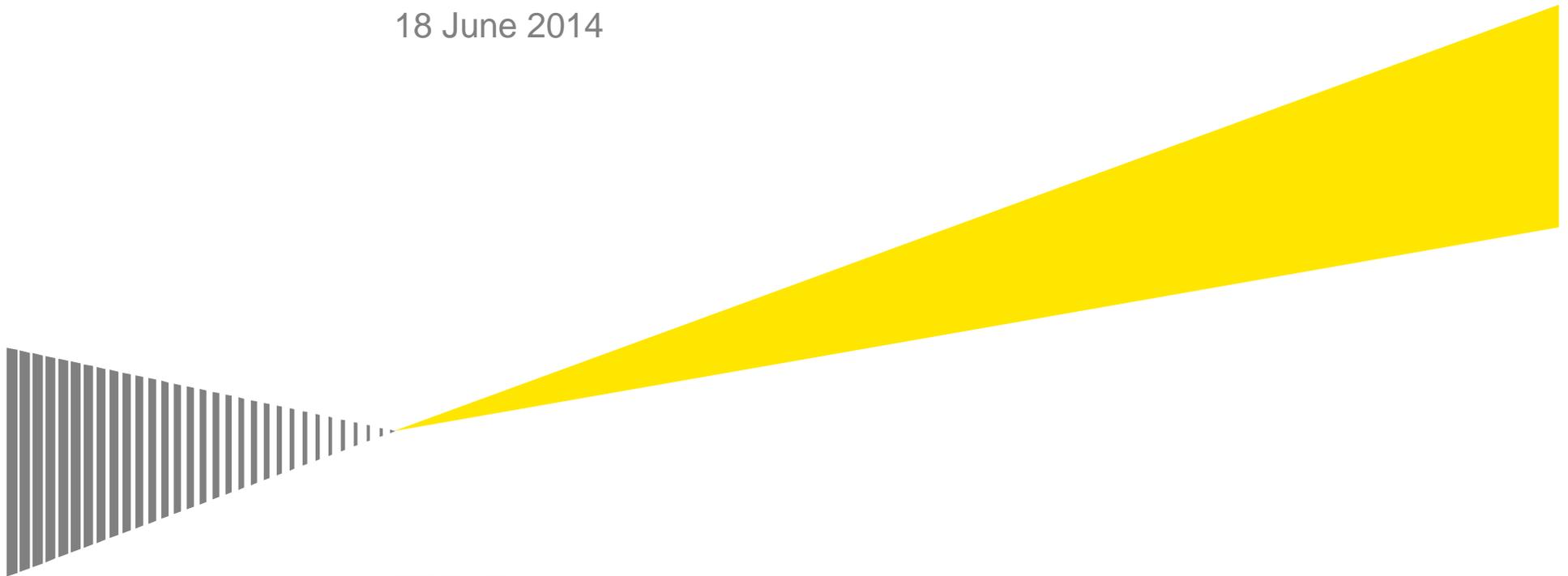


Being Prepared for an FCPA Investigation

Initial Considerations

18 June 2014

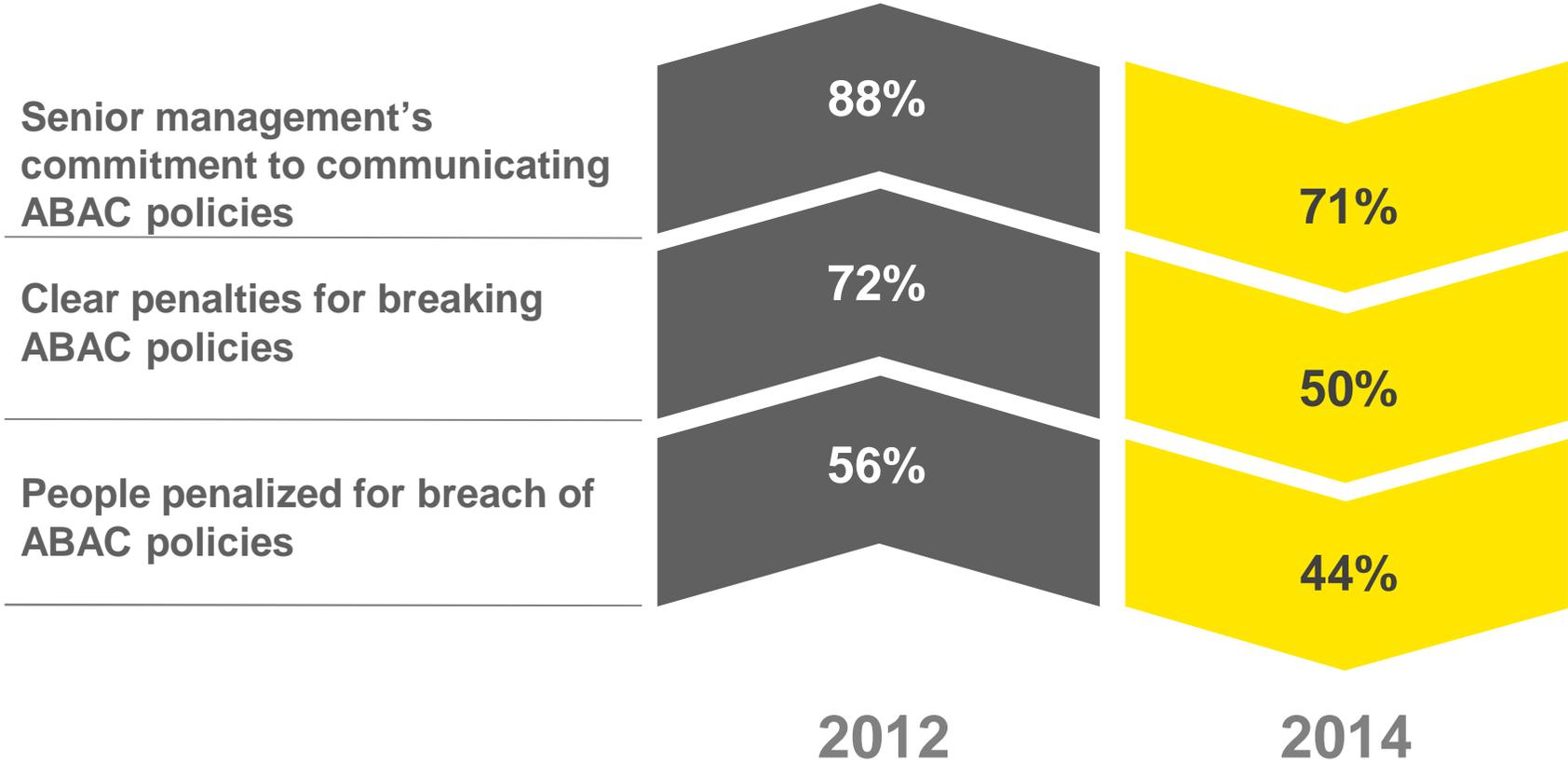


