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Where we go from here

Achieving an effective FCPA compliance program in the age of COVID-19 and beyond: Incorporating the second edition of DOJ and SEC's FCPA Resource Guide

Achieving an effective FCPA compliance program in the age of COVID-19 and beyond

Incorporating the second edition of DOJ and SEC's FCPA Resource Guide

The U.S. Department of Justice (DOJ) has been on a tear in the past year, releasing a series of guidance documents to shape criminal prosecution policies. Just last month, on June 1, 2020, DOJ updated its guidance on the *Evaluation of Corporate Compliance Programs*,[1] providing increased clarity on some of the key questions prosecutors will ask in assessing the adequacy of corporate compliance programs when making charging, sentencing, and plea and settlement decisions. That was followed closely on July 3, 2020, when DOJ and the U.S. Securities and Exchange Commission (SEC) updated *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (the Guide)[2] in a second edition that comes out eight years after the original. The updated Guide – together with the revised *Evaluation of Corporate Compliance Programs* – provide chapter and verse about current DOJ and SEC expectations for corporate FCPA compliance, even in the midst of a pandemic. Indeed, DOJ and SEC officials have publicly confirmed that, although they recognize that companies are facing pandemic-related difficulties, their compliance expectations remain the same.[3] And those expectations convey a larger message: adequately-resourced, effective compliance programs are critical for preventing and mitigating the impact of FCPA violations, especially in this period of increased economic pressure.

As an overview, the updated Guide reaffirms DOJ and SEC's commitment to combating foreign bribery and corruption, and notes that enforcement efforts have increased both domestically and abroad. In the U.S., more agencies – including the Federal Reserve, the Commodity Futures Trading Commission, and the Treasury's Financial Crimes Enforcement Network (FinCEN) – have gotten involved in the investigation and enforcement of FCPA offenses. Meanwhile, "a number of countries have implemented foreign bribery laws and significantly increased their enforcement efforts." Against that backdrop, DOJ and SEC published the updated Guide "to help companies, practitioners, and the public . . . prevent corruption in the first instance." To that end, the updated Guide reflects the government's views on new cases, as well as new insight, guidance, and policies, including:

- New case law on the definition of an "instrumentality of a foreign government" under the FCPA;
- New case law further limiting the FCPA's rarely-used "local laws" defense;
- Guidance on reducing the risk of successor liability in M&A deals;
- How DOJ and SEC view the impact of *United States v. Hoskins* on their jurisdictional reach;
- Clarification regarding the statute of limitations for criminal FCPA accounting violations;
- New case law on SEC's disgorgement authority; and
- New policies and guidance concerning corporate enforcement, monitorships in criminal matters, corporate compliance programs, and the so-called "anti-piling on" policy.

Meanwhile, however, our recent Steering the Course study,[4] designed and conducted in late 2019 and early 2020, found that a large number of compliance leaders at multinational companies across the globe were feeling that their budgets were getting squeezed even as their companies sought to expand into high-risk markets – and that was before the global pandemic. Now, faced with further budget constraints and new challenges, how can companies still meet enhanced DOJ and SEC expectations for FCPA compliance?

Onward

In this article, we review what you need to know about the updates to the Guide, and we offer practical action items for implementing an effective compliance program in the current environment and beyond.

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Key updates in the second edition

New definition of an "instrumentality of a foreign government"

The updated Guide advises companies to take note of the Eleventh Circuit's 2014 decision in *United States v. Esquenazi*, which involved a state-owned enterprise (SOE), when designing their compliance programs. The FCPA prohibits, among other things, making corrupt payments to any foreign official – any officer or employee of a foreign government or any department, agency, or instrumentality of a foreign government. In *Esquenazi*, a case involving Haiti's state-owned telecommunications company, the Eleventh Circuit concluded that an instrumentality of a foreign government is "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own." The court also provided a non-exhaustive list of factors to determine (1) whether an entity is controlled by the government, and (2) whether the entity performs a function that the government treats as its own. In the updated Guide, DOJ and SEC urge companies to "consider these factors when evaluating the risk of FCPA violations and designing compliance programs."

