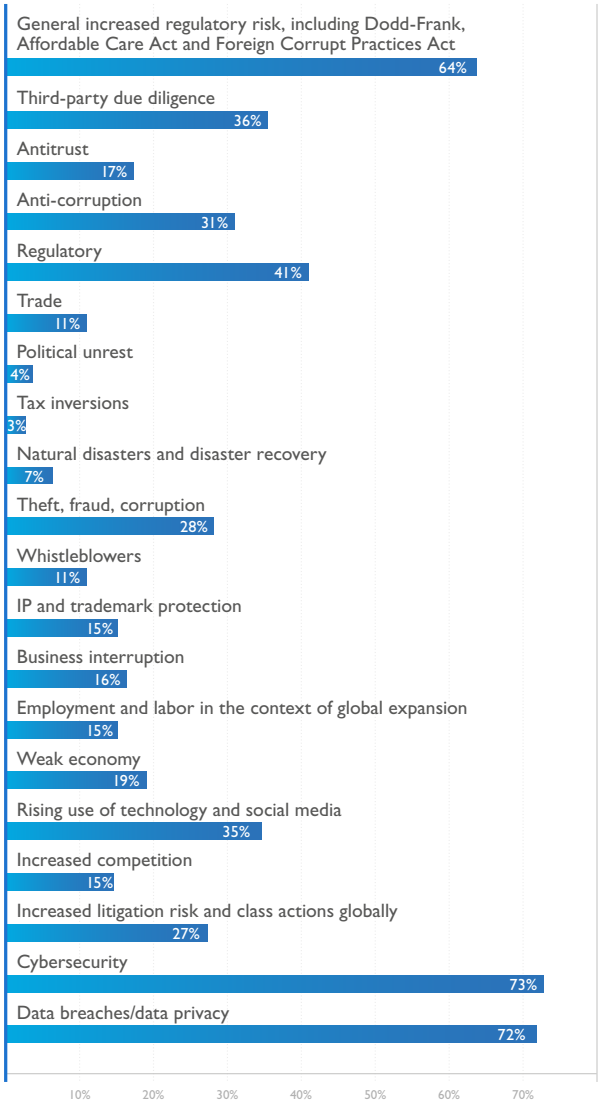
Q22. Do you have cybersecurity insurance?

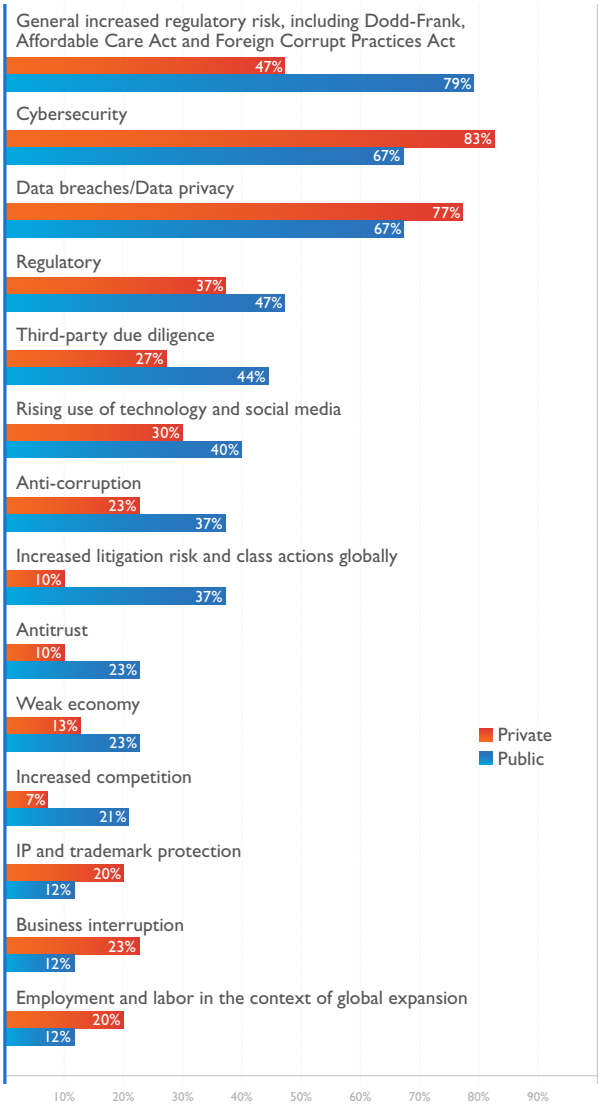


Q23. (If YES above) Has your company ever filed a claim against that policy?

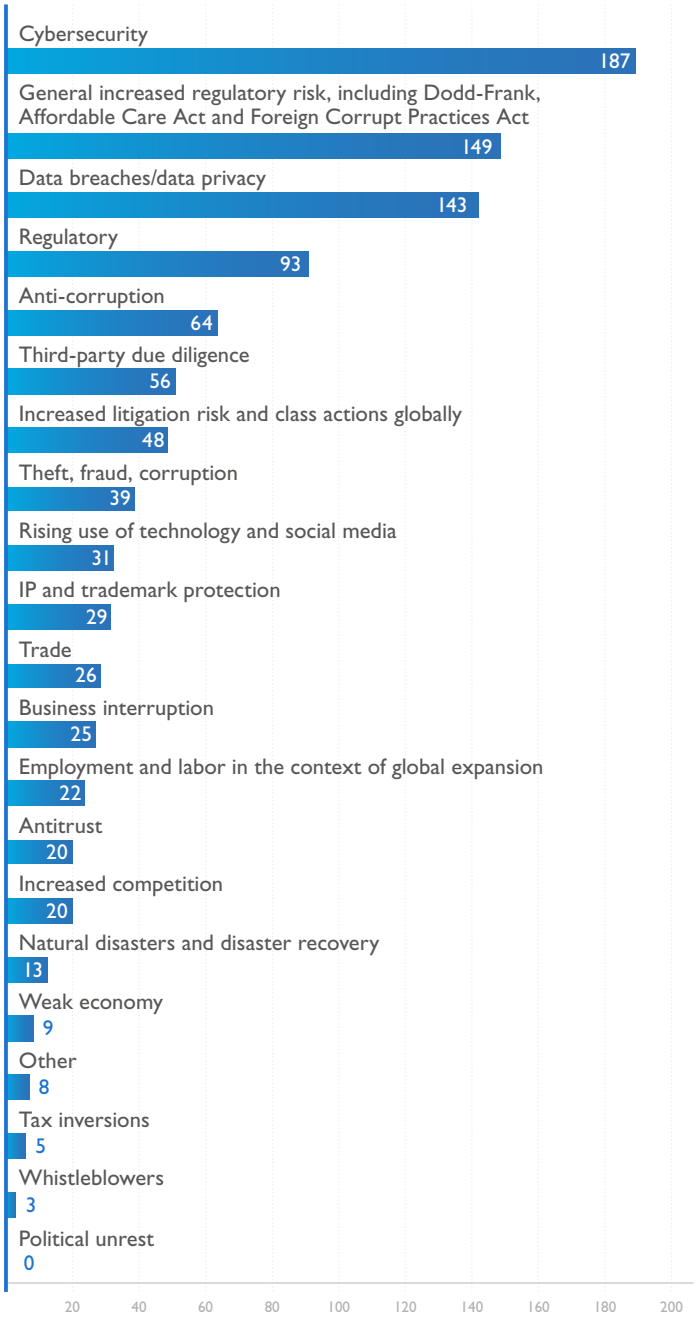


Q24. What are the biggest compliance risks that your company faces today? (Check all that apply)



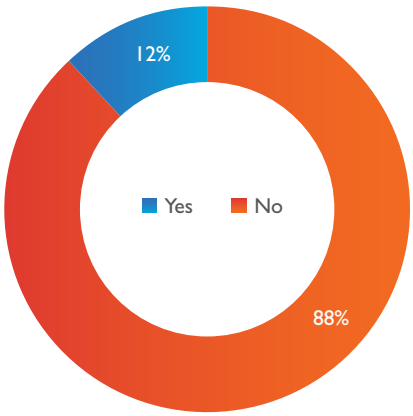


Q25. On which of these compliance risks is your company spending the most resources? (Rank the top 5, with 1 being the greatest amount of resources)

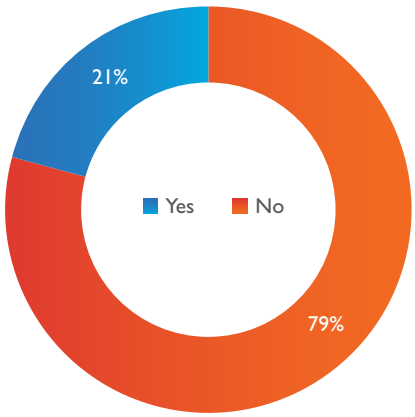


- Not surprisingly, and perhaps reassuringly, the top three compliance risks also are the top three areas in which the respondents' companies are allocating their resources.
- Some respondents specifically noted new data rules from the European Union. "The recent decision on data privacy out of the EU has caused us to look hard at how we deal with data privacy and data transfers."
- One CCO said this kind of information is useful to share with board members in order to help identify new threats. He also said third-party risk seemingly pops up in the news every day.
- A survey by *Compliance Week* found that third-party compliance risk management was the most challenging aspect of respondents' risk management programs.
- Respondents from private companies were more concerned than their public company counterparts when it came to cybersecurity and data breaches/data privacy. Otherwise, concern was greater for almost all risks among respondents from public companies.
- Interestingly, while half of respondents' companies possess cyber-insurance, only about one in 10 has ever filed a claim.