▶ Prepared for: AmCham FCPA monthly telecon

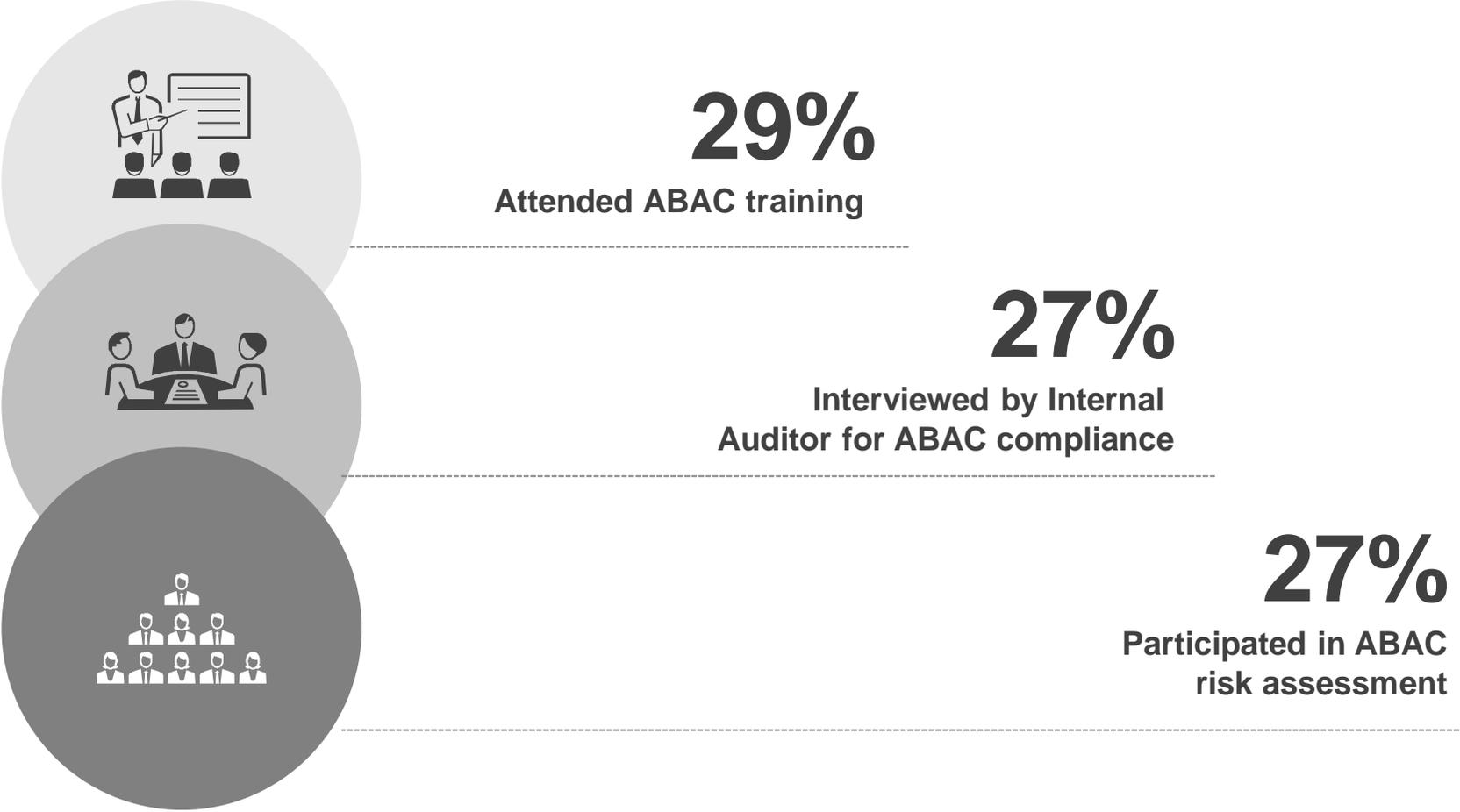
EY Global Fraud Survey – 2014

Has compliance taken a backseat?