The *Esquenazi* test may not be particularly helpful to compliance professionals because it is intensely fact-dependent and somewhat subjective. Consequently, although the *Esquenazi* factors should not be ignored, companies must carefully evaluate the risks when operating in certain markets, such as Asia, where SOEs are ubiquitous. Additionally, commercial bribery is still illegal, and compliance programs have to guard against payments made for a commercial advantage, regardless of whether the recipient is a foreign official. Programs that are effective will address both challenges.

Key updates in the second edition

New decision further limits FCPA's "local laws" defense

The FCPA provides an affirmative defense – the so-called "local laws" defense – for when a defendant can establish that "the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country." The defense has been rarely used, but the updated Guide notes that it was recently invoked, and rejected, in a case in the Southern District of New York. In *United States v. Ng Lap Seng*, the defendant faced charges in connection with an alleged scheme to bribe two ambassadors to the United Nations. He requested that the jury be instructed on the local laws defense, arguing that the jury would have to acquit him if it found that the payments at issue were not unlawful under the written laws of Antigua and the Dominican Republic. Rejecting the request, the court found that the proposed instruction was "inconsistent with the plain meaning of the written laws and regulations affirmative defense contained in the FCPA" – *i.e.*, the statute requires a showing that the local laws explicitly permit the payments at issue.

For compliance professionals, the takeaway is that companies should not expect to rely on the local laws defense. However, it is still important to be familiar with local laws where business is conducted because they may be more strict than the FCPA. Additionally, as our recent research suggests,[1] governments in historically risky markets – such as China, Brazil, and South Africa – have been attempting to improve their reputations to attract business by ramping up local anti-bribery and corruption ("AB&C") enforcement. DOJ and SEC will consider efforts to inventory and comply with local laws as implicit in a strong compliance program.

Guidance on reducing successor liability risks in M&A deals

In the updated Guide, DOJ and SEC continue to encourage companies to conduct pre-acquisition due diligence. But, they "also recognize that, in certain instances, robust pre-acquisition due diligence may not be possible. In such instances, DOJ and SEC will look to the timeliness and thoroughness of the acquiring company's post-acquisition due diligence and compliance integration efforts." DOJ and SEC recognize that in stock tenders or competitive bid situations, fulsome and complete due diligence may not be permitted by the acquisition target.

Companies should not interpret this update to suggest that pre-acquisition due diligence can be ignored, and they should be aware that this new emphasis will result in more scrutiny of post-acquisition due diligence and integration. Companies would be wise to faithfully follow this new guidance and consider self-reporting any uncovered FCPA violations in a timely manner as part of the integration process. The updated Guide states that, "under the DOJ FCPA Corporate Enforcement Policy, in appropriate cases, an acquiring company that voluntarily discloses misconduct may be eligible for a declination, even if aggravating circumstances existed as to the acquired entity." We note that companies considering such self-reports must consider both the costs and benefits of doing so; the speed in which a DOJ and SEC self-report is resolved will not be within the company's control.

How DOJ and SEC view the impact of *United States v. Hoskins* on their jurisdictional reach

In the updated Guide, DOJ and SEC maintain that "[a] foreign company or individual may be held liable for aiding and abetting an FCPA violation or for conspiring to violate the FCPA, even if the foreign company or individual did not take any act in furtherance of the corrupt payment while in the territory of the United States." They express that view despite the 2018 case of *United States v. Hoskins*, in which "the Second Circuit addressed the question of whether individuals not directly covered by the FCPA anti-bribery provisions could nevertheless be guilty of conspiring to violate, or aiding and abetting the violation of, the FCPA anti-bribery provisions, and concluded they could not."