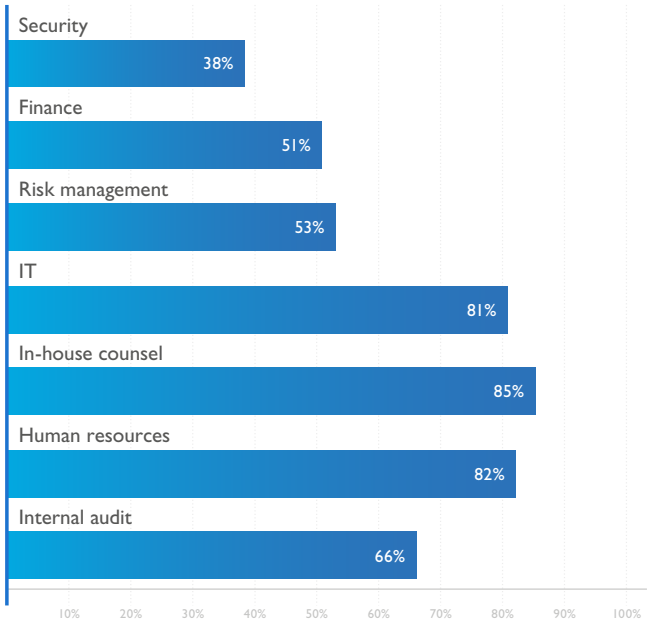
Q26. Have you modified your export management and compliance program in response to recent changes to the Cuban Assets Control Regulations and the Export Administration Regulations involving Cuba?



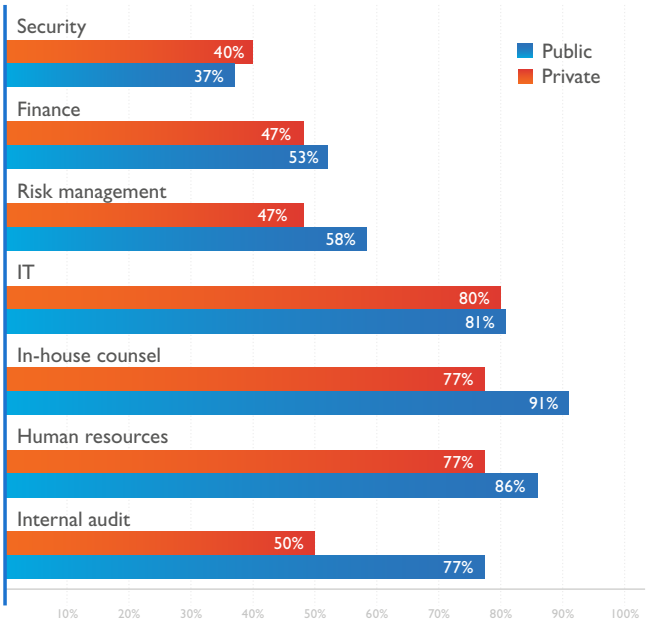
Q27. Have you received an increase in requests to do business as a result of the recent Joint Comprehensive Plan of Action with Iran, or the changes to the Cuban Assets Control Regulations and the Export Administration Regulations involving Cuba?



Q28. What internal resources do you currently leverage as part of your compliance program? (Check all that apply)

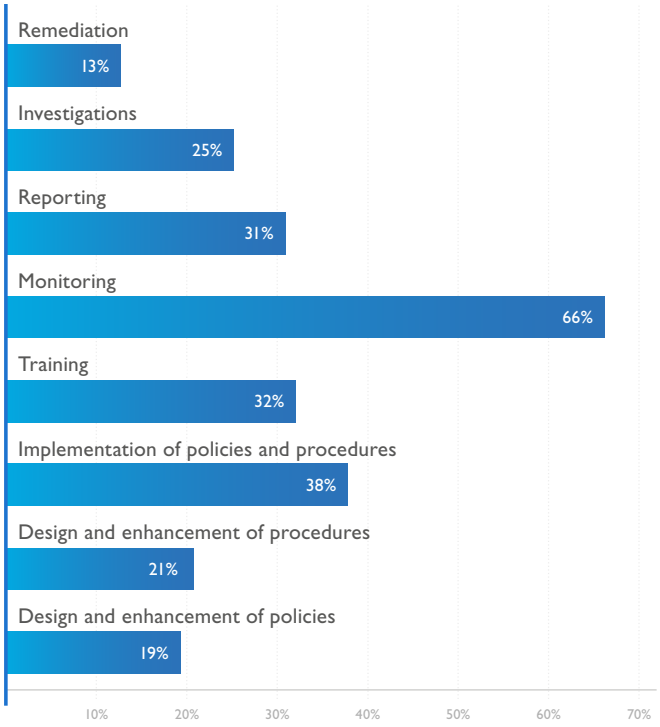


- In-house counsel was even further in front at public companies (91 percent).



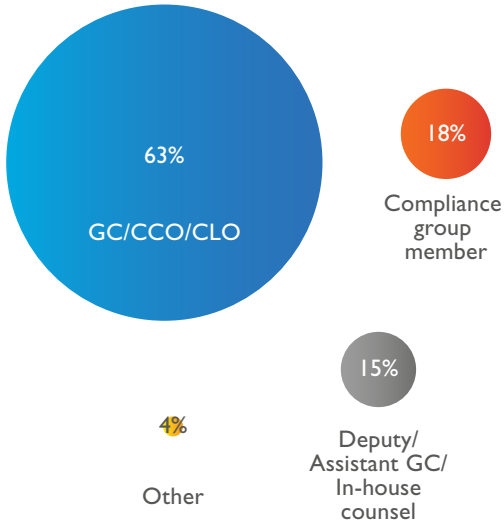
- Internal audits were far more common for public companies, with 77 percent of respondents from that subcategory saying they leverage them, compared with only 50 percent of respondents from private companies.

Q29. In which of these areas do you feel your compliance program is weakest? (Check all that apply)

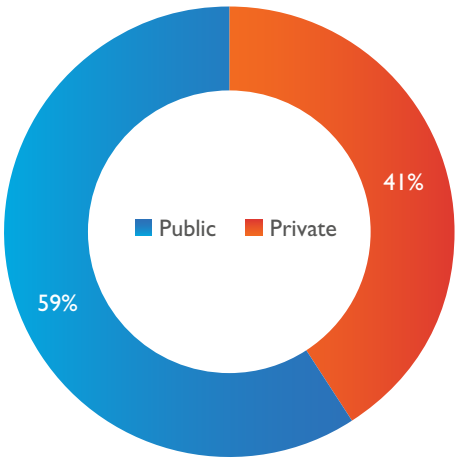


- Monitoring was considered the weakest area by far among both public and private companies.
- Experts note that being able to monitor (in real time) and audit compliance programs is crucial – and that companies should consider building it into quarterly or annual audits of plans. "You've got to do something to figure out if the program is working – and if not, where it needs to be tweaked," one CCO said.

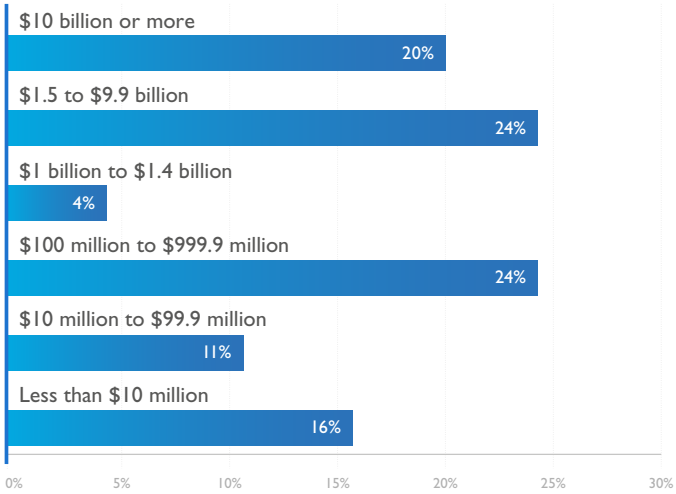
Q30. What is your job title?



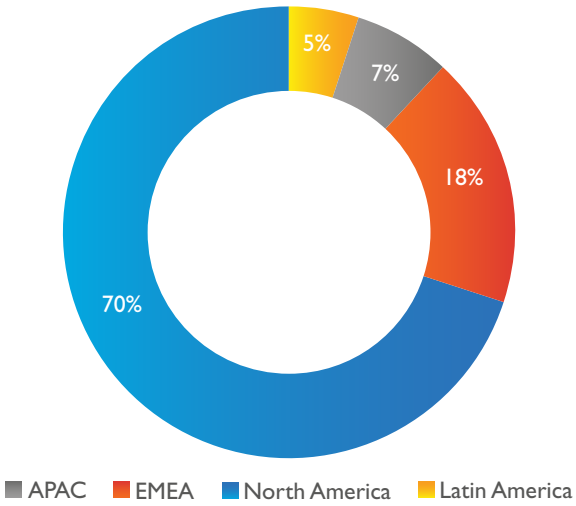
Q31. Is your company publicly or privately held?



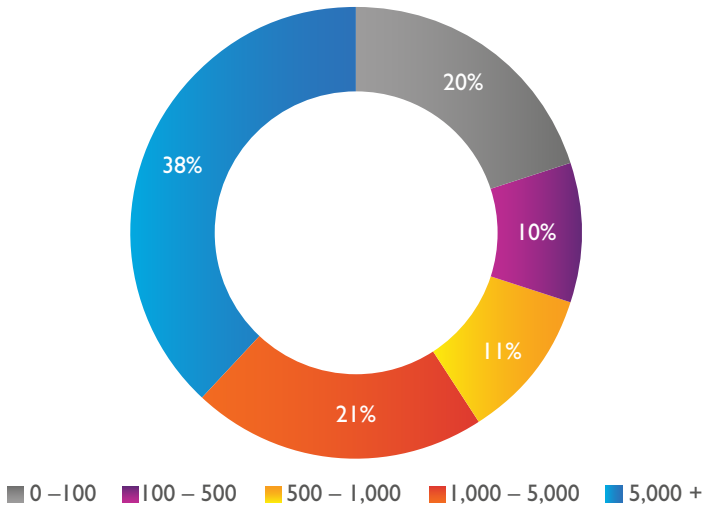
Q32. What were the FY 2014 revenues of your company?



