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Strengthening Corporate Compliance with Diversity and Inclusion

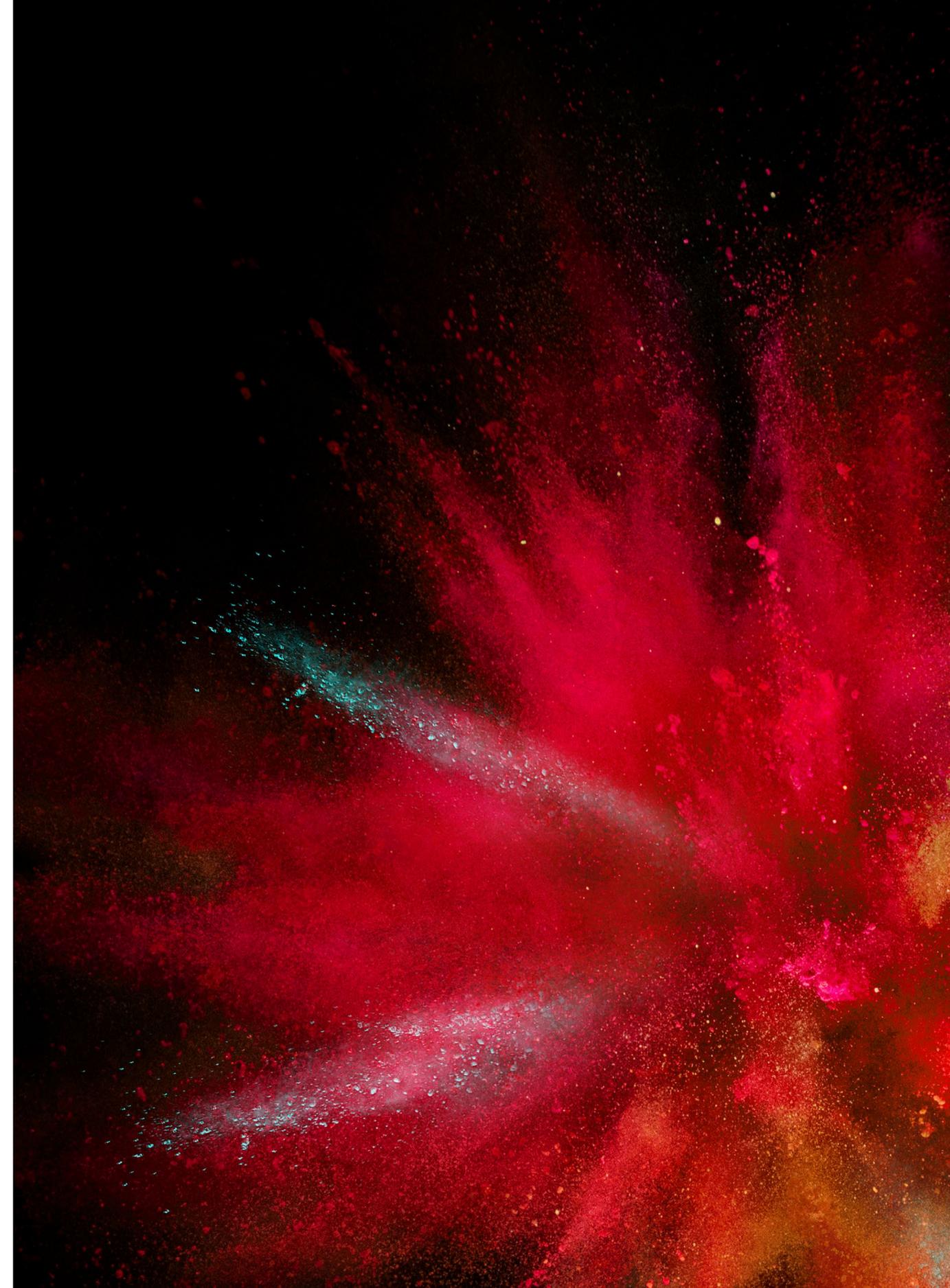
Mind the Gap Series — Part 1:

Insights from Global Compliance Leaders

HOWLETT BROWN.

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Foreword

Organizations are under pressure to strengthen the role which diversity and inclusion (D&I) plays in corporate compliance. As societal unrest, social movements and market disruption challenge companies to think bigger and move faster to address inequality, under-representation and discrimination, stakeholders are also wielding their influence to demand change. More than ever, the imperative to build more diverse and inclusive organizations is front of mind, and compliance leaders will play a lead role in driving change.

Strengthening D&I in corporate compliance is challenging. Best practices are still being established and expectations vary widely across jurisdictions and are continuously evolving. While most compliance leaders agree that D&I matters, *how* to make positive change and ensure it overlays compliance practices in a meaningful way, is less clear.

