

Culture of Compliance & Ethics as a Sustainable Competitive Advantage & Driver of Shareholder Value

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Agenda

- Key Elements of a Culture of Compliance & Ethics
- Resources for Corporate Advisers
- Link to Shareholder Value
- Culture as a Competitive Advantage & Source of Alpha

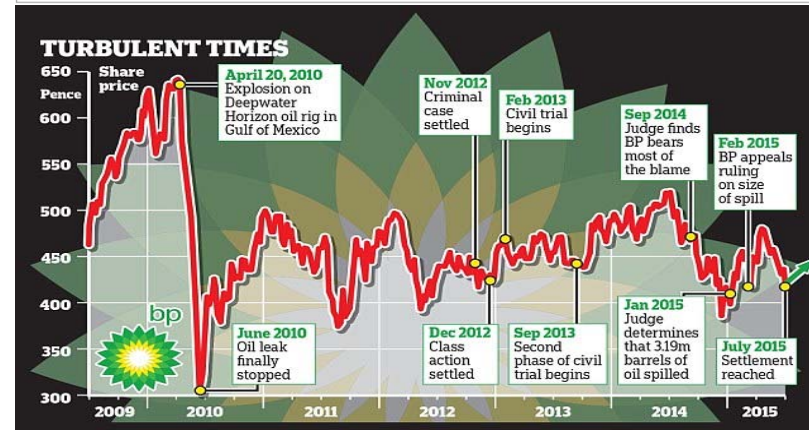
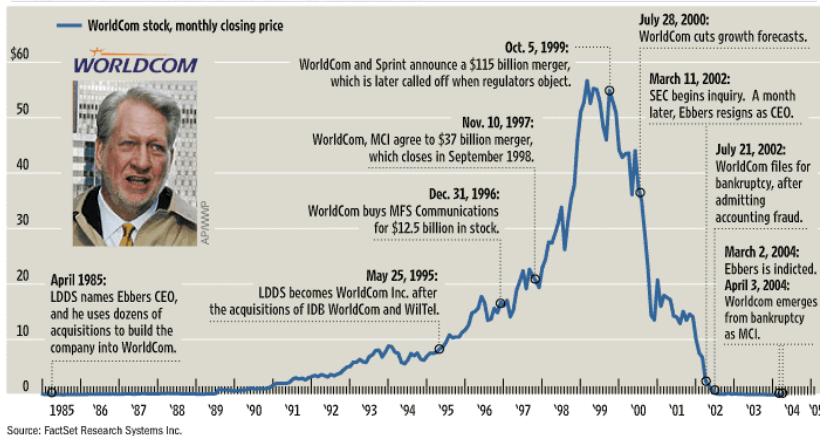
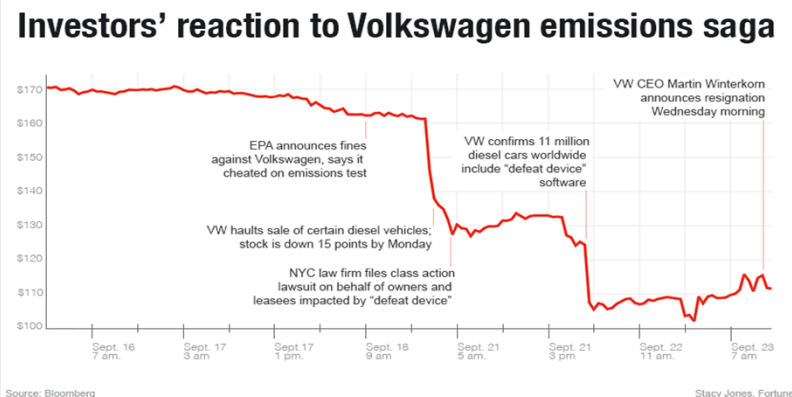
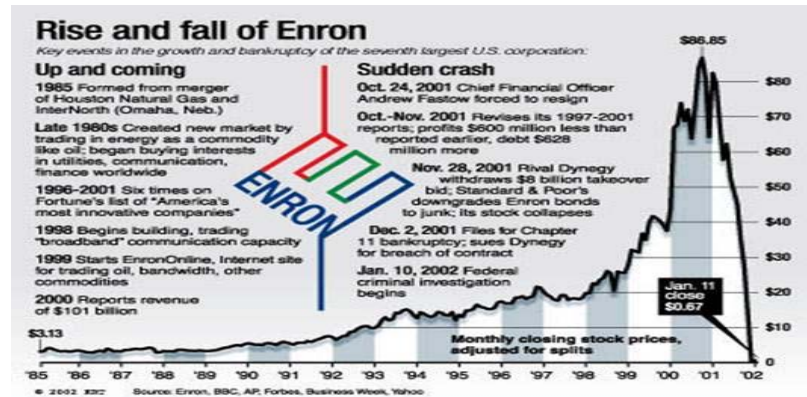
Key Elements of a Culture of Compliance & Ethics