Q33. Please indicate the percentage of your company's business from these regions:



Q34. How many people does your company employ?



METHODOLOGY

During the fourth quarter of 2015, DLA Piper distributed surveys to corporate in-house counsel and compliance professionals at companies large and small, public and private, to better understand how they function, what risks they face and how they are positioning themselves and their organizations to succeed in an era of heightened focus on corporate conduct. The results were tabulated, analyzed and released in April 2016.

In-house counsel respondents identified themselves as GCs/Chief Legal Officers, Deputy/Assistant GCs, In-House Counsel and related titles. Compliance officers identified themselves as Chief Compliance Officers or compliance group members and related titles.

Seventy-eight individuals completed the survey, and subsequent qualitative interviews were conducted to add commentary and insights to the analysis of the results. We thank all participants for their responses.

Eighty-one percent of respondents held the title of Chief Compliance Officer or GC/CLO and about half came from companies with more than US$1 billion in revenue. Seventy percent of respondents' revenue came from North America, followed by 18 percent from Europe, the Middle East and Asia. Fifty-nine percent of companies represented are public and employ more than 1,000 people.

Percentages in certain questions exceed 100 percent because respondents were asked to check all answers that apply. Due to rounding, percentages used in some questions may not add up to 100 percent.

FOR MORE INFORMATION

Stasia Kelly
Partner, Washington, DC
Co-Chair, Global Governance and Compliance
Co-Managing Partner (Americas)
stasia.kelly@dlapiper.com
T +1 202 799 4239

Brett Ingerman
Partner, Baltimore
Co-Chair, Global Governance and Compliance
brett.ingerman@dlapiper.com
T +1 410 580 4177

Michael D. Hynes
Partner, New York
michael.hynes@dlapiper.com
T +1 212 335 4942

Brian H. Benjet
Partner, Philadelphia
brian.benjet@dlapiper.com
T +1 215 656 3311

T. Brendan Kennedy
Partner, Baltimore
brendan.kennedy@dlapiper.com
T +1 410 580 4196

www.dlapiper.com

DLA Piper is a global law firm operating through DLA Piper LLP (US) and affiliated entities. For further information please refer to www.dlapiper.com. Note past results are not guarantees of future results. Each matter is individual and will be decided on its own facts. Attorney Advertising. Copyright © 2016 DLA Piper LLP (US). All rights reserved. | APR16 | MRS000054348

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

September 9, 2015

MEMORANDUM FOR THE ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION
THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION
THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION
THE ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION
THE ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION
THE ASSISTANT ATTORNEY GENERAL, TAX DIVISION
THE DIRECTOR, FEDERAL BUREAU OF INVESTIGATION
THE DIRECTOR, EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES
ALL UNITED STATES ATTORNEYS

FROM: Sally Quillian Yates
Deputy Attorney General

SUBJECT: Individual Accountability for Corporate Wrongdoing

Fighting corporate fraud and other misconduct is a top priority of the Department of Justice. Our nation's economy depends on effective enforcement of the civil and criminal laws that protect our financial system and, by extension, all our citizens. These are principles that the Department lives and breathes—as evidenced by the many attorneys, agents, and support staff who have worked tirelessly on corporate investigations, particularly in the aftermath of the financial crisis.

One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing. Such accountability is important for several reasons: it deters future illegal activity, it incentivizes changes in corporate behavior, it ensures that the proper parties are held responsible for their actions, and it promotes the public's confidence in our justice system.

There are, however, many substantial challenges unique to pursuing individuals for corporate misdeeds. In large corporations, where responsibility can be diffuse and decisions are made at various levels, it can be difficult to determine if someone possessed the knowledge and criminal intent necessary to establish their guilt beyond a reasonable doubt. This is particularly true when determining the culpability of high-level executives, who may be insulated from the day-to-day activity in which the misconduct occurs. As a result, investigators often must reconstruct what happened based on a painstaking review of corporate documents, which can number in the millions, and which may be difficult to collect due to legal restrictions.

These challenges make it all the more important that the Department fully leverage its resources to identify culpable individuals at all levels in corporate cases. To address these challenges, the Department convened a working group of senior attorneys from Department components and the United States Attorney community with significant experience in this area. The working group examined how the Department approaches corporate investigations, and identified areas in which it can amend its policies and practices in order to most effectively pursue the individuals responsible for corporate wrongs. This memo is a product of the working group's discussions.

The measures described in this memo are steps that should be taken in any investigation of corporate misconduct. Some of these measures are new, while others reflect best practices that are already employed by many federal prosecutors. Fundamentally, this memo is designed to ensure that all attorneys across the Department are consistent in our best efforts to hold to account the individuals responsible for illegal corporate conduct.

The guidance in this memo will also apply to civil corporate matters. In addition to recovering assets, civil enforcement actions serve to redress misconduct and deter future wrongdoing. Thus, civil attorneys investigating corporate wrongdoing should maintain a focus on the responsible individuals, recognizing that holding them to account is an important part of protecting the public fisc in the long term.

The guidance in this memo reflects six key steps to strengthen our pursuit of individual corporate wrongdoing, some of which reflect policy shifts and each of which is described in greater detail below: (1) in order to qualify for any cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct; (2) criminal and civil corporate investigations should focus on individuals from the inception of the investigation; (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another; (4) absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation; (5) Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should

memorialize any declinations as to individuals in such cases; and (6) civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.[1]

I have directed that certain criminal and civil provisions in the United States Attorney's Manual, more specifically the Principles of Federal Prosecution of Business Organizations (USAM 9-28.000 *et seq.*) and the commercial litigation provisions in Title 4 (USAM 4-4.000 *et seq.*), be revised to reflect these changes. The guidance in this memo will apply to all future investigations of corporate wrongdoing. It will also apply to those matters pending as of the date of this memo, to the extent it is practicable to do so.

1. To be eligible for <u>any</u> cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.

In order for a company to receive <u>any</u> consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct. Companies cannot pick and choose what facts to disclose. That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor pursuant to USAM 9-28.700 *et seq.*[2] Once a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible for consideration for cooperation credit. The extent of that cooperation credit will depend on all the various factors that have traditionally applied in making this assessment (*e.g.*, the timeliness of the cooperation, the diligence, thoroughness, and speed of the internal investigation, the proactive nature of the cooperation, etc.).

This condition of cooperation applies equally to corporations seeking to cooperate in civil matters; a company under civil investigation must provide to the Department all relevant facts about individual misconduct in order to receive any consideration in the negotiation. For

---

[1] The measures laid out in this memo are intended solely to guide attorneys for the government in accordance with their statutory responsibilities and federal law. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States.

[2] Nor, if a company is prosecuted, will it support a cooperation-related reduction at sentencing. *See* U.S.S.G. USSG § 8C2.5(g), Application Note 13 ("A prime test of whether the organization has disclosed all pertinent information" necessary to receive a cooperation-related reduction in its offense level calculation "is whether the information is sufficient ... to identify ... the individual(s) responsible for the criminal conduct").

example, the Department's position on "full cooperation" under the False Claims Act, 31 U.S.C. § 3729(a)(2), will be that, at a minimum, all relevant facts about responsible individuals must be provided.

The requirement that companies cooperate completely as to individuals, within the bounds of the law and legal privileges, *see* USAM 9-28.700 to 9-28.760, does not mean that Department attorneys should wait for the company to deliver the information about individual wrongdoers and then merely accept what companies provide. To the contrary, Department attorneys should be proactively investigating individuals at every step of the process – before, during, and after any corporate cooperation. Department attorneys should vigorously review any information provided by companies and compare it to the results of their own investigation, in order to best ensure that the information provided is indeed complete and does not seek to minimize the behavior or role of any individual or group of individuals.

Department attorneys should strive to obtain from the company as much information as possible about responsible individuals before resolving the corporate case. But there may be instances where the company's continued cooperation with respect to individuals will be necessary post-resolution. In these circumstances, the plea or settlement agreement should include a provision that requires the company to provide information about all culpable individuals and that is explicit enough so that a failure to provide the information results in specific consequences, such as stipulated penalties and/or a material breach.

2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.

Both criminal and civil attorneys should focus on individual wrongdoing from the very beginning of any investigation of corporate misconduct. By focusing on building cases against individual wrongdoers from the inception of an investigation, we accomplish multiple goals. First, we maximize our ability to ferret out the full extent of corporate misconduct. Because a corporation only acts through individuals, investigating the conduct of individuals is the most efficient and effective way to determine the facts and extent of any corporate misconduct. Second, by focusing our investigation on individuals, we can increase the likelihood that individuals with knowledge of the corporate misconduct will cooperate with the investigation and provide information against individuals higher up the corporate hierarchy. Third, by focusing on individuals from the very beginning of an investigation, we maximize the chances that the final resolution of an investigation uncovering the misconduct will include civil or criminal charges against not just the corporation but against culpable individuals as well.

3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.

Early and regular communication between civil attorneys and criminal prosecutors handling corporate investigations can be crucial to our ability to effectively pursue individuals in

these matters. Consultation between the Department's civil and criminal attorneys, together with agency attorneys, permits consideration of the full range of the government's potential remedies (including incarceration, fines, penalties, damages, restitution to victims, asset seizure, civil and criminal forfeiture, and exclusion, suspension and debarment) and promotes the most thorough and appropriate resolution in every case. That is why the Department has long recognized the importance of parallel development of civil and criminal proceedings. *See* USAM 1-12.000.