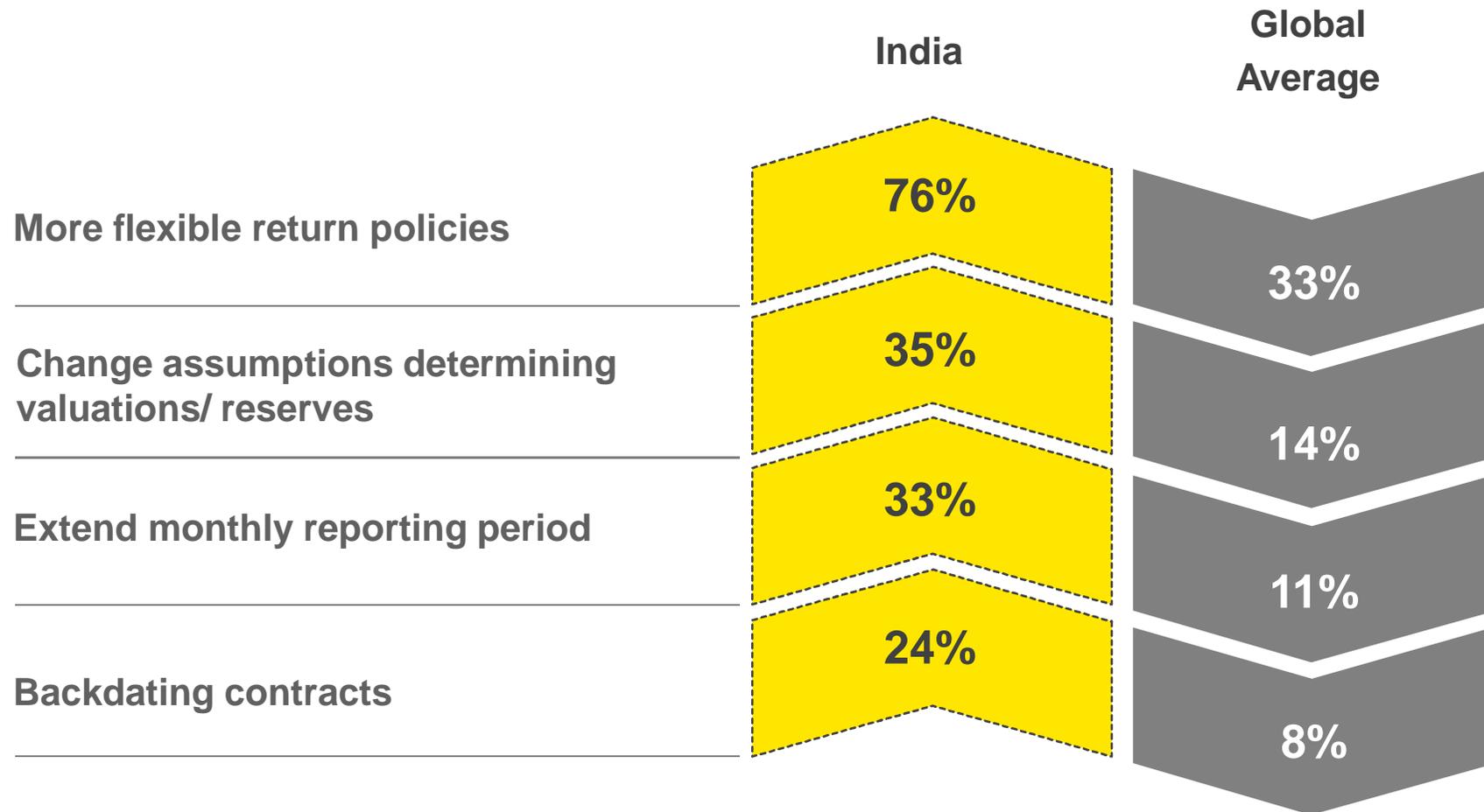
Comparison of EY’s 12th and 13th Global fraud survey



Is management demonstrating commitment or not?



