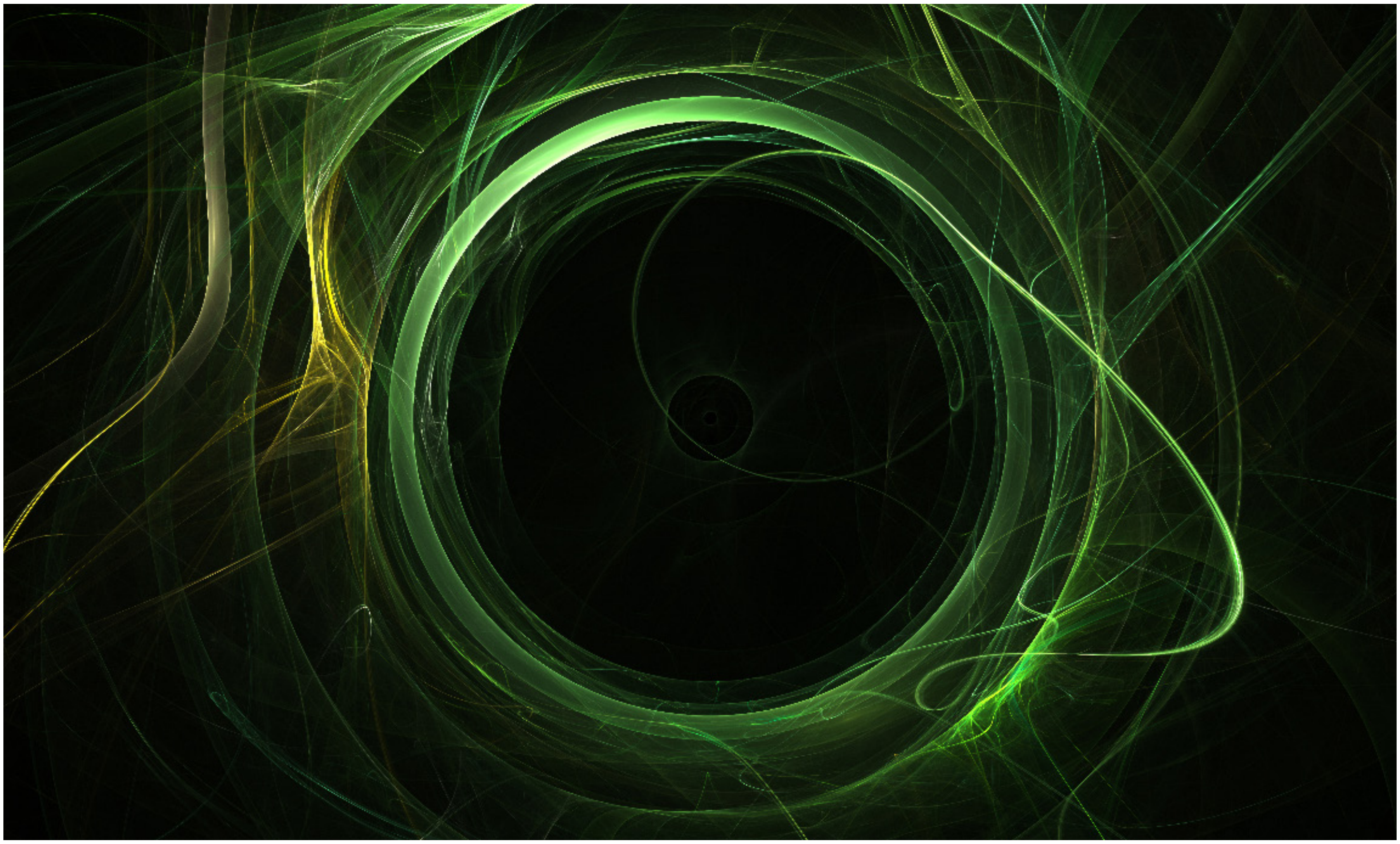

FCPA compliance in the time of COVID-19

Companies shouldn't put their foot on the brakes on anti-corruption compliance

US and global regulators continued to actively enforce anti-corruption laws—including the Foreign Corrupt Practices Act (FCPA)—in 2019, with activity (both in terms of number of enforcement actions as well as monetary fines collected) increasing as compared to 2018. In the US, regulators brought 25 corporate enforcement actions, charged/indicted 40 individuals, and assessed over $2.9 billion in penalties.[1] In the first quarter of 2020, FCPA enforcement continued with two corporate enforcement actions (including the largest single FCPA resolution of all time which included a penalty of $2.1 billion), two individuals pleading guilty to FCPA-related offenses, and three new indictments brought by the US Department of Justice (DOJ) for a prior FCPA case.[2] Additionally, global enforcement authorities continued to update existing and/or issue new guidance around anti-corruption, including updates to the *Corporate Enforcement Policy and Evaluation of Corporate Compliance Programs* from (the Guidance) from the DOJ.[3]