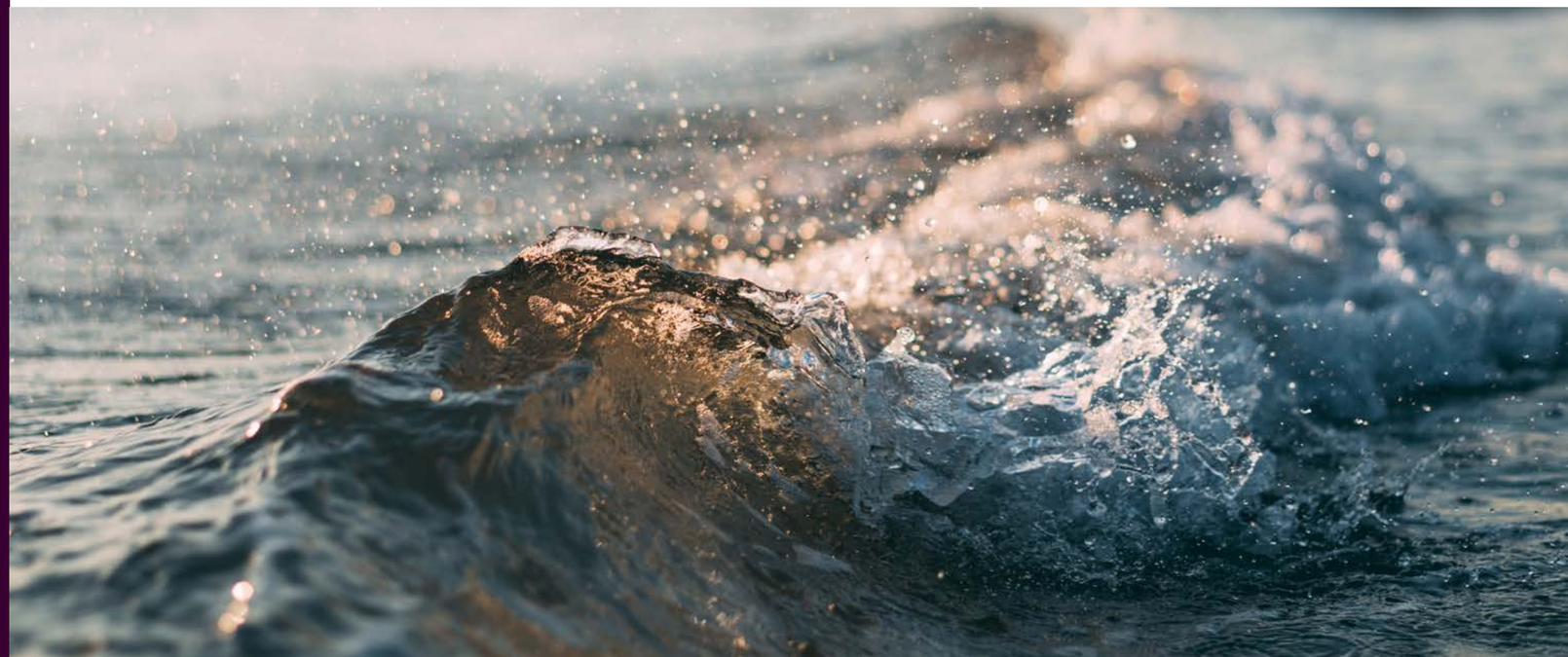
DOJ and SEC downplay the impact of *Hoskins*, which they note applies only in the Second Circuit. The updated Guide states that "[a]t least one district court from another circuit has rejected the reasoning in the *Hoskins* decision." Additionally, in another section of the Guide, DOJ and SEC point out that they have another tool at their disposal to pursue cases like *Hoskins* in the future. "Unlike the FCPA anti-bribery provisions, the accounting provisions apply to 'any person,' and thus are not subject to the reasoning in the Second Circuit's decision in *United States v. Hoskins* limiting conspiracy and aiding and abetting liability under the FCPA anti-bribery provisions."

This provides a good example of why companies cannot rely solely on case law to inform their compliance programs. Despite the *Hoskins* decision, DOJ and SEC are still taking an expansive view of their jurisdiction over foreign companies and individuals for conspiracy and aiding and abetting offenses. Companies' compliance efforts must reflect that view.

Key updates in the second edition

Clarification regarding the statute of limitations for criminal FCPA accounting violations

The first edition of the Guide advised that the statute of limitations for all substantive criminal FCPA cases was five years. The second edition clarifies that the statute of limitations is five years for violations of the anti-bribery provisions, but it is six years for violations of the accounting provisions. This is important because compliance professionals and government investigations lawyers must now account for the six-year statute of limitations when conducting internal investigations and due diligence for companies subject to the accounting provisions.