Criminal attorneys handling corporate investigations should notify civil attorneys as early as permissible of conduct that might give rise to potential individual civil liability, even if criminal liability continues to be sought. Further, if there is a decision not to pursue a criminal action against an individual – due to questions of intent or burden of proof, for example – criminal attorneys should confer with their civil counterparts so that they may make an assessment under applicable civil statutes and consistent with this guidance. Likewise, if civil attorneys believe that an individual identified in the course of their corporate investigation should be subject to a criminal inquiry, that matter should promptly be referred to criminal prosecutors, regardless of the current status of the civil corporate investigation.

Department attorneys should be alert for circumstances where concurrent criminal and civil investigations of individual misconduct should be pursued. Coordination in this regard should happen early, even if it is not certain that a civil or criminal disposition will be the end result for the individuals or the company.

4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.

There may be instances where the Department reaches a resolution with the company before resolving matters with responsible individuals. In these circumstances, Department attorneys should take care to preserve the ability to pursue these individuals. Because of the importance of holding responsible individuals to account, absent extraordinary circumstances or approved departmental policy such as the Antitrust Division's Corporate Leniency Policy, Department lawyers should not agree to a corporate resolution that includes an agreement to dismiss charges against, or provide immunity for, individual officers or employees. The same principle holds true in civil corporate matters; absent extraordinary circumstances, the United States should not release claims related to the liability of individuals based on corporate settlement releases. Any such release of criminal or civil liability due to extraordinary circumstances must be personally approved in writing by the relevant Assistant Attorney General or United States Attorney.

5. **Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.**

If the investigation of individual misconduct has not concluded by the time authorization is sought to resolve the case against the corporation, the prosecution or corporate authorization memorandum should include a discussion of the potentially liable individuals, a description of the current status of the investigation regarding their conduct and the investigative work that remains to be done, and an investigative plan to bring the matter to resolution prior to the end of any statute of limitations period. If a decision is made at the conclusion of the investigation not to bring civil claims or criminal charges against the individuals who committed the misconduct, the reasons for that determination must be memorialized and approved by the United States Attorney or Assistant Attorney General whose office handled the investigation, or their designees.

Delays in the corporate investigation should not affect the Department's ability to pursue potentially culpable individuals. While every effort should be made to resolve a corporate matter within the statutorily allotted time, and tolling agreements should be the rare exception, in situations where it is anticipated that a tolling agreement is nevertheless unavoidable and necessary, all efforts should be made either to resolve the matter against culpable individuals before the limitations period expires or to preserve the ability to charge individuals by tolling the limitations period by agreement or court order.

6. **Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.**

The Department's civil enforcement efforts are designed not only to return government money to the public fisc, but also to hold the wrongdoers accountable and to deter future wrongdoing. These twin aims – of recovering as much money as possible, on the one hand, and of accountability for and deterrence of individual misconduct, on the other – are equally important. In certain circumstances, though, these dual goals can be in apparent tension with one another, for example, when it comes to the question of whether to pursue civil actions against individual corporate wrongdoers who may not have the necessary financial resources to pay a significant judgment.

Pursuit of civil actions against culpable individuals should not be governed solely by those individuals' ability to pay. In other words, the fact that an individual may not have sufficient resources to satisfy a significant judgment should not control the decision on whether to bring suit. Rather, in deciding whether to file a civil action against an individual, Department attorneys should consider factors such as whether the person's misconduct was serious, whether

it is actionable, whether the admissible evidence will probably be sufficient to obtain and sustain a judgment, and whether pursuing the action reflects an important federal interest. Just as our prosecutors do when making charging decisions, civil attorneys should make individualized assessments in deciding whether to bring a case, taking into account numerous factors, such as the individual's misconduct and past history and the circumstances relating to the commission of the misconduct, the needs of the communities we serve, and federal resources and priorities.

Although in the short term certain cases against individuals may not provide as robust a monetary return on the Department's investment, pursuing individual actions in civil corporate matters will result in significant long-term deterrence. Only by seeking to hold individuals accountable in view of all of the factors above can the Department ensure that it is doing everything in its power to minimize corporate fraud, and, over the course of time, minimize losses to the public fisc through fraud.

Conclusion

The Department makes these changes recognizing the challenges they may present. But we are making these changes because we believe they will maximize our ability to deter misconduct and to hold those who engage in it accountable.

In the months ahead, the Department will be working with components to turn these policies into everyday practice. On September 16, 2015, for example, the Department will be hosting a training conference in Washington, D.C., on this subject, and I look forward to further addressing the topic with some of you then.

Bloomberg BNA White Collar Crime Report™

Source: White Collar Crime Report: News Archive > 2016 > 05/27/2016 > BNA Insights > Twenty Questions Raised by the Justice Department's Yates Memorandum

11 WCR 445

JUSTICE DEPARTMENT

Two Jenner & Block LLP attorneys take stock of the Justice Department's Yates Memo, in which federal prosecutors engaged in investigations of corporate misconduct are directed to hold individuals in the organization accountable for their misdeeds. The authors discuss several questions that have been triggered by the policy and provide a unique take on answers to those questions.

Twenty Questions Raised by the Justice Department's Yates Memorandum

By Robert R. Stauffer and William C. Pericak

Robert Stauffer and William Pericak are partners in the White Collar Defense and Investigations practice at Jenner & Block LLP. The views expressed in this article are the views of the authors alone and do not necessarily reflect those of Jenner & Block LLP.

On Sept. 9, 2015, Deputy Attorney General (DAG) Sally Quillian Yates issued a memo on individual accountability, now known ubiquitously as the "Yates Memo," describing a renewed emphasis on prosecution of individual culpable employees in the context of corporate white collar crime. The Yates Memo triggered an immediate wave of client alerts and blog posts musing about its implications. Reactions ranged the gamut, from those who said the Yates Memo is nothing new—just a reflection of long-standing policies and practices, with no practical implications for the white collar defense bar—to those who detected a sea change in how both corporations and individuals will react to government criminal investigations. The truth, as usual, is probably somewhere in the middle. The Yates Memo also prompted many questions from clients asking whether it changes how they should deal with pending investigations and how they should modify existing compliance programs in anticipation of potential future investigations.

The practical impact of the memo remains to be determined. But now that we have passed the memo's six-month anniversary and the dust has settled a bit, it seems an appropriate time to step back, take stock of what has been said about the memo in the interim, compile a list of questions that have been triggered, and venture presumptuously to add to the literature on the topic by providing our own take on some of those questions.

Context

First, some context. In today's world, practitioners have consistently bemoaned the perceived inability of corporations faced with significant criminal prosecutions to seek exoneration from a jury. Particularly for highly-regulated companies, but to some extent for all corporate organizations, the price of a drawn-out investigation and the possibility of a criminal conviction are often seen as simply too steep. The corporation must contend not only with whatever criminal fine and restitution may be imposed, but with a variety of collateral consequences, including public relations issues and significant restrictions or prohibitions on future business, such as exclusion from participation in government health-care programs or debarment from doing business with the government. Many believe the corporation's only alternative is to simply cut the best deal it can, which means in turn investigating its own affairs and cooperating completely with prosecutors, even when doing so results in criminal exposure for individual employees.

The implications for involved corporate employees are dramatic. Although they arguably have more at stake than does the corporation, as they may face the risk of significant jail time, their calculus may be different and they may be willing to run the risk of conviction and contest the allegations at trial. However, during the investigative phase, they are faced with difficult choices. If the corporation's attorneys wish to interview them, should they accede? What they tell the corporation may be properly conveyed to prosecutors. At the same time, if they do not cooperate with the corporation, they may lose their job. Will the firm provide and pay for counsel? And, of course, there is then the tension between the employees themselves, as employees may implicate others in order to provide a complete picture, or perhaps to shift blame or attention from themselves.

With this backdrop of competing pressures, incentives, and ethical issues, the Department of Justice has long provided guidance, in a series of memos and updates to the U.S. Attorney's Manual, outlining how it approaches prosecutorial decisions in the context of corporate criminal wrongdoing.

In 1991, the Federal Sentencing Guidelines for Organizations quantified, in mathematical terms, the benefits to corporations of maintaining effective compliance programs and voluntarily disclosing wrongdoing to the government. Other agencies quickly followed, with the Environmental Protection Agency and the Office of Inspector General of Health and Human Services, for example, taking steps to encourage self-policing and reward cooperation and disclosure.

1999 brought the issuance of a memo by Deputy Attorney General Eric Holder, "Bringing Criminal Charges against Corporations," or more commonly the "Holder Memo," which provided a list of eight principles for prosecutors to consider in deciding whether to prosecute a corporate wrongdoer. Among those factors were timely and voluntary disclosure and a willingness to cooperate with the government's investigation.

The DOJ guidance evolved through the 2003 memo by Deputy Attorney General Larry Thompson, "Principles of Federal Prosecution of Business Organizations," or more commonly the "Thompson Memo;" the 2006 memo by Deputy Attorney General Paul McNulty (McNulty Memo); and the 2008 memo by Deputy Attorney General Mark Filip (Filip Memo). The Filip Memo's articulation of the factors to be considered in determining whether to prosecute a corporation continues to include "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents." Along the way, these guidance memos have also evolved in their approach to the relationships between corporations and their employees on such issues as privilege waivers, advancement of fees, and joint defense agreements.