- Tone at the Top
 - Board – Active & Independent Oversight & Engagement – Fiduciary Duty of Care & Loyalty
 - Executive Management – Leadership by Example – Not Enough to Talk the Talk!
 - Anti-retaliation – Policies v. Practice – Avoiding a Culture of Fear/Silence
 - “Launch Status Check” Environment
 - “Houston, We Have a Problem!”
 - “Work the Problem, People!” – Scapegoating & Finger Pointing v. Appropriate Accountability
 - Prompt Identification, Investigation and Remediation of Red Flags
 - Known Knowns, Known Unknowns, Unknown Unknowns
 - Whistleblower Motivations & Troublemaker Characterizations
 - Don’t Assume!
- Compliance Management System
 - Substance v. Form – Paper program?
 - Context Matters - No One-Size-Fits-All CMS
 - Reporting Relationships & Performance Evaluations of CCOs and GCs
 - Perverse Incentives Lead to Perverse Results – Performance-Based Compensation for Control Functions?
- Competent and Courageous Control/Staff Function Leadership
 - Legal
 - Compliance
 - Environmental, Health & Safety
 - Human Resources
 - Risk Management
 - Internal Audit

Resources for Corporate Advisers

- Principles of Federal Prosecution of Business Organizations (1999) (USAM §9-28.000)
 - Thompson Memo (2003)
 - McCallum Memo (2005)
 - McNulty Memo (2006)
 - Filip Factors Memo (2008)
 - Yates Memo (2015) – Individual Accountability for Corporate Wrongdoing
- Foreign Corrupt Practices Act of 1977
 - FCPA Corporate Enforcement Policy (2017) (USAM §9-47.120)
- U.S. Sentencing Guidelines – Chapter 8 – Sentencing of Organizations
 - Effective Compliance & Ethics Program (§8B2.1)
 - DOJ’s Evaluation of Corporate Compliance Programs Memo (2017)
 - *In re Caremark Int’l. Derivative Litigation* (1996) – Director Duty of Care
 - *U.S. v. Kayaba Industry Company* Antitrust Case Sentencing Memorandum (2015)
 - A “Culture-Changing” Compliance Program Helped Reduce Fine to \$62M from Up to \$207.36M
- SEC Up-The-Ladder-Reporting Requirements for Attorneys (2003)
- Whistleblower Anti-Retaliation Laws
 - Dodd-Frank (2010)
 - Sarbanes-Oxley (2002)
 - Others
- Benefits of Cooperation
 - DOJ – Deferred Prosecution Agreements, Non-Prosecution Agreements, Antitrust Leniency Program
 - SEC Seaboard Report (2001)
 - Yates Memo – No Cooperation Credit if Fail to Disclose All Relevant Facts

Link to Shareholder Value



<http://www.accounting-degree.org/scandals/>
<https://www.investopedia.com/articles/00/100900.asp>

Culture as a Competitive Advantage & Source of Alpha

- The Compliance & Ethics Blog
 - Corporate Integrity Index
- Firms whose employees rate their firm's culture high on CEB's integrity index outperformed peers by more than 16 percentage points in 10-year total shareholder return (TSR).
- Two Drivers of TSR Outperformance:
 1. Healthier Cultures Positively Correlated with Lower Risk of Major Loss Events
 - Employees Feel Safe to Speak Up Early
 2. Healthier Cultures Positively Correlated with Employee Productivity
 - 12% Advantage in Employee Productivity