On June 1, 2020, the DOJ again amended the Guidance to (among other items) place greater emphasis on two key areas: [4] First, the updated Guidance makes it clear that, in addition to evaluating whether a company's compliance program is implemented effectively, regulators will also assess the degree to which it is "adequately resourced and empowered to function effectively," and places greater emphasis on the risk of under-resourcing.[5] Second, the updated Guidance introduces a new factor that regulators will consider when evaluating compliance programs – data resource and access. Specifically, DOJ will be considering the degree to which compliance resources have meaningful access to data "to allow for timely and effective monitoring and/or testing of policies, controls, and transactions." [6] All in all, the revised Guidance underscores the continued importance the DOJ will be placing on FCPA compliance, as well as additional areas for companies to consider when evaluating their own programs.

Fast-forward to present day and the COVID-19 pandemic is presenting additional significant financial, operational, and compliance challenges to global organizations, including disruptions in supply chains, reductions in staff and compliance budgets, displacement resulting in employees working remotely, and travel restrictions. Due to these factors and the number of other concerns that management is responding to, it may be tempting for companies to "put their foot on the brakes" on their own anti-corruption compliance efforts, believing there may be decreased regulatory enforcement or scrutiny around such areas. However, that is unlikely to be the case. Using the financial crisis as a barometer, FCPA enforcement activity continued (and even increased) in the subsequent years, and we would not be surprised if there was a similar pattern for this crisis.

The business community appears to be aware of the heightened fraud and corruption risk companies face. Deloitte conducted a poll of compliance professionals during a recent webcast, and approximately 70% of respondents expected an increase in fraud perpetrated against their company, and approximately 65% reported that they expected corruption/kickbacks and other types of improper payment schemes to increase the most as a result of the current economic climate.[7] Examples of these heightened risk factors include:

- **Potentially weakened internal control environment as a result of remote working conditions:** Most companies' workforces are working remotely, including those professionals responsible for internal controls and compliance. Particular controls, such as segregation of duties or physical oversight, may be weakened due to the inability to access or review transactions and supporting materials in a timely manner. These factors may increase the ability for fraudsters to perpetrate corrupt activity (e.g., disguise improper payments made to government officials, establish fictitious vendors).
- **Increased government interactions and related touchpoints:** For many companies, the current crisis may lead to additional interactions with government entities and officials, particularly with the sharp increase in stimulus and other types of funding being poured into the global economy. Enforcement authorities will likely look to place heightened scrutiny on these interactions, which by their nature present opportunities for corporate actors to engage in corrupt and/or unethical behaviors to seek improper advantages.
- **Supply chain disruptions and other changes in third-party risks:** The pandemic has caused major shifts in organizations' global supply chains. Corporations may have been forced to cease and/or shift manufacturing out of certain countries, identify new vendors to replace those that may have gone under, or quickly identify new types of third parties to adapt to a changing business model. Competition for critical supplies may encourage the hiring of third parties who seek to obtain the materials through bribes or other illegal inducements. Companies responding to these developments will likely encounter material changes in the makeup of their third-party network, which further highlights the need for appropriate risk mitigation procedures (e.g., diligence, onboarding) to be in place.
- **Increased whistleblower activity:** While it may be too early in the pandemic to quantify objectively, it's likely that corporate whistleblower activity will increase in the near future. As employers take aggressive steps to respond to the crisis, employees may be pressured to meet unrealistic sales goals and other targets, potentially leading to increased wrongdoing as well as the discovery and reporting of such wrongdoing (either internally or externally).

Taken together—the likelihood that anti-corruption enforcement and scrutiny will continue to be pursued by regulators, combined with increased risks of corruption and fraud—it is imperative that companies continue to remain vigilant with respect to anti-corruption compliance and take proactive measures to ensure compliance programs are adapted to the current environment.