The Yates Memo is the latest in this series of pronouncements. Likely in response to criticisms of significant investigations that resulted in high-profile settlements with corporations but relatively few prosecutions of top-level employees, the memo emphasizes that "one of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing." The memo outlines a series of steps designed to further that goal:

(1) In order to qualify for any cooperation credit, corporations must provide to the DOJ all relevant facts relating to the individuals responsible for the misconduct;

(2) Criminal and civil corporate investigations should focus on individuals from the inception of the investigation;

(3) Criminal and civil attorneys handling corporate investigations should be in routine communication with one another;

(4) Absent extraordinary circumstances or approved departmental policy, the DOJ will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation;

(5) DOJ attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and

(6) Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring a lawsuit against an individual based on considerations beyond that individual's ability to pay.

Much of the literature and discussion by the defense bar is focused in particular on the first of these principles and whether it has immediate implications for how corporations prepare for and respond to government investigations. We proceed to identify a number of questions we have seen raised in the wake of the Yates Memo and offer our observations.

Differences From Prior Policy

1. How does the Yates Memo's approach to cooperation credit differ from prior policy?

As DAG Yates has stated in public appearances, the concept of holding individuals accountable for their role in corporate wrongdoing is nothing new. The idea of providing a benefit to corporations in terms of credit for their cooperation in providing facts relevant to individual wrongdoing is also not new. What is new is the stated policy that a corporation must provide *all* relevant factual information concerning individuals to even be *considered* for cooperation credit. In previous guidance, this was just one of several factors for determining whether, and to what extent, such credit would be provided. Now, it is the ticket that gets you in the door before the other factors even become relevant. This elevates in importance the corporation's ability and willingness to cooperate with the DOJ and provide all relevant factual information, and heightens issues surrounding the corporation's zeal for protecting its employees.

With respect to FCPA cases, the DOJ has recently released additional guidance on cooperation. In *The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance*, issued April 5, 2016 (FCPA Enforcement Plan), the DOJ announced a one-year pilot program for FCPA cases and, among other things, listed a series of requirements that must be satisfied in order for a corporation to receive "full cooperation credit." One of those

requirements is, as set forth in the Yates Memo, "disclosure on a timely basis of all facts relevant to the wrongdoing at issue, including all facts related to involvement in the criminal activity the corporation's officers, employees, or agents."

Thus, for FCPA cases, provision of all relevant facts relating to individual culpability is necessary not only to be considered for any cooperation credit at all, but also to be considered for "full cooperation credit."

2. Will the Yates Memo really change how the DOJ pursues individual wrongdoers?

The answer to this question is difficult to predict. Certainly there is a tonal difference, and internal DOJ procedures and practices have evolved. Prosecutors may well turn up the heat on corporations as they press for information relating to individuals. However, translating this new tone and these new procedures into an increase in prosecutions of individuals will be difficult. There has always been a focus on pursuing individual wrongdoers in the corporate context, but that pursuit can be challenging for a variety of reasons. It can be more difficult for prosecutors to put together a prosecutable case against an individual, knowing that they may have to ultimately convince a jury of that individual's guilt beyond a reasonable doubt. It can be much easier to put together a case against a corporation when the knowledge and acts of its employees may be imputed to it, especially if the corporation is likely to settle before trial anyway. Indeed, in large organizations, when responsibilities are diffused, or when there is no available evidence showing that a particular individual met all of the elements of the crime, it can be difficult to identify specific individuals responsible for the criminal conduct in which the corporation engaged. The Yates Memo does not diminish these hurdles, so whether the memo results in an uptick in individual prosecutions remains to be seen.

Corporations' Interactions With Prosecutors

3. Will prosecutors become more heavy-handed in overseeing internal investigations?

There has been speculation among the defense bar that this will be the case. Knowing that corporations now must be seen as providing complete cooperation with respect to individuals in order even to be considered for getting cooperation credit, prosecutors may lean on corporations more heavily, demanding that they dig deeper or cast the net more broadly in their search for relevant documents, information, and employee admissions. Some anecdotal evidence suggests that prosecutors under the Yates Memo are already doing more to direct corporations with respect to their conduct of internal investigations.

How much of this reaction is bluster, however, and how much reflects a true shift in practice is difficult to say. Even before the Yates Memo, a corporation that was concerned about its potential liability had a significant incentive to cooperate fully and openly with prosecutors as the company was investigating and to unearth facts in which prosecutors were interested. It is possible that the Yates Memo will increase the pressure corporations feel in this regard and may embolden prosecutors to insist that corporations investigate and produce specific relevant facts, but any difference will likely be incremental rather than a dramatic departure from prior practices.

4. Will the Yates Memo change what corporations share with prosecutors about individual employees?

Prosecutors have long complained about "passive voice" self-reporting, that is, self-reporting done in a way that shielded the identities of wrongdoers ("It was known …" instead of "corporate manager 'x' knew …"). Prosecutors likely will point to the Yates Memo for further leverage to obtain specifics, and corporations may well feel obliged to search out specific factual information about individuals relevant to corporate wrongdoing. However, corporations felt that pressure before the Yates Memo was issued. Corporations seeking cooperation credit were hardly in a position prior to the Yates Memo to conduct an investigation that ignored relevant facts concerning individuals or, once having unearthed those facts, to withhold them from the government, and the government had no qualms about "pushing back" on passive voice reporting. The Yates Memo certainly can increase the pressure to exhaustively search for factual information relating to individual employees' knowledge and intent, but again the difference is likely to be incremental and not dramatic.

5. Will corporations now feel compelled to waive the attorney-client privilege or the work-product protection?

An immediate question raised in the wake of the Yates Memo was whether, in order to obtain cooperation credit, corporations would now be subjected to, or would perceive, pressure to provide information relating to employees even if that information is inherently privileged or was gathered during the course of privileged communications. This issue has a significant history, with the Thompson Memo's recommendation that prosecutors evaluate a corporation's willingness to waive privileges in deciding whether to reward cooperation, a subsequent backlash by the defense bar, and a retrenchment from that position. The Filip Memo clearly states that "eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection." It also expressly prohibits prosecutorial requests for non-factual attorney-client privileged materials.

DAG Yates has clearly stated that nothing in her memo changes that policy and that prosecutors will seek non-privileged facts rather than the substance of privileged communications. The reality may not be quite so simple. In practice, prosecutors may simply ask, "do you intend to maintain the privilege?" during discussions about factual information to be provided by the corporation. Or, as one practitioner recently recounted to us, a prosecutor said, "we're not asking you to waive the privilege, but if you do your client will be in a better position." It is questionable whether, consistent with DOJ policy, a prosecutor can suggest that waiver will put a corporation in a better position, but even in the absence of such a prosecutorial suggestion, the corporation will certainly be asking itself

whether a waiver of privilege, with a resulting more fulsome set of facts to be disclosed, will put the corporation in a better position to advocate that it should receive substantial credit for cooperation.

The impact of the Yates Memo in this respect may again be marginal, as these incentives, whether explicit or implicit, existed before the Yates Memo as well. And DAG Yates does have a point when she says that what the DOJ is interested in is the facts themselves, and facts are not privileged. The corporation may learn about the relevant facts through interviews of employees that are conducted in a privileged context, but the facts that it learns as a result of those interviews are not themselves normally privileged. However, given that cooperation against individuals is now the price of admission, the pressure to be perceived as cooperating fully—which may be perceived as including the production of privileged materials—has certainly increased.

6. Will corporations now have to concede that criminal wrongdoing occurred?

The question has been raised as to whether the Yates Memo deprives corporations of the opportunity to argue that the facts revealed by the investigation do not amount to a crime. DAG Yates has disavowed any such inference, and we see nothing in the Yates Memo that leads to that conclusion. There is nothing inconsistent in sharing all relevant facts with prosecutors and arguing that those facts do not amount to criminal wrongdoing.

How Corporations Conduct Internal Investigations

7. Will corporations be more aggressive in their internal investigations?

Many in the defense bar have speculated that the Yates Memo will result in corporations accelerating the timetable for completing internal investigations, increasing the intensity of those investigations, and broadening their scope. There is a concern in some quarters that a failure to unearth every relevant fact may make it more difficult to obtain cooperation credit.

The talk out of the DOJ is different. In her public comments, DAG Yates has emphasized that corporations do not need "to boil the ocean." She has stated that the department will understand there are times when the relevant facts simply cannot be ascertained, and has suggested that when internal investigators have questions about how far they need to go or which facts they need to pursue, they should simply do what they have always done—pick up the phone and call the prosecutors. She has emphasized that an inability to unearth a relevant fact does not put the corporation out of luck, observing that there is a "good faith element" to the process.

The reality, of course, is that how this plays out will depend on the interactions between particular corporate counsel and particular prosecutors. We take DAG Yates at her word with respect to the department's policies. At the same time, there is always the danger that individual prosecutors will suspect that a professed inability by a corporation's lawyers to unearth relevant facts instead masks an unwillingness to unearth or share those facts because the facts reflect negatively on the corporation or certain of its employees. Once again, that dynamic has existed regardless of the Yates Memo, but there would seem to be a significant possibility that the Yates Memo will increase that tension in particular instances.

8. Will corporations investigate less aggressively?

Some of the same commentators who speculate that corporations may be more aggressive in their investigations in an attempt to ensure the receipt of cooperation credit at the same time speculate that some corporations will find the Yates Memo to be a disincentive to conduct a full investigation. The theory is that corporations that believe they will not be able to obtain cooperation credit unless they undertake a vast, burdensome and expensive investigative effort, which will lead to finger-pointing at executives and other employees and resulting damage to their executive team and to employee morale, will decide it is simply better to take the risks and not even try to obtain credit for cooperation. In other words, if the DOJ is taking an all-or-nothing approach to cooperation, and the "all" alternative seems too burdensome and damaging, perhaps the corporations will opt for the "nothing" alternative. This may particularly be true with respect to corporations headquartered abroad, which may operate with a different mindset with respect to employee privacy and find it culturally less palatable to provide prosecutors with detailed factual information implicating employees in potential wrongdoing.

