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FLAGGING FCPA MISCONDUCT IN VIRTUAL WORK ENVIRONMENTS

Traditional compliance structures are facing new challenges from remote and hybrid workforce environments. In this article, the authors begin by describing in detail these challenges and federal regulators' heightened expectations for corporate compliance programs. They then turn to two recent enforcement actions to illustrate that DOJ and SEC continue to emphasize high-risk areas and anticorruption controls breakdowns in their evaluations of violations by companies. They close with six steps a company can take to reduce the risks of enforcement actions and FCPA violations.

By Michael M. Farhang and Jeannine Lemker *

“I believe that every person is born with talent.” Maya Angelou

The last several years presented companies with an unexpected opportunity to tap into global talent, in part because of the accelerated change in how — and where — people work. Our post-pandemic workforce is now largely comprised of people who prioritize flexibility to work in close-by and far-flung locations, and who seek flexibility through hybrid work and agency as to when (if at all) they visit an office. While this led to unprecedented mobility and unlocked that innate talent Maya Angelou spoke of, for compliance and legal specialists it requires us to rapidly adapt to new risks stemming from this dispersed workforce. And it requires us to think differently about how we reach employees to drive a culture of ethics and compliance. Here, we consider what emerging risks look like in a dispersed workforce and propose possible solutions to help compliance and legal professionals with new tools to meet this changed environment.

The COVID-19 pandemic and its effects on the job market dramatically increased the openness of corporate employers to various forms of remote or hybrid work environments — particularly for professional and white collar employees. According to a 2022 Gallup study of more than 140,000 U.S. employees, 81% reported a current remote or hybrid (between 10% and 100% remote) job setup, with 91% expressing a preference for a remote or hybrid job setup in the future.¹ Opportunities² for remote work increased employee job

¹ Ben Wigert, *The Future of Hybrid Work: 5 Key Questions Answered With Data*, Gallup.com (March 15, 2022), available at <https://www.gallup.com/workplace/390632/future-hybrid-work-key-questions-answered-data.aspx>.

² Laura Wronski and Jon Cohen, *Who is the Happiest Working from Home? Here is What the Latest Jobs Market Data Says*, CNBC (May 26, 2020), available at <https://www.cnbc.com/>

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satisfaction, and flexible arrangements have had the potential for increasing worker mobility.

At the same time, the demands of international commerce have not changed. Arguably, the pressure increased as global supply chains struggled, inflation rose due to low or monopolized supply, and economies became flush with pandemic funding intended to inject needed cash into consumers' pockets and provide small businesses with relief. This perfect storm means that business corruption risks have not abated and risks of the more traditional forms of graft typically addressed by compliance have become supercharged. At the same time, a newly dispersed workforce and the necessary move to virtual communication may enhance risk and weaken transparency. Established controls may be designed for in-person work dynamics between suppliers and customers taking place primarily in physical office or facility environments with multiple personnel present. Far more business communication is now electronic and employees may be under greater stress from increased work demands, reductions in workforces, less support, and economic pressures, leading to greater risks that compliance safeguards may give way. Macroeconomic realities together with evolving job conditions present new challenges for compliance personnel to ensure that compliance programs, including anticorruption policies and controls, are still well-equipped to detect red flags, prevent misconduct, and ensure each employee understands their role in maintaining an ethical culture through responsible decision-making.

NEW RISKS FOR A NEW WORKFORCE: KEY COMPLIANCE CHALLENGES PRESENTED BY REMOTE AND HYBRID WORK

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2020/05/26/who-is-happiest-working-from-home-heres-what-latest-jobs-data-says.html; Bryan Robinson, *3 New Studies End Debate over Effectiveness of Hybrid and Remote Work*, Forbes, February 4, 2022, available at <https://www.forbes.com/sites/bryanrobinson/2022/02/04/3-new-studies-end-debate-over-effectiveness-of-hybrid-and-remote-work/?sh=310d577c59b2>.