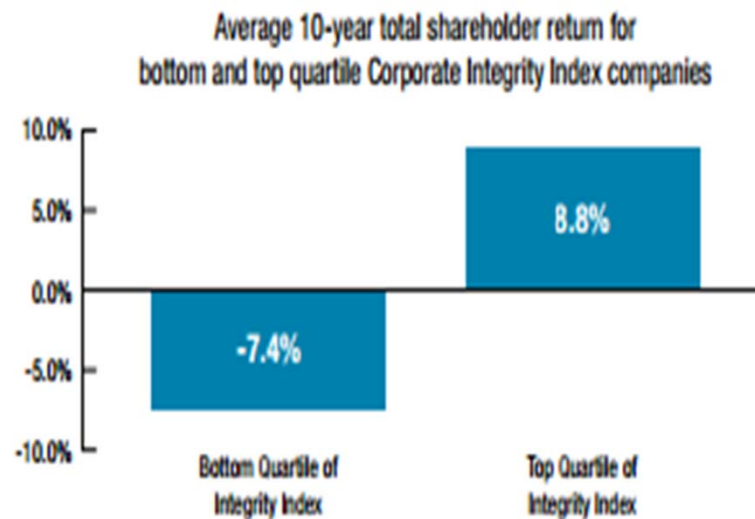
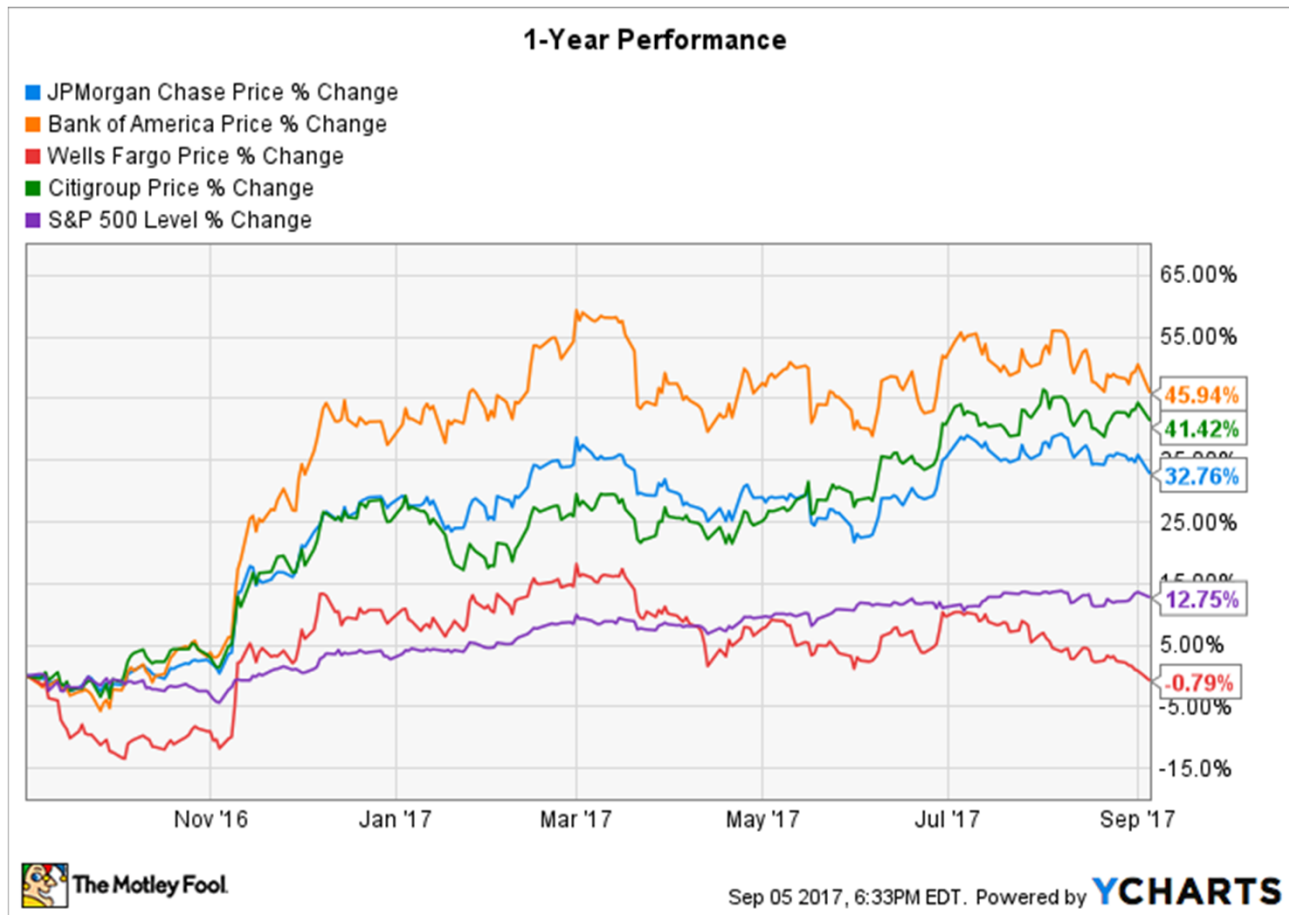