With this in mind, we commissioned an independent survey about the interplay between diversity, inclusion, compliance and corporate risk.

Yindi Gesinde,

Partner, Compliance & Investigations, Baker McKenzie

Charlene Brown,

Co-Founder and Managing Director, Howlett Brown

Monica Kurnatowska,

Partner, Employment & Compensation, Baker McKenzie

Our research indicates that many organizations are struggling to meet good intentions with decisive and strategic action. Compliance professionals report a recent surge in diversity-related compliance breaches and investigations, and suggest that scrutiny of D&I practices and public promises is rising.

Despite our survey finding that compliance teams play a critical role in helping organizations manage risk and promote diversity, functional leaders report that compliance is under-represented in strategic conversations and policy setting. This is a missed opportunity to accelerate progress and may be leaving companies more vulnerable to litigation.

In this report, we explore compliance as an important component of D&I and outline the four key gaps preventing greater connectivity between compliance teams and D&I departments, strategies and initiatives. By addressing maturity, ownership, action and consistency, organizations can strengthen their approach to D&I, support change and manage risk.



“ Diversity is good for business. Organizations that assemble diverse teams and create inclusive cultures reap the benefits in business performance. I believe that includes better management of possible compliance and litigation risk. As this connection becomes better understood, leaders recognize the need to be more organized and targeted in their efforts to accelerate progress, including by improving collaboration between functions. Organizations should manage a lack of diversity and inclusion as they would any other business critical risk. Fear of saying or doing the wrong thing cannot be a barrier to accelerating change.”

Yindi Gesinde,

Partner, Compliance & Investigations, Baker McKenzie

“ The responsibility falls on everyone to contribute to an inclusive culture and when each workplace function collaborates and has a defined role, we see greater overall impact on the ability of all to thrive.”

Anna Brown,

Chief Inclusion and Diversity Officer, Baker McKenzie

“ Inclusion and diversity is an underpin of workplace culture. In a diverse and inclusive organization, group think is avoided, and every day challenge is encouraged. This is a crucial part of managing risk.”

Monica Kurnatowska,

Partner, Employment & Compensation,
Baker McKenzie

Key Findings

1. Stakeholders demand progress on D&I



77%

of compliance leaders see an increase in focus on D&I from critical stakeholders such as investors and shareholders in the past year.



70%

say their customers and clients are asking more about their organization's D&I policies.



30%

say their organization is facing rising pressure from stakeholders to go further than legally mandated standards and targets.

2. D&I breaches and litigation risk are rising



35%

report a recent rise in compliance breaches and investigations related to D&I.



68%

say that a lack of diversity in the compliance team undermines their ability to conduct fair and effective investigations.



28%

state that their organizations are vulnerable to litigation as a result of public promises on D&I that cannot be measured or met.

3. Compliance is pivotal but frustrated by a lack of ownership



95%

say that D&I is an integral aspect of compliance.



80%

say that a robust D&I strategy and policies help to improve overall compliance and minimize reputational risk.



56%

report that compliance has little ownership of D&I strategy or policies.

Section 1:

Organizations Are Under Pressure to Accelerate Progress on Diversity and Inclusion

At an organizational level, improvement on D&I has been slow

Despite some jurisdictions recently introducing legislation aimed at addressing workplace inequality and improving representation, women — in particular women of color and older women — consistently earn less than male counterparts for equal work, and board composition and executive leadership remains overwhelmingly white and male. Further, the #metoo and Black Lives Matter movements demonstrate an ongoing struggle for all people to contribute fully and without fear of prejudice at work and in life. Gender pay gap reporting remains the main regulatory development of recent years in this area, though not even all six jurisdictions covered by this survey require reporting or publication of reporting in this area or action plans to address underrepresentation. Much remains purely voluntary, albeit leading voices in industry and commerce are increasingly making public statements about their visions for the future.

COVID-19 has brought new significance to the interconnectedness of companies and communities, and stakeholders are now challenging organizations to go further, faster. 77% of compliance leaders say they have seen an increase in focus on D&I from investors and shareholders in the past year. Similarly, 70% say their customers and clients are asking more about these policies. This crystallizes the commercial and reputational risk of getting D&I wrong.

With stakeholders actively engaged and demanding transparency on D&I matters, what steps can organizations take to respond and mitigate the attendant risks? And what role can the compliance function play?

“ The Financial Conduct Authority is starting to drive firms to pay greater attention to diversity and inclusion and how that connects with non-financial misconduct. There is a real connection between people practices and behaviors and non-financial conduct. Values such as integrity connect the FCA rulebook, employer standards and good behavior practices.”