Bending the rules or breaking the law?



Investigations increase when organizations have hotlines



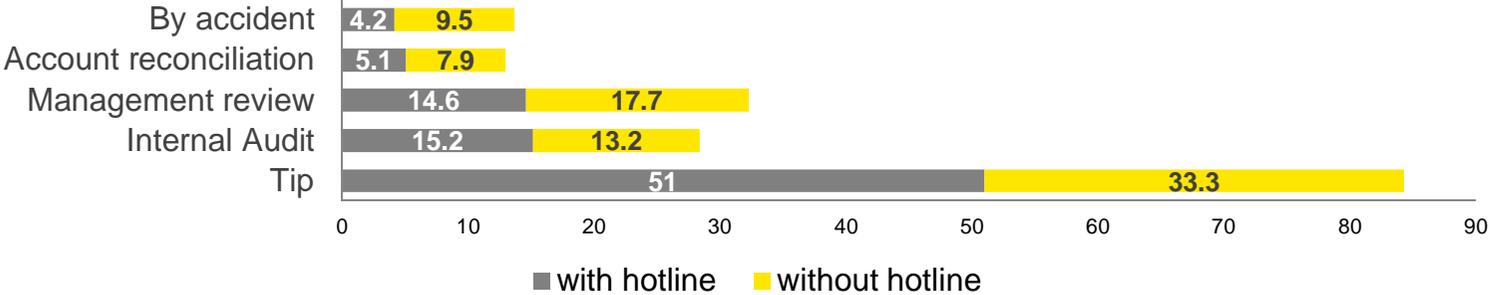
Organizations that experienced frauds were