To that end, there are several tangible, practical steps that companies can take now to better identify, mitigate, and monitor corruption-related risks in the new environment. They include:

- **Refresh anti-corruption risk assessments to reflect the changing risk profile:** Many companies have found themselves subject to regulatory scrutiny when compliance changes lag behind changes in that company's risk profile. There are many ways in which the current pandemic has altered the state of the global economy and how companies operate, which will inevitably cause a company's risk profile to change as well. There may be new and/or emerging risks posed by shifts in operations, geographies, third-party interactions, and government touchpoints. Companies should revisit their anti-corruption risk assessments to ensure they are appropriately picking up on these new risk factors, and then tailor their compliance programs (e.g., policies, procedures, controls) to appropriately respond to such risks.

- **Tailor investigation strategies to adapt to a remote ("virtual compliance") world:** If and when allegations of potential bribery arise, companies may no longer be able to rely on their traditional approach to investigating such allegations, which often rely on physical collection of data, emails, and other information, travel for site visits, and in-person interviews. Companies will need to adapt their investigative strategies so that they can productively and proactively investigate potential misconduct remotely, which may include rethinking the ways in which devices are imaged, documents and other data are collected/analyzed, financial transactions are tested, and interviews are conducted. These capabilities currently exist, many times requiring only remote access to a company's systems to acquire the unstructured (e.g., email) and structured data (e.g., general ledger) necessary to effectively and efficiently conduct the necessary investigative procedures. Adapting your investigative approach for a "virtual compliance" world can better position companies to more quickly and efficiently respond to allegations of potential wrongdoing.
- **Enhance due diligence procedures for potential new and existing third parties:** Along with the shift in a company's third-party network, management may consider enhancing how it performs due diligence of new vendors/suppliers, agents, and distributors (or refreshing diligence for existing high-risk third parties). Higher-risk third parties, such as those having direct or indirect relationships with public officials and local government entities, should be re-examined to determine if negative information has surfaced, such as complaints about corrupt behavior or other potential integrity issues. Once diligence is performed, there should be appropriate protocols and controls in place to mitigate identified red flags, properly onboard, and monitor transactions with the third party.
- **Refresh anti-corruption training based on the current economic environment:** In an environment with increased risk and opportunity for potential wrongdoing, companies should reinforce that their employees need to make the right decisions, as well as recognize and report any unethical behavior. As such, companies may wish to refresh their anti-corruption training efforts (particularly with respect to high-risk functions such as Finance) to ensure personnel are being trained on the company's new risk profile as well as any new controls that may have been implemented as a result.
- **Ensure appropriate FCPA diligence protocols are in place for future M&A activity:** As companies are dealing with the immediate fallout from the pandemic and the resulting economic uncertainty, much existing M&A activity has been temporarily put on hold. However, as time passes, companies will likely look to take advantage of more favorable pricing and low interest rates to identify new merger or acquisition targets, and troubled sellers may be especially motivated to complete deals as quickly as possible. When M&A activity does rebound, it will be critical that companies incorporate anti-corruption and anti-fraud focused procedures as part of any pre-acquisition diligence review—as well as any post-acquisition integration effort—to identify risks of prior bribery, financial statement manipulation, and other accounting-related improprieties.

Companies are facing significant headwinds as a result of the current pandemic, and there is no shortage of concerns competing for management's attention. At the same time, however, companies should recognize how the new environment creates additional opportunity for corrupt and unethical behavior to occur, and that regulators will be on the lookout for companies who run afoul of global anti-corruption laws such as the FCPA. Perhaps seeking guidance from external legal counsel and/or forensic providers, companies should take this time to ensure their anti-corruption compliance program is appropriately updated and responsive to actual risks present in the current environment, which can better enable them to effectively identify and respond to potential problems down the road.

1 US Securities and Exchange Co mmission. *SEC Enforcement Actions: FCPA Cases.* https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml; US Department of Justice. *FCPA Enforcement Actions.* https://www.justice.gov/criminal-fraud/related-enforcement-actions
2 Ibid.
3 US Department of Justice. FCPA Corporate Enforcement Policy. https://www.justice.gov/criminal-fraud/file/838416/download
4 US Department of Justice. Evaluation of Corporate Compliance Programs. https://www.justice.gov/criminal-fraud/page/file/937501/download
5 Ibid. at 9-10.
6 Ibid. at 12.
7 Deloitte Financial Advisory Services LLP. Managing Fraud Risk in Uncertain Times. (May 11, 2020).

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