Head of Compliance,
Financial Institution

“ Brands need to be as diverse as their consumers. Consumers expect brands to lead on D&I initiatives and will not hesitate to vote with their feet if they do not. A consumer goods and retail company that has got D&I right internally, with diverse teams and leadership, will also be more connected to its consumer base. This translates into better customer insights, and ultimately in better decision-making on product innovation, and the design of customer experiences that are tailored to their needs and expectations. For in-house compliance teams, accurate data and information on the make-up of their organization will be important to understand and define what D&I means for them and to communicate priorities and progress accurately and transparently to consumers. Consumers are no longer convinced by words but expect action — and data is the best way to demonstrate action.”

Kurt Haegeman,
Partner and Head of Consumer Goods & Retail Industry Group,
Baker McKenzie

Section 2:

Risks and Vulnerabilities in Not Achieving Diversity and Inclusion Goals

Challenges and Opportunities

Compliance teams are on the front line of D&I: 73% of compliance leaders say that D&I has risen as a priority on their agenda over the last 12 to 18 months and 95% also agree that D&I is now an integral aspect of compliance. Helping organizations respond to change, manage incidents and maintain standards on D&I is now a core competency of a successful compliance function, and one that is likely to demand greater attention in the immediate future.

Our research indicates an increase in D&I incidents in the past 12 to 18 months — 35% of compliance leaders report a recent rise in compliance breaches and investigations in this area, which require compliance involvement. Similarly, 38% say their companies have made public voluntary commitments in relation to diversity that now require disclosure. For example, many organizations have made gender pay and leadership composition promises that go further than the law.

While many of these promises are laudable, our research highlights the importance of ensuring that the compliance function is informed of these promises and involved in the plan to meet them in advance, so they can help to assess the risks to which the organization might be exposing itself.

As D&I becomes a growing focus for compliance and the risks of getting it wrong increase, expectations of the function are also likely to rise. Similarly, the composition of compliance teams will come under greater scrutiny and when conducting internal investigations, they will increasingly be expected to consider D&I issues in the performance of their duties. When 68% of compliance leaders say that a lack of diversity in their team undermines their ability to conduct fair and effective investigations, this is an issue that will demand prompt action in order to mitigate the D&I related risks that organizations frequently now face.

“ We have seen a rise in the number of HR investigations raising issues of culture and the consequences of lack of inclusion. However, this is not always reflected in the context of other compliance investigations into, for example, white collar matters. The practice of investigations is still too siloed and many organizations see these issues as distinct, whereas poor conduct in any area ultimately boils down to culture. There is a correlation between diverse and inclusive cultures, cultures of respect and compliance with legal norms such as anti-bribery and corruption. ‘Group think’ is as much of an issue in relation to antitrust and fraud as it is to harassment and bullying.”

Monica Kurnatowska,
Partner, Employment & Compensation, Baker McKenzie

Understanding the rise in D&I breaches and investigations

35% of compliance leaders report a recent rise in compliance breaches and investigations in relation to D&I. But what is driving this rise?

COVID-19 and related disruption is likely to be a significant factor. Organizations were forced to make rapid changes to working arrangements, teams adapted to remote communication and collaboration overnight, and individuals struggled to balance work and life. In high pressure circumstances, it is not unusual for issues to arise.

Mistrust and oversight concerns around remote working, particularly in relation to childcare responsibilities, were fertile ground for potential breaches around discrimination and fairness. The way in which these and other potentially sensitive issues were handled by managers may also have been an independent driver of D&I investigations.

Section 2:

Risks and Vulnerabilities in Not Achieving Diversity and Inclusion Goals

Challenges and Opportunities

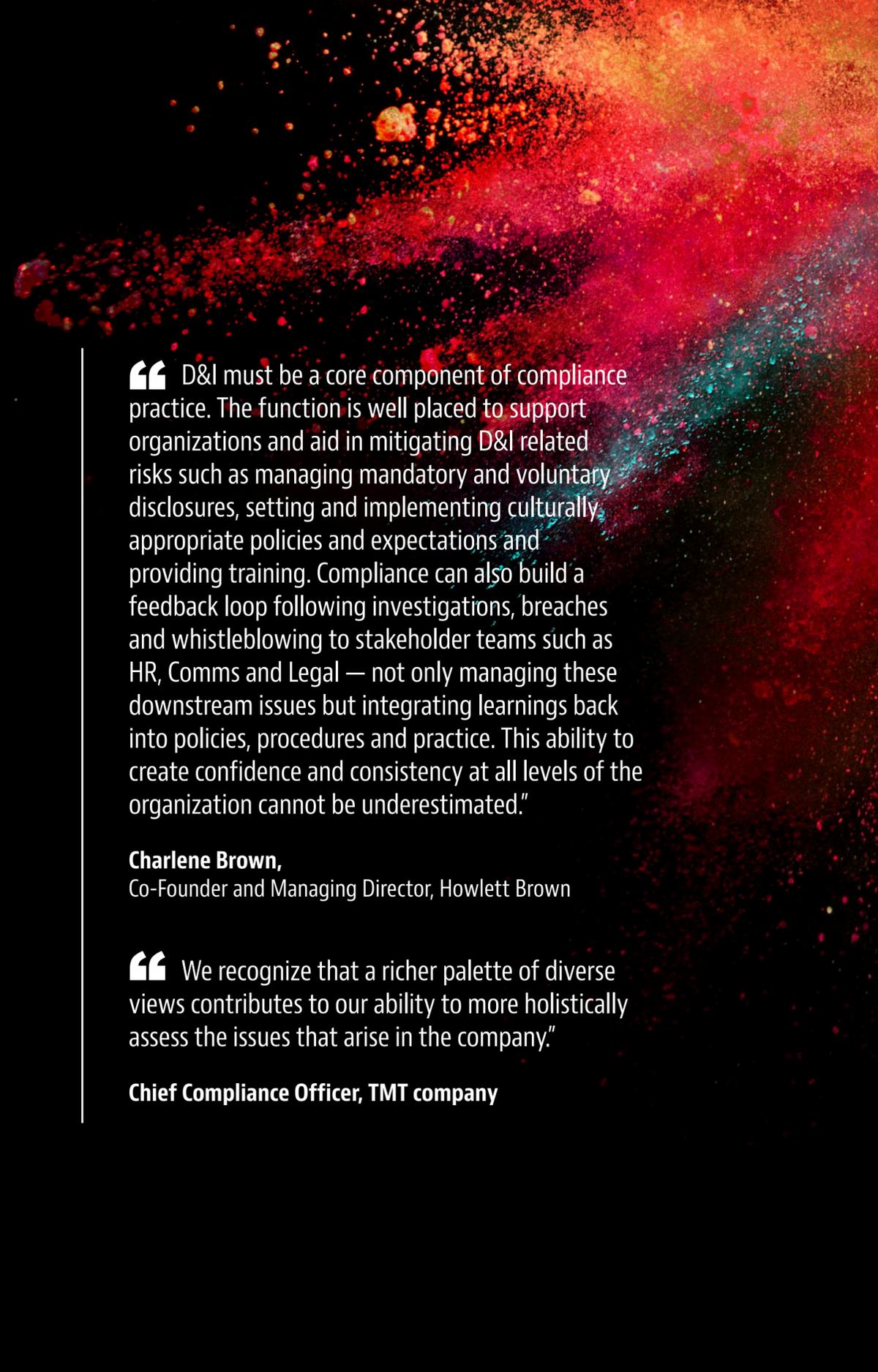
A lack of compliance involvement in strategy and policy-setting could undermine efforts to advance D&I and expose organizations to legal risk. 56% of compliance leaders say that the function has little ownership of D&I. Left out of critical strategic conversations on D&I, compliance is therefore more likely to manage problems when they arise, rather than influence commitments and practices — focused on downside risk rather than shaping positive change and workplace culture.

As a result of limited involvement upfront, 28% of compliance leaders report concern that their organization is not able to effectively measure and report on diversity commitments that have been made publicly. The same number also state that their organizations are vulnerable to litigation as a result of public promises on D&I that cannot be measured or met. For example, company leaders may have been ambitious in responding to calls for action from stakeholders without considering whether key data is available, how to report on progress and what legal requirements the organization has signed up to, which compliance teams are ideally placed to advise on. Making public commitments without understanding how to achieve them, increases the likelihood that they will not be achieved. This could affect

stakeholder confidence in the organisation, which could have the knock-on effect of undermining the speak-up culture. Over time, this might affect an organisation's ability to anticipate emerging risk and mitigate it promptly.

The vulnerability to litigation is beginning to manifest itself. In the US last year, shareholder derivative lawsuits were filed seeking to hold directors and officers of some major companies accountable for alleged failures to uphold the companies' commitment to diversity. The lawsuits included allegations of breaches of fiduciary duty by directors for failure to monitor compliance with anti-discrimination laws and to nominate diverse candidates to their boards, and claims of material misstatements in annual statements in relation to the companies' stated commitment and efforts to achieve satisfactory levels of diversity among board members and executives. Although such litigation seems to be isolated for now, it highlights how vulnerabilities in this area could be exploited.

What was once a "nice to have" is now a business imperative and potential source of legal risk for organizations. Could greater collaboration lead to better outcomes?