New case law on SEC's disgorgement authority

The Guide also includes updates about the statute of limitations for disgorgement remedies and SEC's disgorgement power more generally. By statute, SEC has five years to bring a civil action to enforce a fine, penalty, or forfeiture. However, the five-year limitation "does not prevent SEC from seeking equitable remedies, such as an injunction, for conduct pre-dating the five-year period" – unless, according to the Supreme Court, the *equitable remedy* being sought is disgorgement.

In the 2018 case of *Kokesh v. SEC*, the Supreme Court found that a disgorgement remedy amounts to a "penalty" and, therefore, it is subject to the five-year statute of limitations. Some questioned whether the SEC even had the legal authority to obtain disgorgement, but the Court left that question unanswered until its recent decision in *Liu v. SEC* in June 2020. In *Liu*, the Court confirmed that disgorgement is an equitable remedy and, thus, an available form of relief in civil actions filed by the SEC in federal courts. However, that power has limitations. The Court held that disgorgement shall not exceed the net benefit to the wrongdoer, and it must be awarded to the victims of the misconduct.

As we observed previously,[5] these limitations may create significant evidentiary hurdles for SEC in future proceedings. For FCPA cases, for example, victims may be hard to identify; and the Court left open the question of whether SEC can seek disgorgement in such cases.

Key updates in the second edition

New policies and guidance concerning corporate enforcement, monitorships in criminal matters, corporate compliance programs, and the so-called "Anti-Piling On Policy"

The updated Guide incorporates new principles and resources that inform DOJ's corporate enforcement decisions. DOJ continues to follow the department's longstanding *Principles of Federal Prosecution of Business Organizations*, which provide factors to be "considered in conducting an investigation, determining whether to charge a corporation, and negotiating plea or other agreements." New to those factors is "the adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging or resolution decision." In November 2017, DOJ incorporated its *FCPA Corporate Enforcement Policy* ("CEP") into the Justice Manual, which now also helps guide the department's enforcement decisions. The updated Guide highlights steps that companies can take to obtain a declination pursuant to the CEP when they uncover misconduct. "[W]here a company voluntarily self-discloses misconduct, fully cooperates, and timely and appropriately remediates, there will be a presumption that DOJ will decline prosecution of the company absent aggravating circumstances." The updated Guide also includes three examples of declinations since the CEP was adopted.

Key updates in the second edition

As has been the case since the first edition of the Guide, DOJ and SEC will also consider a company's compliance program when making enforcement decisions. In the updated Guide, they emphasize that compliance programs that exist only on paper will not suffice. Instead, compliance programs should to be "appropriately resourced" and frequently tested and improved to ensure effectiveness. DOJ will consider the adequacy and effectiveness of a compliance program when deciding "(1) the form of resolution or prosecution, if any; (2) the monetary penalty, if any; and (3) the compliance obligations to be included in any corporate criminal resolution (e.g., whether a compliance monitor is appropriate and the length and nature of any reporting obligations)." According to the updated Guide, "The truest measure of an effective compliance program is how it responds to misconduct." Such a program should have (1) "a well-functioning and appropriately funded mechanism for the timely and thorough investigations of any allegations or suspicions of misconduct"; (2) "established means of documenting the company's response, including any disciplinary or remediation measures taken"; and (3) a process for analyzing "the root causes of the misconduct" and providing timely and appropriate policies, training, and controls to prevent future compliance breaches.

Should companies want any additional resources, the updated Guide also references the DOJ's published guidance on the *Evaluation of Corporate Compliance Programs*, which "provides companies insight into the types of questions that prosecutors ask to evaluate and assess a company's compliance program."

Finally, the updated Guide provides more insight into how DOJ and SEC decide whether to impose a monitor as part of a corporate resolution, as well as details of the so-called "Anti-Piling On Policy," which influences how DOJ and SEC "strive to avoid imposing duplicative penalties, forfeiture, and disgorgement for the same conduct."