Figure 1: Higher integrity, stronger long-term shareholder returns

<http://complianceandethics.org/8287-2/>

Culture as a Competitive Advantage & Source of Alpha



Culture as a Competitive Advantage & Source of Alpha

- “The Integrity Decision”
 - Doing the Right Thing in a Reliable Way
 - Withstanding the Pressures to Do What is Wrong
 - **Including Remaining Silent!**
 - Model Rule 1.6 – Confidentiality of Information (Exceptions Apply – See 1.6(b))
 - Model Rule 1.13 – Organization as Client (See 1.13(c) and 1.13(e))
- Identify, Protect & Support Champions of Ethics & Compliance
 - Create Safety by Rewarding Good Faith Reporting of Concerns
 - Implement a Robust Process for Responding to Complaints of Retaliation
 - Promptly Investigate and Remediate Reported Concerns
 - Consider Both Personal and Professional Incentives of Individuals Involved
 - Consider Early Engagement of Independent & Objective Outside Advisers
 - Promptly Hold Culpable Individuals Accountable & Make Restitution

Appendix

- Principles of Federal Prosecution of Business Organizations (1999) (USAM §9-28.000) –
<https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>
 - Thompson Memo (2003) –
https://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf
 - McCallum Memo (2005) –
http://federalevidence.com/pdf/Corp_Prosec/McCallum_Memo_10_21_05.pdf
 - McNulty Memo (2006) –
https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf
 - Filip Factors Memo (2008) –
<https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf>
 - Yates Memo (2015) –
<https://www.justice.gov/archives/dag/file/769036/download>
- Foreign Corrupt Practices Act of 1977 –
<https://www.justice.gov/criminal-fraud/statutes-regulations>
 - USAM §9-47.000 – Foreign Corrupt Practices Act of 1977 –
<https://www.justice.gov/usam/usam-9-47000-foreign-corrupt-practices-act-1977>
 - FCPA Corporate Enforcement Policy (2017) (USAM §9-47.120) –
<https://www.justice.gov/criminal-fraud/file/838416/download>
- U.S. Sentencing Guidelines – Chapter 8 – Sentencing of Organizations –
<https://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-8>
- DOJ's Evaluation of Corporate Compliance Programs Memo (2017) –
<https://www.justice.gov/criminal-fraud/page/file/937501/download>
- *In re Caremark Int'l. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996) –
<https://www.law.upenn.edu/live/files/6824-a>
- *U.S. v. Kayaba Industry Company* Sentencing Memo –
<http://www.jonesday.com/files/upload/ATalerts/KYB%20Sentencing%20Memo.pdf>

Appendix

- DOJ Antitrust Leniency Program –
<https://www.justice.gov/atr/leniency-program>
- SEC Enforcement Cooperation Program –
<https://www.sec.gov/spotlight/enforcement-cooperation-initiative.shtml>
 - SEC Seaboard Report (2001) –
<https://www.sec.gov/litigation/investreport/34-44969.htm>
- SEC Up-The-Ladder-Reporting Requirements for Attorneys (2003) –
<https://www.sec.gov/rules/final/33-8185.htm>
- OSHA's Whistleblower Anti-Retaliation Desk Reference –
https://www.whistleblowers.gov/whistleblower_acts-desk_reference
- Culture as a Competitive Advantage –
<http://complianceandethics.org/8287-2/>
- The Integrity Decision –
<http://complianceandethics.org/the-integrity-decision/>
- ABA Model Rules of Professional Conduct –
https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html