“ D&I must be a core component of compliance practice. The function is well placed to support organizations and aid in mitigating D&I related risks such as managing mandatory and voluntary disclosures, setting and implementing culturally appropriate policies and expectations and providing training. Compliance can also build a feedback loop following investigations, breaches and whistleblowing to stakeholder teams such as HR, Comms and Legal — not only managing these downstream issues but integrating learnings back into policies, procedures and practice. This ability to create confidence and consistency at all levels of the organization cannot be underestimated.”

Charlene Brown,
Co-Founder and Managing Director, Howlett Brown

“ We recognize that a richer palette of diverse views contributes to our ability to more holistically assess the issues that arise in the company.”

Chief Compliance Officer, TMT company

Section 2:

Risks and Vulnerabilities in Not Achieving Diversity and Inclusion Goals

Industry Pain Points

Financial Institutions

42% of compliance leaders — the highest proportion of any sector surveyed — agree their organization is facing rising pressure from stakeholders to go further than legally mandated standards and targets. Leaders in the industry are also most likely to report that compliance has little ownership of D&I strategy or policies (65%).

Healthcare & Life Sciences

73% of compliance leaders say they have seen an increase in focus on D&I from critical stakeholders such as investors and shareholders in the past year. 39% also report a recent rise in compliance breaches and investigations related to D&I. This is the highest of any sector surveyed.

Technology, Media & Entertainment

96% of compliance leaders say that D&I is an integral aspect of compliance. However, 73% also report that a lack of diversity in the compliance team undermines their ability to conduct fair and effective investigations. This is the highest of any industry surveyed.

Consumer Goods

35% of compliance leaders report a recent rise in compliance breaches and investigations related to D&I. 24% also state that their organizations are vulnerable to litigation as a result of public promises on D&I that cannot be measured or met.

Industrial, Manufacturing & Transportation

94% of compliance leaders say that D&I is an integral aspect of compliance. But 48% also report that compliance has little ownership of D&I strategy or policies. This is the lowest of any sector.

“ Organizations feel a strong urgency to take action on D&I not just because it is the right thing morally, but also because accounting for D&I issues in conducting investigations leads to better, faster and more effective results. Those in the TMT sector in North America, which is heavily interconnected with operations in Asia, are increasingly thinking through the D&I implications of various investigatory approaches under consideration and how these align to their commitments and values. For example, I have seen more willingness on the part of companies to push back on government information requests that appear specifically targeted at particular groups, for example based on connections to China in the US government’s ongoing China-related trade secrets and sanctions-related investigation efforts. I’ve also seen new thought being given to investigations in relation to immigration and visa fraud on the same basis. Companies understand that an investigation that may be necessary for compliance reasons must be considered carefully when it might have a disparate impact on groups based on national origin.”

Jessica Nall,
Partner, Litigation & Government Enforcement,
Baker McKenzie

“ D&I is moving from words to data. Organizations are now having to field questions and deliver actual facts and figures in relation to their policies and commitments. Healthcare and Life Sciences organizations are very worried about how missteps on D&I will play out on social media and in public — protecting company reputation and living brand values is paramount. Organizations operating in this highly regulated sector have real cultures of compliance and well-tested systems around whistleblowing in place already. However, many are taking additional measures in relation to their supplier assessments and training programs, in particular, to reflect the growing importance of D&I and to ensure that they are only choosing to partner with companies that reflect their values.”

Cecilia Pastor,
Partner, Head of Healthcare & Life Sciences Industry Group in Madrid,
Baker McKenzie

“ It’s clear that a key component of a successful D&I program is data; leaders and shareholders expect the organization to be able to measure the success and failures of their program and to provide a statistical narrative. But here’s the rub: data privacy laws, particularly in the EU, greatly restrict what data an organization is allowed to process about its candidates and employees. This challenge is particularly acute with respect to ethnicity, sexual orientation and disability data, and often leaves organizations with just a patchwork of data across their global workforce. Compliance, legal, HR and privacy teams have to work closely together to understand what data can be leveraged and where.”

Julia Wilson,

Partner, Employment and Global Lead HR Data Protection, Baker McKenzie

Section 3:

The Role That Compliance Can Play

Amid rising scrutiny and a shifting landscape, compliance must play a greater role in managing D&I

79% of compliance leaders agree that companies are best able to manage risk when there is a strong connection between compliance, culture and D&I. Similarly, compliance leaders recognize the benefits associated with such a connection: 77% say that the ability to conduct fair and effective compliance investigations is improved by having a diverse compliance team and an even higher proportion (83%) of compliance leaders agreed that mishandling D&I investigations creates significant corporate compliance risk.