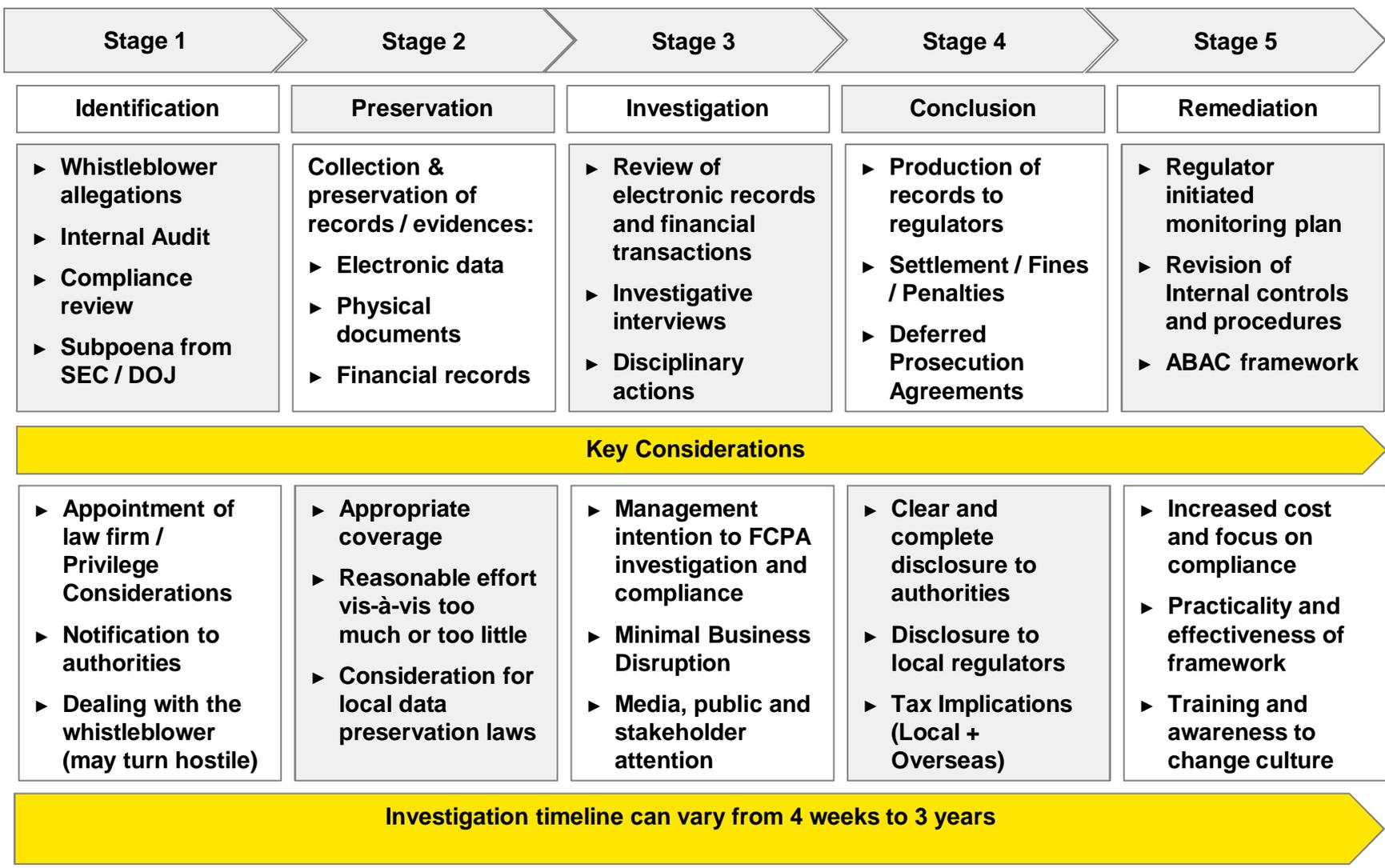
41% less costly
and they detected

50% more quickly

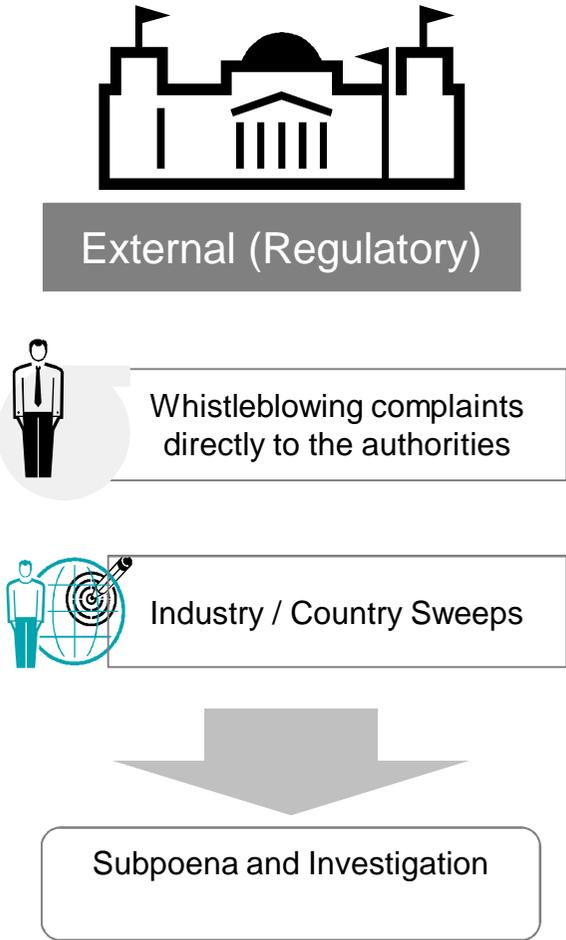
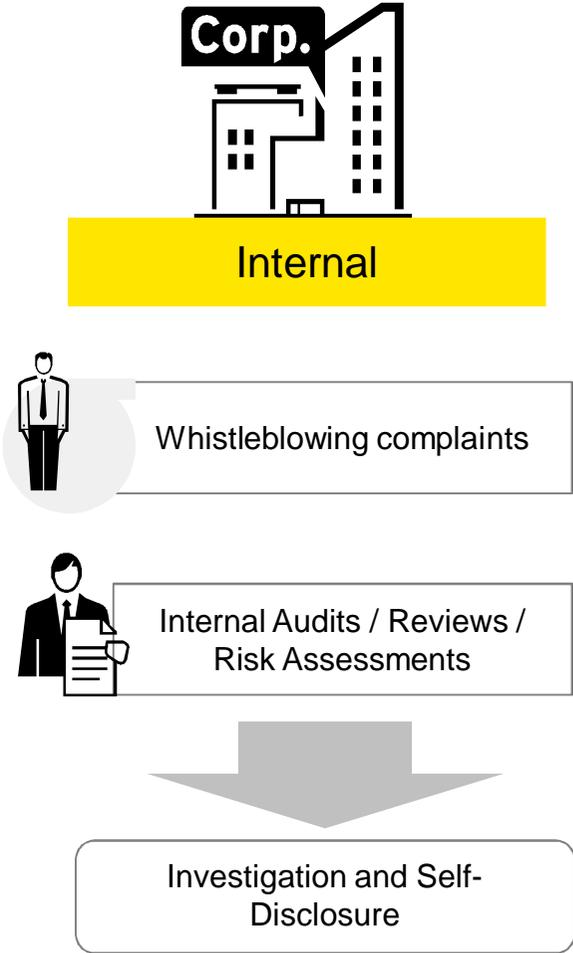
Impact of hotline



Typical FCPA investigation lifecycle



How does it all start



Initial steps

Once an entity has been notified of an impending investigation the key steps would be as follows



Formation of a committee to tackle and track investigation or an authorize an existing cross functional committee to track the same. The committee should ideally have representation from