Recent moves to remote and hybrid work environments exerted pressures on traditional compliance structures that did not previously exist in fully- or largely in-person formats. For example, business disruptions caused by COVID-19 lockdowns drew resources and experience away from the traditional compliance guardians like legal, compliance, finance, human resources, and internal audit departments, which quickly pivoted to developing new safety protocols, figuring out how to conduct a quarter-end close fully remotely, or rapidly ingesting and developing strategies for new global regulations. These functions likewise fell victim to turnover in key positions as a result of workforce challenges created by lockdowns, employee absences due to illness, the Great Resignation, layoffs, or other resource reductions made necessary by reduced revenues. This turnover may have impacted the level of experience and seniority of personnel in compliance and audit positions globally.

In addition, trends away from traditional forms of authorization for expenditures or contracts like inked signatures or in-person approvals that were already well underway before the pandemic have only accelerated as companies increasingly rely on digital authorizations through software systems, e-mails, or portals that require no in-person or live coordination. Consider what it took to execute SEC filings at quarter-end fully remotely, including the expanded volume of electronic certifications, shared documents, approval workflows, and more.

Similarly, coordination among employees and oversight of customer interactions has become more difficult. For example, customer meetings often take place remotely or outside the office. Increased remote work and employee travel may create new burdens for expense reimbursement controls. Finally, disruptions to supply chains due to lockdowns and economic pressures forced many companies to rely on and onboard rapidly new suppliers for raw materials, goods, and labor. In the demands of constrained supply situations, companies may have been forced to accelerate, change, or even curtail their traditional third-party diligence procedures.

The job of compliance professionals has no doubt become tougher. An informal poll of compliance

professionals during a May 2020 webcast by Deloitte found increased levels of concern regarding elevated fraud, kickback, and bribery risks during the pandemic due to weakened internal control environments, increased governmental touchpoints due to pandemic stimulus or business relief programs, supply chain disruptions, and increased pressure to cut corners due to business pressures and unrealistic revenue goals.³ A June 2020 survey of 343 compliance professionals in different industries at an early stage in the pandemic found 36% of respondents reporting that compliance budgets had been reduced either moderately or significantly.⁴ A 2021 Thomson Reuters survey of 720 compliance professionals in the financial industry reported that in that industry compliance budgets were not expected to keep pace with the expected increases in the size of compliance teams, and the difficulty of managing a remote team was cited as one of the biggest challenges to maintaining a culture of compliance and managing risks of illegal conduct.⁵

The high degree of employee turnover occurring during 2020 and 2021 likely has meant that a whole generation of employees may have been onboarded without traditional in-person orientations and trainings, never met a compliance colleague, or felt immersed in the culture of ethics the company strives to maintain. The influx of new employees who may come from companies in other industries (either highly regulated or minimally regulated) and geographic footprints (purely domestic or largely international) will mean that widely divergent company cultures and traditions relating to compliance will be converging with a potential for gaps in awareness of compliance culture to grow. At the same time, remote work has meant that fewer “listening channels” now exist, *i.e.*, opportunities for in-person interaction and bonding both among compliance personnel and vis-à-vis the business units they serve. Communication in a remote or hybrid work environment

is now more digital and “noisy,” *i.e.*, voluminous and transmitted through e-mails and other digital avenues that may be easier to ignore.

During the most restrictive periods of the pandemic, work travel to far-flung business locations became nearly impossible and this likely affected both the opportunities for on-the-ground monitoring and audits of business activities and corporate investigations. Conducting remote compliance investigations and internal audits, for example, required adjustments that will likely persist over time with remote and hybrid work — videoconference interviews, virtual datarooms, and online trainings in place of in-person trainings are now commonplace. Most compliance professionals see both opportunities and reasons for caution in these new investigation and monitoring practices — they allow compliance to do more yet may mean some risk that key signals that used to be identified during an interview or an in-person third party audit could be missed.

U.S. GOVERNMENT EXPECTATIONS REGARDING CORPORATE COMPLIANCE PROGRAMS

At the same time, the expectations of U.S. regulators regarding the strength and resilience of corporate compliance programs have not flagged and, like risk, have expanded and accelerated. In its June 2020 updates to its Guidance on Evaluation of Corporate Compliance Programs, the DOJ clarified that in making prosecutive and leniency decisions it will focus on whether corporate compliance programs are (1) adequately resourced and empowered to function effectively and (2) structured to ensure adequate access to data and information across functions so as to permit companies to adapt their policies, procedures, and monitoring to address risk.⁶ One year later, in June 2021, the Biden Administration established the fight against global corruption as a “core national security interest of the United States,” and pursuant to presidential directive, federal departments and agencies were to conduct an interagency review of existing anticorruption efforts.⁷ In December 2021, the Administration published the first *United States Strategy on Countering Corruption* based on the findings of this review. The Strategy identified five pillars for

³ Deloitte, *FCPA Compliance in the Time of Covid-19*, available at <https://www2.deloitte.com/us/en/pages/advisory/articles/fcpa-compliance-time-covid-19.html>.