65% of compliance leaders also say that companies in their industry use their D&I strategies to help to reduce corporate risk. It seems that the typical risks associated with mishandling an investigation could be amplified where D&I is not taken into

consideration. For example, failing to identify and deal with wrongdoing, exposing the company to the risk of external investigation or that the same conduct will happen again. In circumstances where compliance leaders recognize these risks, it is important to examine how the compliance and investigations teams' processes can be addressed and potentially augmented to reduce the likelihood that this lack of diversity could lead to negative outcomes.

More than simply managing downstream D&I issues, compliance is an **enabler of progress**. Four critical gaps risk frustrating organizations' D&I ambitions, which the compliance function is ideally placed to bridge.

“In conducting investigations, compliance professionals need to be alive to D&I issues, including the challenges of speaking up particularly for those from underrepresented groups.”

Krissy Katzenstein,
Partner, Employment & Compensation, Baker McKenzie

Four Critical Gaps for Compliance D&I



Maturity Gap

Organizational strategies designed to promote diversity and inclusion are perceived by compliance leaders to be in their infancy.



Action Gap

Good intentions don't always meet decisive actions. Organizations often pay lip service to D&I but lack adequate practices and training to effect change.



Consistency Gap

Organizations struggle to ensure consistent implementation of D&I practices across employees, subsidiaries and partners, as well as face inconsistencies between public promises and actual results.



Integration Gap

Compliance is part of an organizational ecosystem managing and influencing diversity and inclusion, but collaboration on D&I matters is infrequent and policies often remain disconnected.



Maturity Gap

As new issues come to light and societal unrest, social movements and market disruption continue to evolve, D&I is becoming more expansive, intersectional and complex to manage — demanding more from organizations and compliance teams.

But according to our research, 71% of current D&I strategies have been in place for fewer than three years. Of this number, 23% have been operational for less than one year. Similarly, in our experience, the majority of in-house compliance and investigations teams have only recently been asked to focus on their team's own diversity. However, it is important for them to take this a step further and identify how they can harness D&I within their teams for better outcomes in the roles they perform in their organizations.

With formalized workplace policies and practices on D&I continuing to evolve and compliance teams still stepping into their pivotal role, the demand for change is accelerating faster than organizations can keep up. As a result, leaders may find that D&I approaches fall behind the requirements of employees before they've even become embedded.

Key Actions

- Ensure the presence of diverse voices in compliance teams and actively monitor new thinking, guidance and regulation. Consider how else to achieve diversity of thought, even if diversity is lacking in the team.
- Collaborate with other stakeholders to assess the maturity of the compliance team in the D&I context.
- Build adaptive values and principles-based policies and procedures that can be updated and communicated quickly.
- Regularly refresh and re-run D&I training at all employee levels in line with evolving needs and best practices.
- Ensure that the compliance team receives unique and tailored D&I support and training to build team confidence and capability in identifying and addressing D&I related issues connected to their function.

“ Compliance leaders need to shift from being reactive to proactive in order to make meaningful, consistent progress on D&I. By being honest about where capability or understanding is lacking and building targeted plans to address these areas, organizations can think about old problems in new ways and better manage risk across networks.”

Yindi Gesinde,
Partner, Compliance & Investigations,
Baker McKenzie

“ To have a speak-up culture and willingness to come forward, you have to feel like your voice will be heard. Inclusion is the basis of having that speak-up and transparent culture. If you don't feel you could speak up about a racial injustice issue, then you probably won't speak up about fraud or any other legal or compliance issue.”

Lisa LeCointe-Cephas,

SVP, Chief Ethics and Compliance Officer, Merck



Action Gap

Words without action has been the constant criticism of organizations' approach to D&I.

In our survey, 66% of compliance leaders report their perception that companies often pay lip service to D&I but without taking meaningful action and only 61% say corporate leadership of their organization is doing enough to address the growing importance of D&I. A further 24% say their organization does not have a “speak up” culture, which limits their ability to understand issues and make positive change.

Similarly, while virtually all compliance leaders consider D&I to be an integral aspect of compliance, relatively few have taken steps to integrate compliance and D&I. Only 43% have increased the prominence of D&I within annual reports and the same proportion have created or improved whistleblowing mechanisms to report D&I issues.

Key Actions

- Improve whistleblowing mechanisms and regularly review relevant data and processes to ensure that they are responsive to company needs, and that employees understand how to report issues in confidence.
- Take an integrated and consistent approach to managing whistleblowing investigations across different subject areas of expertise and jurisdictions. This will become increasingly important as organizations look to integrate D&I and implement the EU Whistleblowing Directive.
- Demonstrate transparency and accountability when issues have occurred — communicating clearly how policies will change as a result of an investigation (whilst respecting confidentiality requirements).
- Ensure executive leadership and the board are upholding D&I best practices and following through on stated objectives.