Domestically, our reaction is that this concern is misplaced. Corporations have long had an incentive to investigate misconduct and provide the results of their investigation to prosecutors, and we have not perceived the prosecutors' hunger for facts relating to individuals as disincentivizing corporations from investigating. Indeed, corporations have other incentives to investigate, including their own interests in knowing whether misconduct has occurred, in disciplining bad actors, and in using that experience as a roadmap for preventing future misconduct. Corporations may also have difficulty explaining to shareholders that in the face of alleged wrongdoing and the potential to obtain a better outcome by cooperating, they circled the wagons and ignored the problem.

The concern may be well–taken, however, with respect to organizations whose corporate culture makes them unable to stomach the idea of "turning in" their own employees. Although the Yates Memo is not new with respect to providing an incentive to do this, it does represent a tonal change that in some instances could conceivably have the ironic effect of decreasing cooperation.

9. Will corporations be more likely to point the fingers at individuals?

It has been suggested that the Yates Memo will cause cooperating corporations to be more hasty and less cautious in identifying and blaming individuals for conduct that has placed the corporation under investigation.

Based on DAG Yates's remarks, that need not be the case. As she has said, the department is not asking corporations to designate whether individuals are actually culpable or to build a prosecutable case for the government; rather, the department is simply asking for the relevant facts and the department will decide whether those facts suggest criminality.

Academically, DAG Yates certainly has a point. There is a difference between telling the prosecutors, "this is what the employee said and this is what the employee did," and saying "this employee committed accounting fraud." In practical terms, however, a corporation can hardly be excused from thinking that it will be able to cut a better deal, and will be seen more favorably by prosecutors, if it can serve up employees on a silver platter. To repeat what has become an ongoing theme here, this incentive existed prior to the Yates Memo as well, and the Yates Memo may increase this incentive only to a degree. However, given the tonal difference in how the Yates Memo ramps up the rhetoric about prosecution of individuals, corporations may well feel increased pressure to blame specific individuals for violating the law even if that approach is not required by official department policy.

10. Will the Yates Memo inhibit corporations from making voluntary disclosures?

There has been some speculation that corporations are now less likely to voluntarily disclose wrongdoing to the government when they know the result will be government pressure to undertake a complete internal investigation that includes the provision of all relevant factual information relating to employees. Many corporations are already concerned that voluntary disclosures may lead to unnecessarily heavy-handed government investigations. A decision to voluntary disclose may be even more likely if the corporation believes it will not be able to unearth sufficient evidence of individual wrongdoing to satisfy prosecutors.

The department has gone to pains to try to separate the issue of cooperation from the issue of voluntary disclosure, and DAG Yates has made clear that those are two separate issues. In practice, it is not so easy to separate the two factors, as voluntary disclosure will almost certainly be accompanied by a government investigation, a government request for an internal investigation, or both, unless the internal investigation has already been done and the prosecution accepts it as complete. That has been true since before the Yates Memo, but the Yates Memo may lead corporations to have additional concerns about the extent and burden of the internal investigation they will be required to pursue. Nonetheless, the decision whether to voluntarily disclose is influenced by many different factors, including the seriousness and recency of the wrongdoing and the overall enforcement context. In light of these case-specific factors and the continued incentives to voluntarily disclose in appropriate cases, we believe it unlikely that the Yates Memo will have a chilling effect on voluntary disclosures in most instances.

Indeed, possibly in light of concerns that it is difficult to confirm or quantify the benefit to be gained from voluntary disclosure, the recent FCPA Enforcement Plan attempts to further incentivize voluntary disclosures by quantifying the benefit that may be obtained by a corporation that has voluntarily self-disclosed FCPA misconduct, has fully cooperated, and has timely and appropriately remediated—up to a 50 percent reduction off the bottom end of the U.S. Sentencing Guidelines fine range, avoidance of a monitor, and consideration of a declination of prosecution.

Skeptics will argue that this program is more about the message than it is about tangible changes, as the government may still back into its calculations in order to receive a desired result, but nonetheless the messaging is important and will not be overlooked by corporations faced with a decision as to whether to disclose misconduct.

Interactions Between Corporations and Employees

11. Will corporations now be more heavy-handed in seeking and conducting interview of employees?

Employees whose cooperation is sought through interviews or otherwise can feel significant pressure to cooperate. Employees may fear loss of employment and in some cases loss of other financial benefits, and they may wonder whether failing to cooperate will result in the corporation deciding to stop providing counsel or to draw adverse inferences from the lack of cooperation and communicate those adverse inferences to prosecutors. Applying these types of pressure at the request of the government may be improper under *United States v. Stein*, 541 F.2d 130 (2d Cir. 2008 (conditioning and ultimately stopping advancement of fees as result of government's "overwhelming influence" constituted state action and unconstitutionally interfered with employees' relationship with counsel and ability to mount a defense). However, if the employee is concerned about such factors without receiving express pressure, or if a corporation were to bring these pressures to bear without having been asked by the government to do so, there is likely no legal remedy for the employee. The employee is faced with the unpalatable choice of cooperating, and perhaps providing the very evidence that will be used to prosecute him or her, or losing his or her job and access to counsel.

Corporations are certainly aware of these difficulties, and how they deal with an employee who may be reluctant to cooperate has long been a difficult issue for counsel representing the corporation. Often the corporation will decide that it wants the information from the individual regardless of any interest the employee may have to the contrary, and insist on the employee's cooperation as a condition of the individual's continued employment. Does the Yates Memo increase the likelihood that the corporation will take that position? The case can be made that it would, as corporations have even more incentive now to extract relevant information from employees than they did before. However, even before the Yates Memo was issued, in our experience it would be highly unusual for a corporation to decide not to interview an employee, and forgo the potentially relevant information that the employee may have, simply because the employee was uncomfortable cooperating.

12. Does the Yates Memo affect the approach taken by corporations to providing counsel for individual employees?

One of the difficult decisions often faced by counsel who conduct internal investigations for corporate clients is how to deal with the employee who, when asked for an interview, asks whether he or she needs an attorney (the answer is typically "we cannot advise you on that issue") or whether the employee can bring an attorney to the interview. Opinions and practices on this issue are varied. We have heard practitioners opine that if an individual wants to bring a lawyer, the corporation is obligated to let her do so. We have heard other practitioners suggest that an employee has a complete duty to the corporation to cooperate in the investigation and has no right to adjourn or postpone an interview in order to identify and retain a lawyer. A full discussion of the potential legal and ethical implications of this issue is beyond the scope of this article. However, the Yates Memo would seem to move the needle slightly closer toward the decision to allow an employee to bring counsel to an interview when the employee makes such a request. It has always been the case that an employee being interviewed runs the risk that the statements she makes to the investigator will be later communicated to prosecutors. However, the Yates Memo appears to make the possibility of this scenario more likely. If we assume that all relevant information provided by the employee during the interview will then be communicated directly to prosecutors, a scenario made more likely by the Yates Memo, then the individual has more reason for insisting that counsel should be allowed to attend the interview.

13. Does the Yates Memo change the approach of corporations in paying the fees for attorneys representing individual employees?

The Filip Memo prohibits prosecutors from considering a corporation's decision to advance legal fees to employees when assessing a corporation's cooperation. The DOJ has said that the Yates Memo does not affect that principle. In instances where a corporation is required by its bylaws or by contract to provide attorneys' fees for employees, the Yates Memo should not change anything. But what about instances where the fee decision is within the discretion of the corporation? Suppose the corporation is providing fees, on a discretionary basis, for an individual's counsel and the individual is cooperating less than the corporation would like—refusing to make himself available for an internal interview, refusing to comply with a government interview request, refusing to provide relevant materials, etc. Will the corporation be more likely at that point to decide to stop paying the lawyer's fees?

The corporation cannot tell the lawyer how best to represent the lawyer's client, and even if it did, the lawyer would have an ethical obligation to continue to act in the client's best interests. At the same time, however, a corporation that wants to make sure that prosecutors believe it is providing complete cooperation, such as is necessary to get its foot in the door for a cooperation credit, may legitimately ask why it is paying the legal fees for employees who are impeding the corporation's ability to provide the full cooperation it wants to provide, and may decide to stop paying the legal fees that it is not obligated to pay in the first place. This tension existed before the Yates Memo, and it is probably aggravated by the tonal shift that the Yates Memo brings. The answers are not easy. Different lawyers will probably bring different approaches to this question, and their decisions will vary depending on individual circumstances. Some guidance may be found in *Stein* (*supra*), but that decision on its face applies only where the corporation's decisions are prompted by explicit directions or concerns from prosecutors.

14. Does the Yates Memo affect the manner in which interviews are conducted?

Knowing that a prosecutor is likely now to give enhanced scrutiny to the corporation's efforts to provide relevant information concerning individuals, questions arise as to whether a corporation conducting an internal investigation will want to interview employees more quickly than it otherwise would, or conversely might postpone interviews and defer to the government to conduct those interviews.

There may be some marginal pressure to do interviews more quickly where the corporation knows that prosecutors will be closely scrutinizing the extent of its cooperation with respect to individuals. However, the timing of interviews is driven by factors other than the Yates Memo, and those issues are likely to have a greater impact on timing than the Yates Memo. Those factors include the current state of the investigators' knowledge based on other information at their disposal, such as document review and other interviews; regulatory or prosecutorial pressure to complete the investigation quickly; and the presence or absence of continuing harm resulting from the underlying conduct.

The question also arises whether the manner in which the interviews are conducted will be different in light of the Yates Memo. It does seem likely that corporations will now have a greater incentive to confer with the government during the interview process. A corporation that plans to seek cooperation credit wants to be sure it is gathering the facts that the prosecutors want to know, and thus may have an incentive to confer with the prosecutors before the interviews to make sure it covers all the questions the prosecutors want answered.