⁴ Society of Corporate Compliance and Ethics & Health Care Compliance Association, *Compliance and the Covid-19 Pandemic*, (June 2020) at 7, available at <https://www.corporatecompliance.org/sites/corporatecompliance.org/files/2020-06/2020-COVID-19-survey-report%20%28%29.pdf>.

⁵ Thomson Reuters, *Cost of Compliance 2021: Shaping the Future*, at 5 (2021), available at <https://legal.thomsonreuters.com/content/dam/ewp-m/documents/legal/en/pdf/reports/shaping-the-future.pdf>.

⁶ U.S. Department of Justice, Criminal Division, *Evaluation of Corporate Compliance Programs*, (June 2020), available at <https://www.justice.gov/criminal-fraud/page/file/937501/download>.

⁷ Available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/03/memorandum-on-establishing-the-fight-against-corruption-as-a-core-united-states-national-security-interest/>.

combating corruption, including curbing illicit financing and holding corrupt actors accountable.⁸ The U.S. AML Act of 2020 legislation passed in 2021 strengthened the government's ability to investigate and prosecute corruption-related money laundering, and expanded the budget and enforcement tools of the Financial Crimes Enforcement Network. Pursuant to the 2020 Act, FinCEN listed combating corruption as a national enforcement priority.⁹

The DOJ also stressed the importance of effective compliance responses to ongoing misconduct and made clear that corporate recidivism will draw harsh penalties. In October 2021, the Deputy Attorney General announced that the DOJ will increasingly scrutinize companies that have received pretrial diversion through deferred or non-prosecution agreements in the past to determine whether they have continued criminal conduct during the period of those agreements. The DOJ's renewed verve to impose compliance monitorships in certain resolutions where a compliance breakdown occurred only heightens the importance of maintaining adequate compliance programs. Moreover, in a recent August 2022 report issued by the U.S. Sentencing Commission, the Commission highlighted the importance of an effective compliance program in helping corporations avoid criminal prosecution.¹⁰

Recent enforcement resolutions show that both the DOJ and SEC continue to emphasize high-risk areas and anticorruption controls breakdowns in their evaluations of violations by companies. Such resolutions are often premised on alleged issues like disregard of red flags raised by due diligence, audit findings and complaints, and failures to implement recommendations from internal audit or legal departments. Other issues include the use of risky third-party intermediaries in connection with government-related business, deficiencies in post-acquisition compliance integration, and departures from internal policies and procedures.

In April 2022, Stericycle, a global waste disposal company, agreed to parallel DOJ, SEC, and Brazilian

enforcement resolutions relating to an alleged bribery scheme affecting government waste management contracts in Brazil, Mexico, and Argentina. The scheme involved the alleged use of false recordkeeping to conceal bribe payments, including code words and fictitious third-party transactions. Stericycle agreed to the imposition of a two-year compliance monitorship and agreed to pay more than \$84 million in criminal and civil penalties¹¹

In May 2022, Glencore, a Swiss commodities trading firm, pled guilty to FCPA-related charges arising from alleged bribes to government officials in Africa and agreed to the imposition of a three-year compliance monitorship. The DOJ alleged the use of coded language and fictitious third-party consulting agreements to conceal bribery. As part of the settlement, Glencore agreed to pay more than \$700 million in criminal penalties and forfeitures.¹²

NEW TOOLS FOR A NEW WORKFORCE: CONSIDERATIONS FOR ENHANCING COMPLIANCE IN REMOTE AND HYBRID WORK ENVIRONMENTS

There are a number of steps companies can take to make sure they meet the challenges of a new remote work environment. Your new audience is a workforce inundated with e-content and perhaps experiencing videoconference fatigue. Simplicity and cross-company integrated messaging is likely to land far better than complex, stand-alone engagement strategies. Likewise, the role a company's control infrastructure plays has become all the more crucial, as it operates to protect the company in the background in a consistent, reliable, and durable way while lifting the burden off of individual, dispersed employees who may face challenges making decisions in the same way. Partnering with other company components like legal, finance, human resources, and audit that focus on risk mitigation is increasingly important to drive these principles forward. Specific actions can include the following:

First, anticorruption policies and related procedures, including policies pertaining not just to corruption, but also to money laundering and trade sanctions issues, can be refreshed to accommodate both new legislation and remote environment risks. For example, your compliance hub or online policy ecosystem can be

⁸ *Id.*

⁹ Financial Crimes Enforcement Network, U.S. Department of Treasury, *Anti-Money Laundering and Countering the Financing of Terrorism National Priorities*, June 30, 2021, available at [https://www.fincen.gov/sites/default/files/shared/AML_CFT%20Priorities%20\(June%2030%2C%202021\).pdf](https://www.fincen.gov/sites/default/files/shared/AML_CFT%20Priorities%20(June%2030%2C%202021).pdf).

¹⁰ United States Sentencing Commission, *The Organizational Sentencing Guidelines: Thirty Years of Innovation and Influence* (August 2022).

¹¹ Available at <https://www.justice.gov/opa/pr/stericycle-agrees-pay-over-84-million-coordinated-foreign-bribery-resolution>.

¹² Available at <https://www.justice.gov/usao-sdny/pr/glencore-entered-guilty-pleas-foreign-bribery-and-market-manipulation-conspiracies>

recalibrated for simplicity, contemporary FAQs, and easy access. This includes new consideration for translation or public-facing policies, giving employees faster access to key approval controls dos and don'ts, and immediate escalation channels to seek guidance or help. Likewise, “snackable” guidance or training launched in real time (for example, as employees are booking travel or seeking approvals) that delivers action-oriented risk scenarios highlighting the above can be a cost-effective and “less noisy” way to reach newer employees who are still trying to understand expectations.

Second, periodic risk assessments should be updated to take account of the company’s changing business and geographic focus, third party and customer relationships, and personnel footprint, and to plan budgets and personnel resources for the compliance program accordingly.

Third, consider whether to augment or adapt the company’s compliance analytics program to change rules-based assumptions about the supply chain or risky third parties (*e.g.*, by enhancing red flags for newly onboarded third parties or those whose business was born during the pandemic). Compliance’s access to data on transactions, vendor relationships, risky expenditures, and government touchpoints can be reviewed to consider whether emerging data sources are useful to find patterns in expense reports, sales leads, or others. Diligence procedures for third parties can be evaluated to see if there are reasons to enhance controls based on the changing nature of the supplier community or greater levels of government interface created by increased pandemic restrictions, programs, or government-facing business.

Fourth, investigation and audit strategies can be adapted to the remote and hybrid work environments by updating the investigation procedures manual or other

codes governing how an investigation team conducts its work, seeks approvals, and makes findings. Companies can build training on effective ways to conduct remote interviews and fact-finding, create playbooks for local on-the-ground compliance resources, expertise, and links to local counsel. Training can take advantage of digitization of books and records in overseas locations to enable easier access at headquarters. Audit planning can include not just testing of older, stalwart controls, but highlighting newer product or geographic control challenges, such as newer controls for a dispersed contingent workforce.

Fifth, strengthened management-led committee structures — including ones that tackle issues of emerging risk — that operate remotely can increase interaction between the compliance organization and international business and help to promote more “listening channels,” and regular compliance discussions. This should lead to faster access to emerging business strategies that could present risk, real-time prioritization of resources, better messaging, and reporting lines for complaints.

Sixth, anticorruption training can be refreshed and diversified to reduce the risks of “videoconference fatigue” and to keep training up-to-date and specific regarding current company-specific risks.

Although remote work may give a surface appearance of reducing compliance’s reach into the business, in many ways it can create opportunities to deepen and further integrate the role of a company’s compliance program. Innovations and new strategies can easily overcome challenges posed by physical distance of the compliance team from business colleagues. And they can actually work to strengthen the important partnership role that compliance can play in promoting the company’s mission of responsible business and keeping the business safe from legal risk. ■