Consistency Gap

Failing to translate corporate D&I policies creates the space for confusion and inaction.

Just as third parties can pose a compliance risk for companies (for example, in respect of bribery, corruption and money-laundering), D&I issues identified in decentralized organizational models, subsidiaries, franchises, suppliers and partner organizations can be just as damaging to companies. 67% of the compliance leaders who participated in our research are concerned that these groups are not always compliant with corporate D&I policies.

When coupled with stakeholders' quest for greater scrutiny and transparency, the risks which these third parties' non-compliance pose to companies is clear. This is why 77% of compliance leaders are building D&I into due diligence on M&A transactions and 68% are building D&I into supplier audits. Cultural differences are a leading cause of failure in acquisitions. Once an organization has established the importance of D&I to its culture, it is important to identify whether this is shared by those with whom the organization does business. A non-diverse culture is likely to make integration more difficult and may mask liabilities.

Key Actions

- Avoid a "one-size-fits-all" approach when attempting to disseminate a D&I strategy across a global business — adopting a values and principles-based approach to include local offices in D&I strategy. Be sure to demonstrate sensitivity to cultural and regulatory differences in implementing key policies and procedures.
- Build D&I into M&A due diligence and supplier audits in order to identify and address inconsistencies or potential issues as soon as possible.
- Establish mechanisms to identify, escalate and manage D&I issues across partner and supplier organizations.

“For us, it is not enough to simply slot diversity and inclusion into our compliance policies and practices, we need to find a way to ensure that our staff pay attention to it, and practise it, every day.”

Head of Legal,
Financial Institution



Integration Gap

Promoting D&I and managing issues as they arise brings together collaborators from leadership, HR, compliance, employment, legal and the employee population.

D&I is a critical thread running throughout the business. However, only 31% of compliance leaders collaborate frequently with their counterparts in other departments to advance D&I. Without regular discourse, it is easy to see how efforts to address D&I may be stalled by siloed decision-making or created in a manner that is not fully suitable for the organization as a whole. While frequent collaboration remains the exception rather than the rule — and a lot of this collaboration is reactive and events-driven — the gains we have identified may prove elusive for some organizations.

In a complex ecosystem, determining clear responsibility for driving action also presents a problem for many organizations. Although 79% of compliance leaders say that compliance has a critical role to play in ensuring companies can meet their D&I commitments, 51% say that compliance policies have been connected to D&I only in the past year. Open lines of communication between these functions is crucial, with a clear idea of what they hope to achieve by working together, underpinned by an understanding of the organization's existing risks and the drivers of compliance issues.

Key Actions

- Establish the structural, procedural and experiential parameters of the D&I strategy — delineating owners and contributors within each.
- Encourage and facilitate regular, intentional and transparent communication between key stakeholders; focused on proactive — rather than reactive — engagement.
- Set the groundwork to ensure the right people are notified and included at the right time, particularly when diversity-related breaches or investigations occur.

“ There are missed opportunities to connect the dots between investigations into D&I and those relating to other areas of law. Often there are different teams investigating these issues, but they all amount to investigating the culture of an organization and the effectiveness of training, processes, education and leadership. If organizations were to consider the learnings from both and take a more connected approach, they could gain a truer understanding of the issues to be addressed and, as a result, undertake a more effective remediation of the core problems.”

Joanna Ludlam,

Partner and co-chair of Global Compliance & Investigations,
Baker McKenzie

“ D&I cuts across all aspects of business and managing related issues involves multiple departments. The most effective compliance teams collaborate with colleagues and make an active contribution to shaping strategy as well as policy — setting the roadmap for action, protecting positive workplace culture and good corporate governance. Compliance's role within the D&I ecosystem is key to creating the conditions for good conduct. Leaders also need to develop strong partnerships with HR colleagues to build a strong knowledge base and understanding of D&I among employees and company management.”

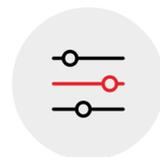
Charlene Brown,

Co-Founder and Managing Director, Howlett Brown

Additional Insights and Findings

Driving Positive Change: Top Measures to Accelerate D&I

We asked compliance leaders what top measures they found most successfully helped to accelerate progress around D&I. They cited these five best practices to instill in organizations to help promote effective D&I strategies.



Aligning HR

and compliance on D&I strategy and policies



Promoting

the whistleblowing hotline as a channel for reporting



Regular training

for all employees



Communication

of policies across the business



Development

of a compliance focused code of conduct for D&I

Conclusion

D&I has long been the missing chapter of the compliance playbook. However, organizations are increasingly recognizing the importance of embracing the connections between D&I and compliance and the impact this can have on reducing their risk exposure. When so much of D&I progress rests on setting a framework for action, ensuring conformity, managing sensitive issues and measuring outcomes, it is clear that compliance is the enabler of change that organizations need.