Current challenges

Current challenges

In the midst of a global pandemic, there is even more reason to construct and maintain effective compliance programs. The COVID-19 pandemic has spurred widespread economic uncertainty, including market volatility and the sudden onset of a recession. Historically, in periods of economic downturn, there is an increased risk within public companies of corporate executives and company employees engaging in fraudulent conduct. Thus, on March 23, 2020, SEC warned market participants that the Enforcement Division "is committing substantial resources to ensuring that our Main Street investors are not victims of fraud or illegal practices in these unprecedented market conditions."[6] And during a compliance webinar on April 23, 2020, top officials from DOJ and SEC's FCPA units urged companies to be vigilant during this time because they "anticipate an increase in fraud as companies become more desperate and try to cut corners in order to gain business."[7] As such, companies may expect increased enforcement from both SEC and DOJ, particularly as COVID-related inquiries could expose other evidence of wrongdoing.

Current challenges

This increased enforcement will run headlong into an era of diminishing compliance resources. The Hogan Lovells' Steering the Course study,[8] which contains opinion research conducted amongst 700 compliance leaders working in multinational companies with at least 2,000 employees in the U.K., U.S., France, Germany, Spain, China, Singapore, and Japan, found that compliance leaders have been experiencing significant pressures in their role balancing compliance with the desires of their business units, especially in high-risk markets, where companies must balance the pressure for growth with increasing regulatory pressure:

- In 2020, compliance leaders reported that only 41% of AB&C budgets increased over the last three years, compared to 84% in 2016.[9]
- In 2020, compliance leaders reported that only 42% of compliance teams have grown over the last three years, compared to 84% in 2016.[10]
- More than half of compliance leaders reported that although AB&C demands are ever-growing, their organization is cutting overall budgets.[11]

The results are stark. Even before COVID-19, compliance leaders felt that they were being asked to do more with less. COVID-19 has added new, and in many cases, unforeseen pressures and challenges. Companies are now dealing with additional budget constraints, supply chain disruptions, and adapting to remote work. For compliance leaders, this has been especially difficult as they grapple with how to conduct internal investigations remotely, possibly involving furloughed employees, and additional difficulty in assessing risk.

Effective compliance measures for the new normal

Make the business case for adequate compliance funding

Compliance leaders facing potential COVID-19-related budget or personnel cuts should consider bringing the Guide to corporate management – DOJ and SEC have spoken and compliance is not the area to cut costs, at least not in an across-the-board percentage reduction mandated by management. Indeed, a top DOJ prosecutor recently said that, although DOJ understands that companies may need to make cuts, the department will "be looking to make sure that a company is not just discarding its compliance program as a result of difficult times."[12] Companies "will need to ensure that their compliance programs are still able to address any new or ongoing risks," which may mean that resources are reallocated to address the specific risks posed to the business by the current climate.[13] The Guide frequently cites the importance of an effective compliance program that is tailored to address the risks specific to a company's operations. For example, in discussing the CEP, companies are reminded of the benefit of voluntarily self-disclosing misconduct, fully cooperating, and timely and appropriately remediating problems – namely, reduced penalties and the presumption of a declination. Without a strong compliance program and ongoing monitoring, companies are less likely to identify issues early enough to reap the benefits of voluntarily self-disclosure. Further, as discussed above, the adequacy and effectiveness of a company's compliance program influence DOJ's decisions about whether to prosecute, how much to fine a company, and what compliance obligations to impose on a company as part of a resolution (which can be very costly and intrusive). Money spent on compliance now could save the company significantly more in the future.

Data analytics and monitoring risks

DOJ has made it clear that collecting data to measure the effectiveness of a compliance program is important to ensuring appropriate compliance efforts. The new edition of the Guide suggests undertaking employee surveys to measure compliance culture and the strength of internal controls, identifying best practices, and detecting new risk areas. Although the nature and frequency of proactive evaluations may vary depending on the size and complexity of an organization, the idea behind such efforts is the same: continuous improvement.

In line with DOJ's guidance, compliance personnel should consider working with their human resources colleagues to conduct employee surveys, particularly during this unstable and ever-changing time. These "voice of associates" surveys can often provide candid comments about what line-level employees are seeing. Compliance leaders could then use the results of the survey to design policies and initiatives for the coming fiscal year. Work may not return to normal for some time, and the insights gleaned about compliance during remote work, to take one example, could be invaluable to an organization.