- ▶ Compliance
- ▶ Legal
- ▶ Finance
- ▶ Operations



- ▶ Appropriate consultation from external legal counsel should also be considered (multiple legal firms may be involved in case of cross country investigations)
- ▶ Appointment of an external investigation team should be considered



- ▶ In case required open a channel of communication with the regulator to
 - ▶ Inform the regulator commencement of an internal investigation
 - ▶ Understand the exact nature of the information sought by the regulator



- ▶ Where possible consider speaking to the whistle blower in order to gather more information.
- ▶ In case the issue has been notified through an internal whistleblower appropriate consideration should be given to the prevention of retaliation and protection of the whistleblower. This is important as the failure to appropriately deal with the situation may cause the whistle blower to turn hostile or approach external authorities.

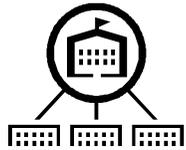
Practical challenges – initial steps

- ▶ Analyzing the allegations / issues and deciding whether investigation is warranted.
- ▶ Meeting with the whistleblower:
 - ▶ Are they ready to meet?
 - ▶ Who should meet?
 - ▶ Where and When?
 - ▶ What is the information that is to be obtained from the WB?
- ▶ Reliability of the information of WB
- ▶ Selection of employees and third parties to be subject to investigation
- ▶ Stakeholders to be roped in for the investigation (External Lawyers, Investigating Agency, In-house Legal Counsel etc.)
- ▶ Scope and extent of coverage of investigation and data preservation
- ▶ Lack of clarity around Reporting mechanism among the Company, External Lawyers and External Investigation Agency
- ▶ Maintaining Attorney client privilege
- ▶ Timing and extent of self-disclosure
- ▶ Deciding on the point of contact at the location of investigation (to coordinate with External Agency, Lawyers and Head Office)