15. Does the Yates Memo affect what investigators tell employees at the outset of an interview?

Any attorney who conducts an internal investigation is familiar with the "*Upjohn* warnings" stemming from *Upjohn Co. v. United States*, 449 U.S. 383 (1981), in which the U.S. Supreme Court held that communications between a corporation's counsel and its lower level employees were protected where a number of factors were present. *Upjohn* warnings can be given in greater or less degree of detail, but the basic warnings are that:

- the questioners are counsel for the corporate entity and not the individual being interviewed;
- the attorneys are conducting the interview in order to provide legal advice to the corporation;

- the interview is accordingly governed by an attorney-client privilege;
- this privilege is held by the company and not by the individual and it is thus the company's prerogative to decide what to do with the information; and
- the individual is expected to keep the contents of the interview confidential in order to protect the privilege.

The question arises, in light of the Yates Memo, whether it would be prudent to provide more than this. In particular, should employees be told that what they tell investigators is "likely" (or in appropriate cases, "certainly") to be conveyed to prosecutors, and/or should they be told that the company will be seeking cooperation credit from the government and that the government will not provide credit for cooperation unless the corporation shares all relevant information concerning individuals with prosecutors.

This question of how strong an *Upjohn* warning to give is one that investigating counsel deal with on a regular basis. The *Upjohn* warnings can be given in varying degrees of detail according to the preferences and beliefs of the counsel conducting the investigation and according to the facts and circumstances of a particular investigation, but a more fulsome disclosure may now be warranted. However, there is little guidance for answering these kinds of questions and there does not promise to be any definitive or authoritative guidance on these issues any time soon.

16. Does the Yates Memo affect decisions to enter into joint defense agreements?

In a joint defense agreement, multiple parties (such as co-employees, or the corporation and one or more employees) share privileged information with each other under an agreement that the privileged information will not be shared with third parties and will remain governed by the attorney-client privilege. Such agreements can range from a one-sentence understanding on a phone call to an elaborate written agreement. Joint defense agreements between corporations and their employees have become relatively unusual given the interests that corporations now have in providing full cooperation, including information gathered from employees, to prosecutors. Nevertheless, they still sometimes arise, such as when the corporation believes that it may get more fulsome disclosures of information through a joint defense arrangement than it would be able to obtain otherwise.

The question has arisen whether the Yates Memo makes joint defense agreements between corporations and their employees less likely. Under the Filip Memo, the existence of a joint defense agreement should not enter into the government's determination of whether a company has fully cooperated. But the question still remains, as it does with respect to payment of fees or a refusal to waive privilege, whether a joint defense agreement may influence the government's perceptions as to the extent of cooperation. Aside from that perception issue, we are skeptical that the Yates Memo will have much impact on the decision whether to enter into a joint defense agreement. As noted above, joint defense agreements in this context have already diminished in frequency. And the calculus for corporations is probably not much different under the Yates Memo than it was before—they must assess whether, under the facts and circumstances of a particular case, they are likely to learn more with a joint defense agreement in place than they can learn without one, and whether they are better or worse off knowing additional information but not being able to disclose it. Quite often, given the other tools available to it (as noted in question 11 above), a corporation does not need the added incentive of a joint defense agreement in order to obtain information from employees.

17. Will the Yates Memo affect what information and documents the corporation's counsel shares with employees' counsel?

When a corporation and its employees are the subject of a criminal investigation, counsel for the corporation may be faced with requests by employees' counsel for information and documents relevant to the defense of those individuals. For example, counsel for an individual employee may want to see copies of any e-mails that the employee sent or received relating to the topic under investigation—or even copies of e-mails relevant to the topic that the employee did not send or receive. In some instances, corporate counsel may decide that it has no reason to provide such materials to the individual's counsel. In other instances, the corporation may decide that it would be appropriate for counsel to see at least those documents that the employee would have seen in the normal course of business anyway—and may decide that with the benefit of those documents, the individual's counsel may be able to assist the corporation in identifying potential factual or legal defenses.

The question arises whether the Yates Memo, with its emphasis on providing prosecutors with full cooperation concerning individuals, gives corporations more of an incentive to withhold relevant information from counsel for individuals for fear that providing such information will be perceived as inconsistent with full government cooperation, or even perceived as in some way obstructive of the investigation. It can certainly be argued that providing an individual with a copy of a document that the individual already saw at some point in his or her daily work is not inconsistent with government cooperation and indeed is perfectly appropriate. It is also easy to see, however, that an investigator or prosecutor may want to be able to show such a document to an employee during an interview and get an immediate reaction without having given the employee an opportunity to contrive an explanation. Once again, tension between these two competing interests is not new. However, the Yates Memo does call increased attention to this tension given its greater tonal emphasis on full cooperation with respect to

information relevant to employees. Whether the Yates Memo will have an impact in practice on how corporations address these issues remains to be seen and will be heavily dependent on the facts of particular cases.

Will the Yates Memo Change The Way Employees Behave?

18. Will the Yates Memo make employees less willing to cooperate with internal investigations?

As noted earlier, individuals can be faced with the difficult decision of whether to submit to an internal investigative interview or risk losing their job. The question arises whether the Yates Memo tips the balance such that employees are more likely to accept the consequences and decline to participate in internal interviews. DAG Yates has observed that this tension has always existed and that her memo does not change the analysis. Many practitioners, however, have expressed concern that the memo will have a chilling effect on cooperation by employees. Indeed, even if the competing interests are similar to what they have always been, just the publicity surrounding the Yates Memo may elevate the sensitivity employees have to the risks involved in an interview. It is one thing to hear the *Upjohn* warnings at the beginning of an interview, treat them as legal boilerplate, and then proceed with an interview; the same *Upjohn* warnings may be perceived very differently by an employee who has heard, or has been advised by counsel, that the Yates Memo increases the incentive for corporations to point the finger at employees. The downside, of course, remains the same—individuals who do not cooperate risk losing their jobs. However, they may decide that losing the job is better than increasing the risk of jail time.

There is some anecdotal evidence that such a chilling effect is already occurring. However, for the most part this chilling effect appears speculative. We suspect that the chilling effect will be minimal, and that employees will prefer to retain their employment status rather than decline an interview, risk losing their job, and concomitantly risk the perception that they would have incriminated themselves if they had submitted to an interview. Time, of course, will tell.

19. Will the Yates Memo impede the truth seeking process?

The ultimate goal, of course, of both the corporation's internal investigation and any DOJ criminal investigation is to arrive at the truth. One of the fundamental questions that arises is whether the Yates Memo will make this goal more achievable, be an impediment, or have no effect. Ostensibly it is designed to further this goal, by encouraging the full and frank disclosure of relevant facts needed to arrive at the truth. However, there is a contrary view. Individuals who are now more aware of a danger that what they say to corporate investigators will be shared with prosecutors may have an increased incentive to shade their statements, believing it is important to deliver evidence against their superiors or against their peers, and may be less likely to provide information that they believe could be used to incriminate themselves. If employees are less likely to cooperate at all, that will additionally impede the corporation's ability to unearth and disclose relevant facts.

If the Yates Memo indeed prompts employees to risk their jobs rather than submit to interviews, that will certainly impede the truth seeking process. However, we are not convinced that the Yates Memo will have much of an impact on whether employees otherwise tell the truth when interviewed. That people may shade the truth (whether intentionally or not) in order to cast themselves in a better light is a given, and employees interviewed by corporate counsel have always had an incentive to minimize their own culpability. On the other hand, employees who have engaged in wrongdoing intended to benefit the corporation have sometimes been extremely forthcoming when interviewed by corporate counsel out of a belief (notwithstanding the *Upjohn* warnings) that they are confiding in someone "on the same team." An employee who has been made aware of the Yates Memo and its implications may be more likely to stop and think about the fact that not only will that information be considered by the corporation and by its counsel and by the individual's own counsel, if present, but also by a prosecutor, before deciding how candid of an answer to give. Nevertheless, the truth-seeking process during an internal investigation will always be an imperfect one, depending on the skill and experience of the investigators to identify and interpret the relevant documents and make appropriate assessments of the credibility of witnesses. That was the case before the Yates Memo, and will remain the case in the future.

Impact on Compliance Programs

20. Is there anything corporations should be doing, in light of the Yates Memo, in anticipation of potential future investigations?

Many corporations are wondering whether compliance programs or procedures governing internal investigations should be modified in light of the Yates Memo. Since at least the 1991 adoption of the sentencing guidelines for organizations, corporations have had a significant incentive to maintain effective compliance programs. Those incentives have, as discussed above, only increased over time, and most corporations are now fully aware of the benefits of a strong compliance program and have implemented compliance programs that are effective in various degrees. The Yates Memo does not create a new incentive to adopt a strong compliance program—that incentive is significant already. Nor does the Yates Memo change what a compliance program should include, and there is a plethora of guidance in the sentencing guidelines—in agency promulgations, in industry literature, and in advice from consultants and attorneys—as to what a compliance program should contain and how it can be made effective. Many companies now also have internal procedures for conducting internal investigations, in varying degrees of detail. The Yates Memo does not, in our view, typically necessitate changes to those procedures, which should retain flexibility to allow investigations to be tailored to the needs of individual facts and circumstances.

However, one of the hallmarks of an effective compliance program is that it is continually reevaluated. As the Sentencing Guidelines say, an organization should take reasonable steps to "evaluate periodically the effectiveness of the organization's compliance and ethics program" and should "periodically assess the risk of criminal conduct

and shall take appropriate steps to design, implement, or modify" its program to reduce the risk of criminal conduct.

The attention the Yates Memo has received in the corporate community provides an excellent opportunity and incentive for corporations to take this advice to heart and evaluate their compliance programs to ensure that they reflect current best practices and adequately address the particular risks that an individual organization faces. Thus the Yates Memo provides not so much a reason to change an existing program as a useful reminder of the importance of ongoing reevaluation of a corporation's compliance program.