In addition, there are several vendors that offer suites of risk and compliance solutions, which can help manage analytics and benchmarking metrics as well as assist with third party due diligence and monitoring. To the extent budgetary constraints allow, such programs may be useful in monitoring and detecting new risk areas. However, compliance professionals should continue to engage in proactive measures to identify risks and anomalies. They should continuously ask questions and conduct audits as needed to pressure test the data: Are sales trending higher than expected in a certain, high-risk region? Do the accounting records reflect payments to entities not listed on an approved vendor file? Are third party invoices unusually vague?

Further, companies must ensure that anonymous reporting hotlines have been continuously monitored and any issues investigated, particularly if compliance efforts stalled during the onset of the pandemic. To the extent there is a backlog, those reports should be addressed promptly. Further, any ongoing investigations that may have stalled during the initial shelter-in-place orders should be reactivated and concluded.

Conducting internal investigations remotely

Certain aspects of an effective compliance program are certainly more difficult to implement during COVID-19, namely conducting internal investigations. The second edition of the Guide states that companies should have in place an "efficient, reliable, and properly funded process for investigating the allegation and documenting the company's response, including any disciplinary or remediation measures taken." However, internal investigations often rely on face-to-face communication and assessments of credibility. Moving to a remote format may be the only viable alternative at present.

To be sure, remote interviews conducted over telephone or video conference may pose a greater challenge. There is more to consider logistically and interviewers may find the setup less than ideal for establishing rapport and assessing witness credibility. To ensure video interviews run smoothly, we recommend having all passwords and links set up and ready in advance of the interview start time, and conducting a practice session beforehand to familiarize oneself with the technology. Many programs offer capabilities such as virtual backgrounds that can make participants feel more comfortable if participating in interviews from their homes. As with in-person interviews, we recommend staffing all interviews with more than one attorney or investigator, and asking the additional person to take careful and accurate notes. Even though the video environment may make an interview easier to record, we do not recommend creating an audio or video recording of interviews, as this creates a greater risk that the interview will be discoverable.

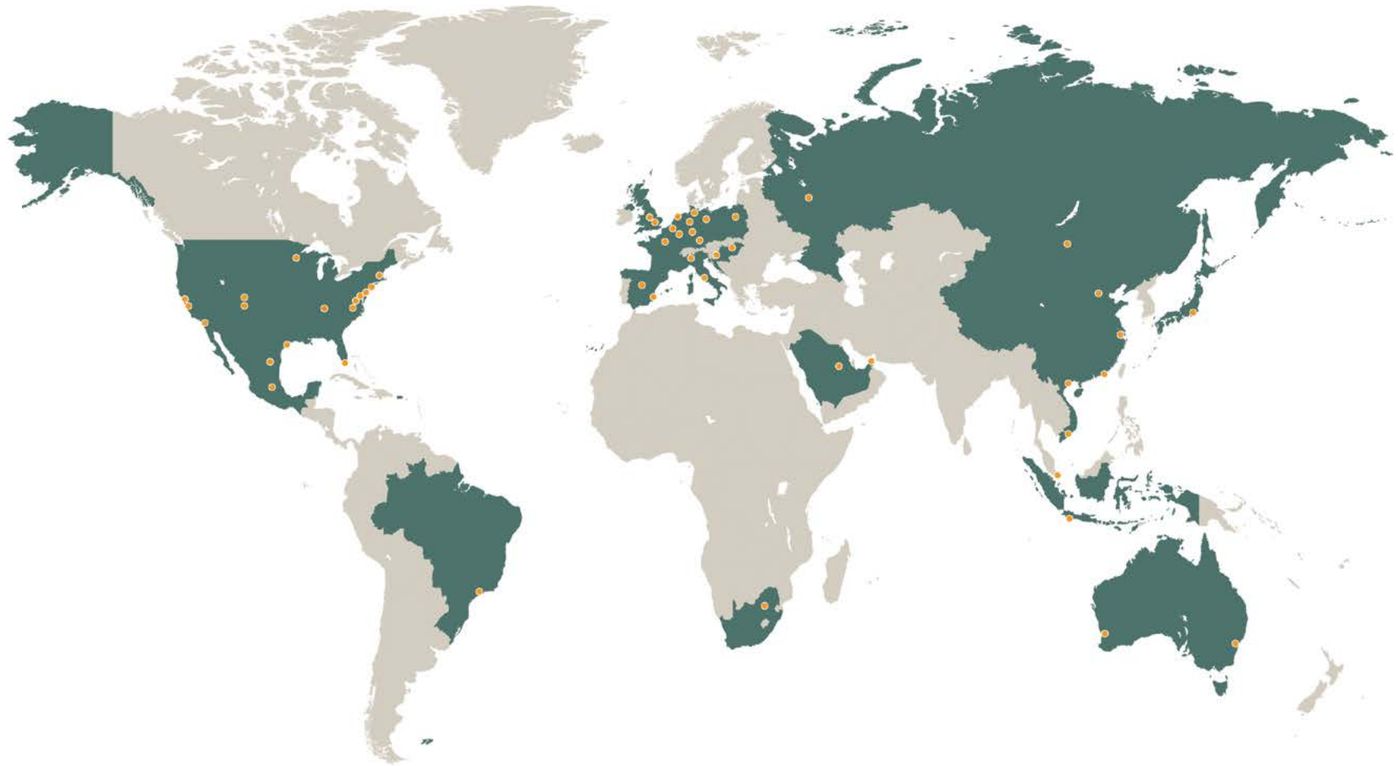
Data preservation, collection, and review largely can be accomplished remotely, particularly for data stored in the cloud or on a server. There are technological solutions to preserve and collect data stored on local drives and on personal devices, but those may be limited to company-owned devices and require network synchronization. In addition, data privacy and data transfer obligations must be reviewed and complied with.