Data preservation

Considerations in the issue of a Document / Information hold notice

Offices to be covered



Period to be covered



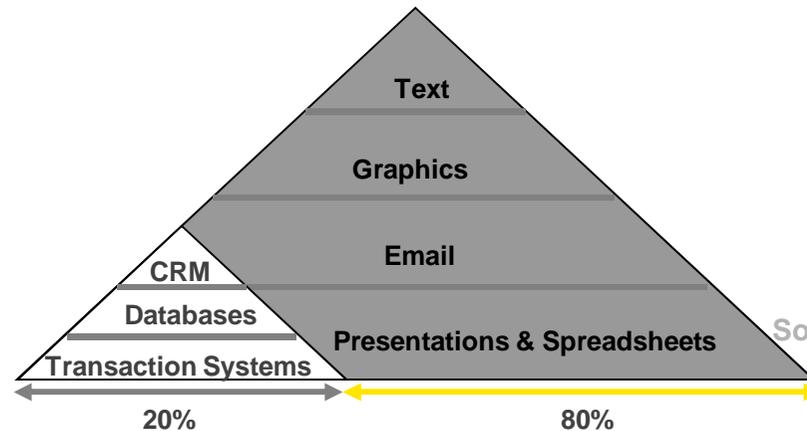
Employees to be covered



Chain of Custody of data



Data sources in today's organization



Source: Gartner Research



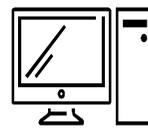
Databases and Archives



Transaction Records



Contracts and Agreements



Desktops



Laptops



Tablets and Phones



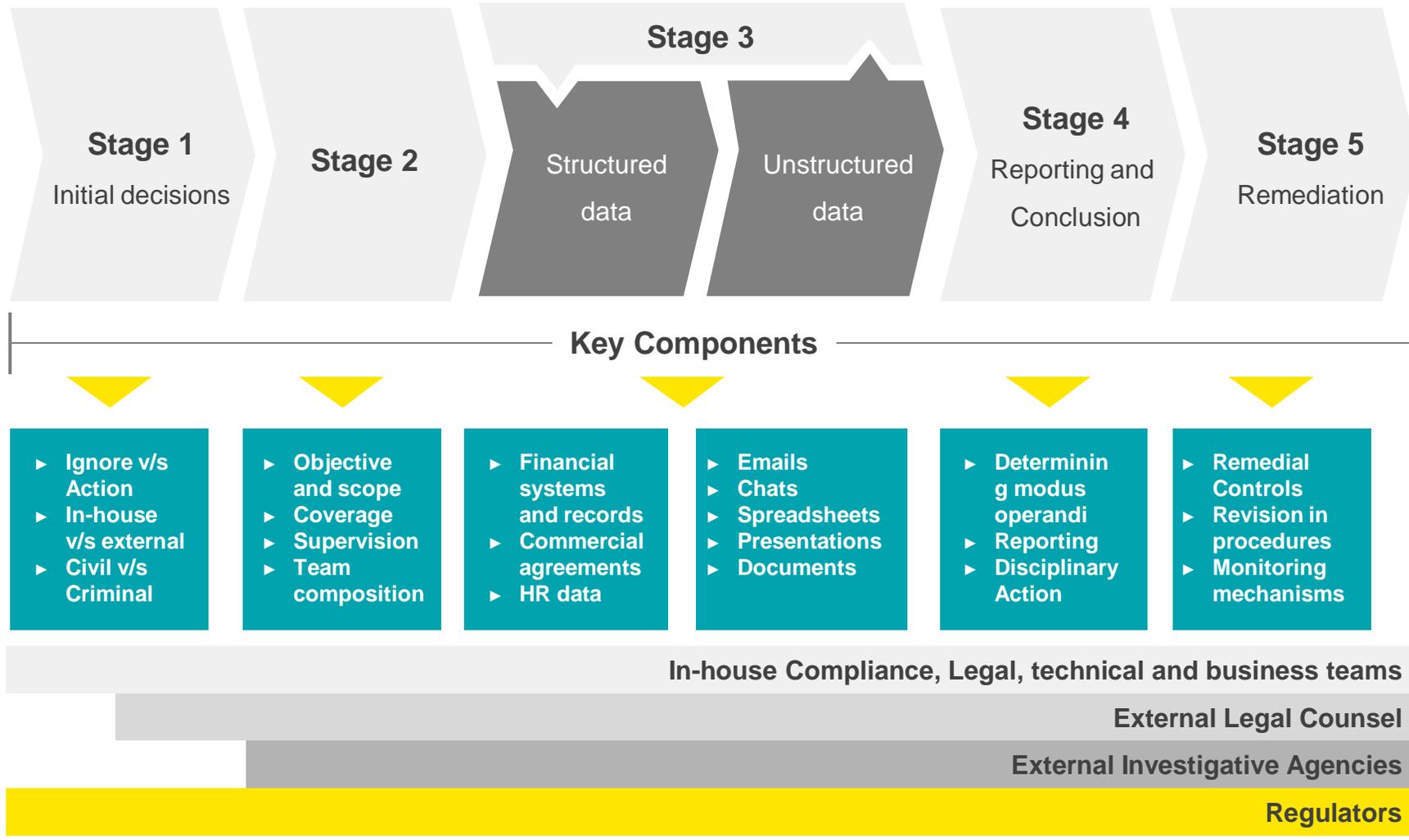
Storage Devices

Practical challenges – data preservation

- ▶ Decide on assets (Custodians) to be preserved and reviewed (Computers, servers, laptops, mobile phones, tablets etc.)
- ▶ Legal ownership of the IT assets and company IT policy
- ▶ Location of custodians who's data is to be preserved (Leaves / Travelling)
- ▶ Period to be covered
- ▶ Geographical coverage
- ▶ Types of data warehouses – Servers, tape drives etc.
- ▶ Ownership and locations of data warehouses.
- ▶ Implications of territorial data privacy laws
- ▶ Sudden damage to the IT Assets before preservation and damage to data
- ▶ Deleted data (Recovery and extraction)
- ▶ Encrypted data
- ▶ Chain of custody (Responsibility of arranging and returning assets)
- ▶ Information / documents stored at third party locations

Components of an investigation

An overview of the key components of an investigation from a confirmed lead to closure



Practical challenges – investigation

- ▶ Resistance from employees on sharing of information and data
- ▶ Unique terminologies used by each company to describe bribes and payments
- ▶ Spelling errors while recording accounting entries
- ▶ Non English language and words used
- ▶ Need for dynamic keywords and strings of keywords to get the best desired output
- ▶ Extraction of information from the unallocated clusters
- ▶ Password protected file and scanned images (Keyword search does not apply)
- ▶ Obtaining information from ex-employees or ex-third parties.
- ▶ Storage and retrieval of physical documentation
- ▶ Chain of custody of physical documents
- ▶ Missing / unavailability of supporting information
- ▶ Decision on coverage (100% or sampling)
- ▶ Multiple ERP systems and manual books and records out of ERP system
- ▶ Dynamic approach based on additional observations

An 'effective' compliance program is the answer to Remediation

Department	Guidelines
<p style="text-align: center;">Securities Exchange Commission</p>	<p>Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions:</p> <ul style="list-style-type: none"> ▶ “Criteria we will consider in determining whether, and how much, to credit self-policing, self-reporting, remediation and cooperation -- from the extraordinary step of taking no enforcement action to bringing reduced charges, seeking lighter sanctions, or including mitigating language in documents we use to announce and resolve enforcement actions. <ul style="list-style-type: none"> ▶ What compliance procedures were in place to prevent the misconduct now uncovered? ▶ Did the company adopt and ensure enforcement of new and more effective internal controls and procedures designed to prevent a recurrence of the misconduct?”
<p style="text-align: center;">Department of Justice</p>	<p>McNulty Memo: Principals of Federal Prosecution of Business Organizations:</p> <p>Charging a Corporation: Factors to be considered:</p> <ul style="list-style-type: none"> ▶ “the existence and adequacy of the corporation's <u>pre-existing</u> compliance program” ▶ “the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one” <p>UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL CHAPTER EIGHT - SENTENCING OF ORGANIZATIONS</p> <ul style="list-style-type: none"> ▶ <i>Culpability Score:</i> If the offense occurred even though the organization had in place at the time of the offense an effective compliance and ethics program, as provided in §8B2.1 (Effective Compliance and Ethics Program), subtract 3 points.