Contact us at http://www.bna.com/contact-us or call 1-800-372-1033

ISSN 1559-3207

Copyright © 2016, The Bureau of National Affairs, Inc.. Reproduction or redistribution, in whole or in part, and in any form, without express written permission, is prohibited except as permitted by the BNA Copyright Policy.

Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

6 Milestones That Continue To Shape Corporate Compliance

By **Melissa Maleske**

Law360, New York (May 12, 2016, 2:01 PM ET) -- Compliance officers are vital corporate leaders in just about every organization of a certain size or industry, but just a few decades ago they — and the programs they lead — were virtually nonexistent. Here, experts discuss how compliance rose to prominence in corporate America and the recent developments that give us a preview of where it's headed.

1991: U.S. Sentencing Guidelines for Organizations

The U.S. Sentencing Commission's guidelines contained the first clear government articulation of what it wanted to see in a compliance program. Although plenty of additional guidance has been delivered in the following years, they marked a milestone.

"That really spawned an industry in terms of helping organizations to focus on particular practices," said Pat Harned, CEO of the Ethics & Compliance Initiative. "It began a much more concerted effort by corporations to designate somebody who is in charge of an ethics and compliance program. In general it was the rise of the development of organizations and resources to help them."

By directing judges making sentencing determinations to consider whether corporations had in place an "effective program to prevent and detect violations of law," the guidelines incentivized companies to adopt and implement "internal mechanisms" to prevent criminal violations.

They also established seven minimum standards for a compliance program, including codes of conduct, oversight and support by high-level personnel, employee and agent education and training, monitoring and internal auditing, and standards and punishment.

The standards were a guide for prosecutors determining whether compliance programs were sincere efforts or simply designed to look good on paper, says Ted Banks, a founding partner at Scharf Banks Marmor LLC and the former chief counsel of global compliance and senior director of compliance policy at Kraft Foods, where he worked for 33 years in compliance.

"The requirements of the sentencing guidelines really were extremely helpful to companies," Banks said. "Now we know what target to aim at and how to do this, and none of the requirements are really unreasonable. ... In 1991 that really got things started. Companies were doing these things, but not in an organized fashion."

2001-02: The Enron Era and the Sarbanes-Oxley Act

Later, the sentencing guidelines were revised as required by the Sarbanes-Oxley Act, which put more of an emphasis on the assessment of risk inside organizations, the ethics and compliance program's role in mitigating those risks, and the creation of an ethical culture within organizations. The changes also asserted that companies had to demonstrate their programs actually had an impact.

"That changed the focus of chief compliance officers and their programs because all of a sudden you had to develop a much more robust risk assessment process but also have metrics to show that your organization was accomplishing its goals," Harned said.

SOX, adopted in the wake of the era-defining scandals at Enron, WorldCom and Tyco, also emphasized corporate governance, engaged boards more on compliance, and put internal controls into the compliance equation.

Shortly after SOX was adopted, the SEC issued a rule that took effect in 2004 in response to a flurry of mutual fund trading scandals. Rule 38a-1 under the Investment Company Act of 1940 and the Investment Advisors Act of 1940 required investment companies to establish and regularly assess internal compliance programs and to appoint a chief compliance officer who reports directly to the board, expanding the profile and obligations of CCOs and giving them greater visibility.

"Up to that point, CCOs would normally report to the general counsel," said Don Andrews, a partner at Venable and a former chief compliance officer at Bessemer Trust Co. and Van Kampen Investments. "Now they have an independent reporting relationship all the way to the top. … Now the board is also saying to the CCO: 'Are we good? Prove that to us.'"

September 2002: The Glassman Speech

Months after SOX became law, then-SEC Commissioner Cynthia Glassman delivered a speech calling on companies to designate "an officer with ownership of corporate compliance and ethics issues and of what Title III of Sarbanes-Oxley broadly refers to as 'corporate responsibility.'" Although the role was not specifically required under SOX, Glassman said it would be essential to satisfy SOX and SEC requirements.

"I wasn't suggesting that the SEC make a rule on this but was suggesting that a good practice for companies to develop or maintain a compliance culture was to have somebody designated to own compliance or own the process," said Glassman, who is now a director at Navigant Consulting and a director and chair of the audit committee at Discover Financial.

In her speech, Glassman said a "corporate responsibility officer" should have sufficient authority to take action, the full support of the CEO and senior management, direct access to the board, and adequate time and resources to effectively implement a company's corporate responsibility program. A compliance officer's role, Glassman emphasizes now, is to ensure everyone else is compliant, but he or she shouldn't be expected to do it all.

While the role of corporate compliance officers has evolved throughout the years, Glassman's speech is cited as a turning point and rallying cry to U.S. companies within which the corporate compliance officer has become a common figure with increasing stature and responsibility.

"The compliance officer is the catalyst for making sure people understand what they are supposed to do, to make sure training happens, to make sure they have a process for evaluating the extent to which they're in compliance, and for monitoring that compliance is being approached in the right way," Glassman said.

2007: FCPA Sweeps and the Morgan Stanley Case

The wave of Foreign Corrupt Practices Act compliance that began in earnest in 2007 has shaped compliance programs and focused the industry much more on anti-corruption programs and organizational transparency than it would otherwise, Harned says.

The record-setting Siemens AG FCPA settlement of December 2008 set a tone and sent a message. The company agreed to pay $800 million to the DOJ and SEC, and it stands as the highest FCPA settlement to date. But the case with even more impact in the corporate compliance world involved no action or penalties.

In 2012, the DOJ and SEC announced that after a yearslong investigation of possible FCPA violations at Morgan Stanley, they would bring no action against the financial giant, instead charging just an executive at the company.

Specifically cited by the DOJ as a factor in their declination — the first to be publicly announced in an FCPA case — was the fact that Morgan Stanley "constructed and maintained a system of internal controls, which provided reasonable assurances that its employees were not bribing government officials." It also voluntarily disclosed the FCPA issues and cooperated with the government's investigation.

In an enforcement area where fines can reach hundreds of millions of dollars, the declination underscored the importance of compliance programs. It also gave weight to previous promises to give credit for programs, including the 2010 Eric Holder memo that said well-designed and effective compliance programs should be considered when prosecutors are determining whether to bring charges.

"A lot of corporations of course follow what the DOJ is doing because that sets the tone for what's important in our compliance program," Harned said. "The Morgan Stanley declination stood out because the DOJ was publicly recognizing and giving credit because there was a good program in place."

September 2015: The Yates Memo

Deputy Attorney General Sally Quillian Yates' call on both federal prosecutors and civil enforcement attorneys to hold wrongdoing individuals accountable laid out the requirement that companies deliver to investigators all "relevant facts about the individuals involved in corporate misconduct" in order to receive any cooperation consideration.

"The concept of the Yates memo is a very interesting one because there's sort of a flipside to compliance, which is that in some cases it's entirely appropriate for the company to point to a rogue employee who did something wrong," Banks said. "Personally I think you always have to have skin in the game, and if CEOs think they will be protected, then why should they care?"

On balance, Banks says, the Yates memo is a positive development. However, he also understands the concerns that it could deter companies from enthusiastic compliance with government investigations and self-reporting. Will employees be afraid to talk to in-house lawyers and compliance personnel because maybe they will be misconstrued as having taken improper actions? Will people try to earn credit by turning people in instead of listening and having an objective viewpoint?

"I think a lot of companies are nervous about what this will mean as far as their employees and their in-house counsel," said Ronald Machen, former U.S. attorney for the District of Columbia and a partner at WilmerHale. "Deputy AG Yates has really been trying to calm the waters and make people understand that ... the objective is to go after individuals and hold them accountable, not to incentivize corporations to throw individuals under the bus when they haven't committed wrongdoing."

Where previously the common line of thinking among enforcement agencies was that individual charges were not worth it because individuals lacked the ability to pay penalties on the level of corporations, Machen says that attitude has changed, and the Yates memo doubles down on the growing belief that the ability to pay should not deter the government from bringing actions.

"If that's the case, you could see more civil actions against individuals irrespective of their ability to pay," Machen said.

November 2015: Hui Chen's Hire

The DOJ fraud section's appointment of Hui Chen as compliance counsel marked the entry of a corporate perspective into the agency to help create and inform benchmarks to evaluate compliance programs. Chen, a former assistant U.S. attorney in the Eastern District of New York, has a thoroughly corporate background, having previously served as Standard Chartered Bank's global head for anti-bribery and corruption, assistant general counsel in Pfizer Inc.'s compliance division and Microsoft Corp.'s director of legal compliance for Greater China.

The hire was critical because prosecutors usually lack experience inside companies, Machen says.

"Everyone has a compliance program on paper, but trying to understand whether that company and its leadership are committed to properly resourcing that compliance program, whether that compliance program is narrowly tailored to the risks of that business — that takes a little bit more experience, and I think that's what the hiring of Ms. Chen was all about," Machen said.

Banks, who has more than 30 years of in-house compliance experience under his belt, says many criminal attorneys think that because they know criminal law, they understand compliance. But they don't understand the nuances that compliance entails, such as why people behave and misbehave, how corporate cultures differ and how to train people.

Harned says the hire, along with the Yates memo and the DOJ's FCPA pilot program, announced in April, are milestones that show an evolution in the DOJ's sophistication in assessing ethics and compliance programs, raising the importance of self-disclosure and giving credit when organizations turn in wrongdoing individuals.

"All of these things are now impacting the way people think about what's most important when we're in an enforcement situation," Harned said.

--Editing by Jeremy Barker and Rebecca Flanagan.

All Content © 2003-2016, Portfolio Media, Inc.