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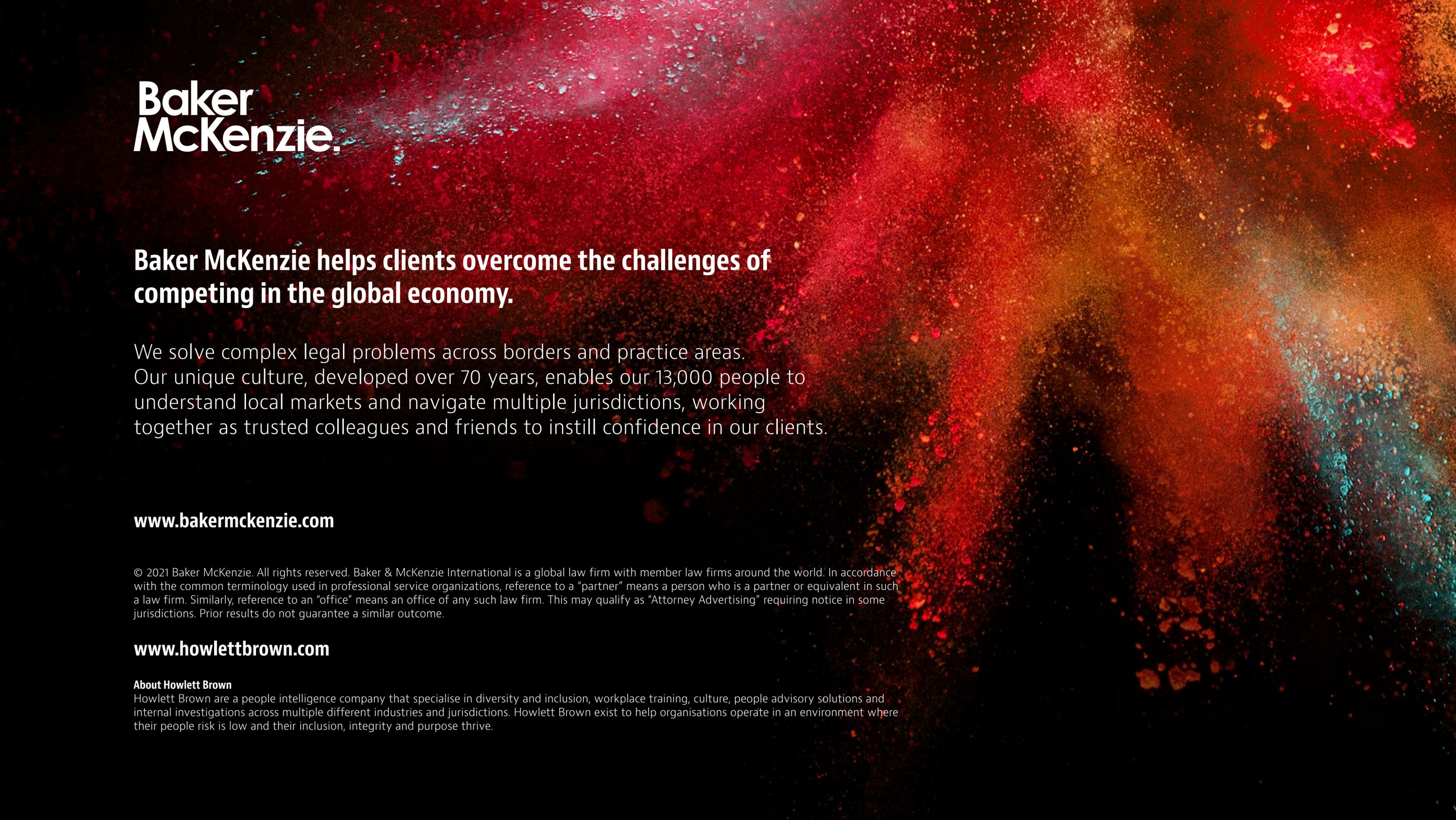
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Research methodology

Part 1 of the Mind the Gap Series: Strengthening Corporate Compliance with Diversity and Inclusion is based on an independent opinion survey of more than 600 compliance leaders in global organizations, including a representative sample in six key markets (US, UK, Italy, Germany, Spain and France) and five sector groups: (Industrials, Manufacturing & Transportation; Consumer Goods & Retail; Financial Institutions; Healthcare & Life Sciences; and Technology, Media & Telecommunications).

Interviews were conducted in May 2021.



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