Effective compliance program

Expectations of governing bodies



Effective compliance and ethics program

Key Components

- ▶ High level commitment
- ▶ Policies and procedures
- ▶ Periodic risk based review
- ▶ Proper oversight and independence
- ▶ Training and guidance
- ▶ Internal reporting and investigation
- ▶ Enforcement and discipline
- ▶ Third-party relationships (DD and compliance)
- ▶ Mergers & acquisitions
- ▶ Monitoring and testing

Factors to be considered

- ▶ Effective compliance program must take into account:
 - ▶ Operational realities and risks attendant to the company's business
 - ▶ How the products or services get to market
 - ▶ Nature of its work force
 - ▶ Degree of regulation
 - ▶ Extent of its government interaction
 - ▶ Degree to which it has operations in countries with a high risk of corruption

Source: *A Resource Guide to the U.S. Foreign Corrupt Practices Act*

FCPA monitoring and Risk review

FCPA risk is effectively mitigated only if the employees of the company follow the policies and the procedures both in letter and spirit. A proactive FCPA review moves beyond the practices of annual confirmation of compliance and tests the actual implementation of the policies and procedures.

Proactive Compliance Review - Typical work steps		Benefits
 <p>Discussions with key stake holders :</p> <ul style="list-style-type: none"> ▶ To understand business processes and areas exposed to high FCPA risk and controls in place to mitigate such risk ▶ Determine nature of transactions which typically take place and the process of documenting them 	<ul style="list-style-type: none"> ▶ Improvement in anti-corruption program ▶ Additional controls for potential risk mitigation ▶ Identification of additional high risk business processes and job profiles ▶ Identification of additional training needs and changes to training content 	
 <p>Analyse financial data using search terms and concepts to:</p> <ul style="list-style-type: none"> ▶ Identify transactions which may pose potential risk in terms of non-compliance ▶ Establish trends and patterns in the financial data indicating repetitive nature of potentially high risk transactions and identify employees exposed to in such high risk transactions 		
 <p>Review of sample agreements and due diligence documents:</p> <ul style="list-style-type: none"> ▶ Determine adherence to procedures, norms and inclusion of standard anti bribery ▶ Vendor onboarding process and effectiveness of due diligence process ▶ Identify potentially high risk transaction structures and payment terms 		
 <p>Review of underlying supporting financial documents</p> <ul style="list-style-type: none"> ▶ Determine adherence to schedule of authority, terms of contract / purchase orders and laid down payment process ▶ Identify gaps in documentation of potentially high risk transactions and recording mechanism 		

Training & awareness

Strategy



Considerations for strategy:

Identification and categorization of the target audience (employees, business partners/their employees, contracted workers) based on their role, risks they are exposed to and the interactions they may have with third parties on behalf of the Company

Content Development



Considerations for content development:

- Key areas of focus (may differ for each category of learners)
- Practical illustrations (based on cases, situations specific to the company and ethical dilemma scenarios)
- Attention span of category of audience
- Testing the audience's comprehension

Dissemination



Considerations for dissemination:

- Timelines, logistics and target Audience
- Learning's from previous trainings
- Placement of posters etc
- Wall papers and screen savers on computer

Training and awareness plan should consist of:

- ▶ Timelines/Faculty
- ▶ Mode of training (face to face or web based)
- ▶ Language of delivery
- ▶ Annual declaration process
- ▶ Screen savers, posters/other awareness methods

Content

1. Content for trainings for various class/level of audience (Class room/ web based)
2. Questionnaires to be used
3. Speaker notes and instructions for trainers/facilitators
4. Logistical requirements

Records

1. Attendance records
2. Feedback forms
3. Test questionnaires

Thank you

Arpinder Singh

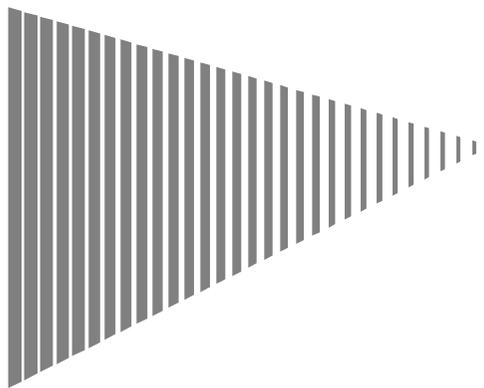
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Building a better
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