Whether remote or in-person, documentation and follow-up is key when aiming to comply with DOJ and SEC expectations. While one must be careful to protect legal privilege, investigators must promptly present their findings to any necessary decision-makers such that any appropriate disciplinary or remediation measures may be taken.

Conclusion

The second edition of the Guide reaffirms DOJ and SEC expectations about corporate compliance programs, which may not mesh with the reality that many compliance leaders are facing with respect to corporate budgets and priorities. Although COVID-19 could further that divide, the recommendations in this article can aid compliance leaders in adapting to a new normal and emerging from the pandemic even stronger than before.

No matter your concerns, the lawyers in our truly global Investigations, White Collar, and Fraud practice can help you navigate this new guidance in context. We have boots on the ground throughout Asia, Latin America, Russia, Europe, and Africa. We can quickly assemble a team capable of providing tailored advice inclusive of cultural issues, local labor and employment laws, specific regional privacy protections, and varying privilege concerns.



Endnotes

1 https://www.justice.gov/criminal-fraud/page/file/937501/download.
2 https://www.justice.gov/criminal-fraud/file/1292051/download.
3 On April 23, 2020, top officials from DOJ and SEC's FCPA units joined a compliance webinar and spent much of the time discussing the pandemic's impact on compliance and enforcement. See Ines Kagubare, "FCPA officials urge companies to communicate pandemic-related difficulties quickly," Global Investigations Review (April 23, 2020), available at https://globalinvestigationsreview.com/article/jac/1226073/fcpa-officials-urge-companies-to-communicate-pandemic-related-difficulties-quickly. More recently, during another compliance webinar on July 27, 2020, a prosecutor from DOJ's fraud section "said that while companies facing economic difficulty may have to make cuts to their compliance programs, they should do so in a way that will still allow them to address compliance risks in an effective manner." Maggie Hicks, "DOJ official discusses how to address compliance budget challenges," Global Investigations Review (July 28, 2020), available at https://globalinvestigationsreview.com/article/jac/1229433/doj-official-discusses-how-to-address-compliance-budget-challenges.
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7 Kagubare, *supra* note 1.
8 https://stc.hoganlovellsabc.com/.
9 https://stc.hoganlovellsabc.com/executive-summary.
10 *Id.*
11 https://stc.hoganlovellsabc.com/the-global-outlook/pressure-points.
12 Hicks, *supra* note 1.
13 *Id.* ("[The DOJ official] further explained: 'What I would want to see is a company coming in and explaining, 'OK, here are the cuts that we have to make in connection with our business, here are our cuts correspondingly made to compliance. But here are the reasons we felt comfortable making these cuts and why we think that we are still able to address the very real risk that we have.").

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