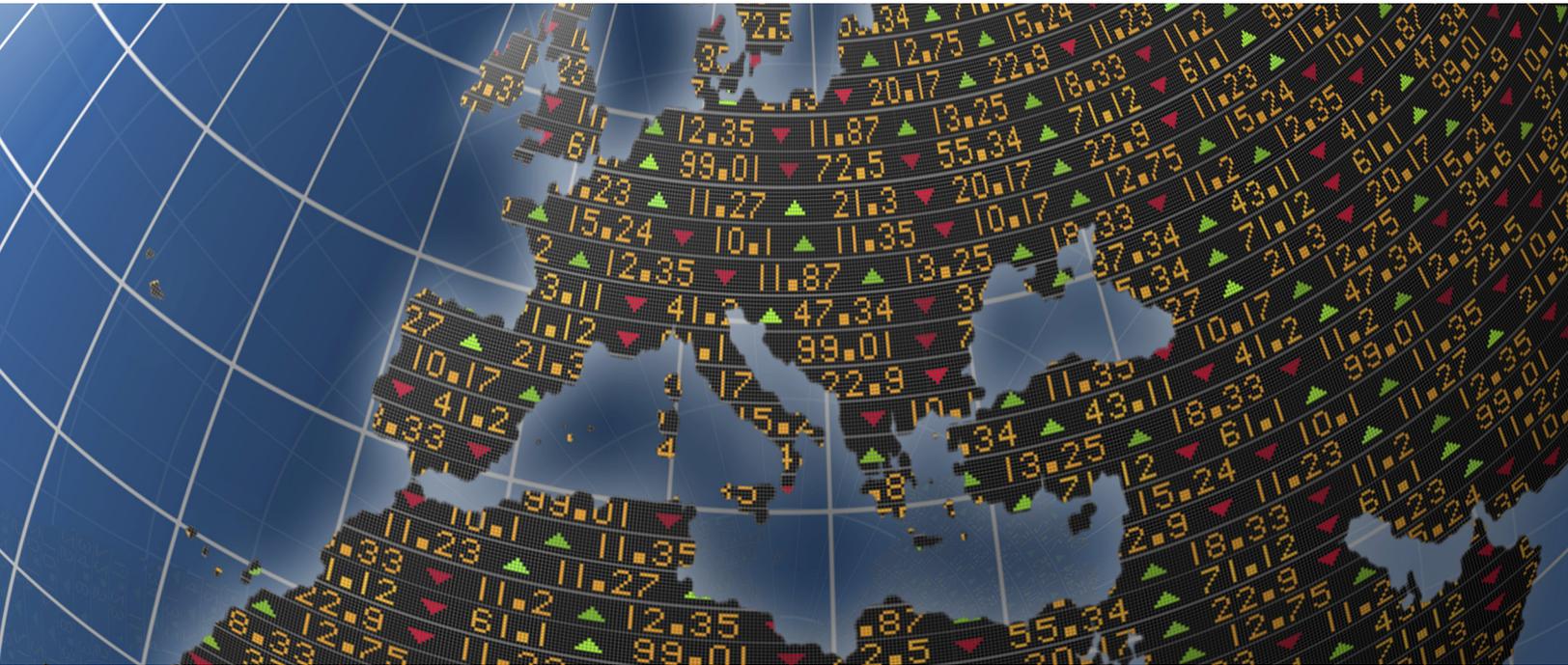


FCPA Update

A Global Anti-Corruption Newsletter



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eogrosz@debevoise.com, or
pferenz@debevoise.com

Safeguarding Corporate Compliance Programs During the COVID-19 Crisis

COVID-19 has altered life for billions, including how companies interact with their employees, business partners, and regulators. Some changes will reverse as the pandemic ebbs or the virus becomes treatable. Others likely will remain for an extended period of time or even become permanent.

No matter the exact course of the coming months, disruptions from COVID-19 already have had a significant impact on corporate compliance functions, internal investigations, and government enforcement. These disruptions will continue to evolve, affecting companies in differing ways and leaving an unmistakable imprint on the compliance landscape.

Although resources and international travel are likely to be constrained for some time, companies still can take meaningful steps to mitigate their compliance risks. In the short term, employees working remotely can address many of the

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compliance issues that routinely arise, including by leveraging videoconferencing and other technologies. To do so effectively requires an intense focus on identifying shifting compliance risks, purposefully allocating and coordinating compliance resources, and consistently messaging that compliance remains critical. As local travel within jurisdictions resumes, smart planning and the efficient use of resources can mitigate some disruptions to compliance programs. At the same time, counsel and compliance professionals should recognize that some tasks are best left until a return to relative normalcy.

Given the importance of maintaining a robust compliance program, we offer ten strategies for doing so at this trying time.

1. Review Risk Assessments and Adjust Controls Accordingly

As reflected in DOJ's recent guidance on evaluating corporate compliance programs, an effective compliance program rests in significant part on a sound risk assessment.¹ Unexpected as it has been, COVID-19 has radically changed the global marketplace, upsetting many assumptions that underlie such risk assessments.

The pandemic has sufficiently disrupted the economy that prior risk assessments now need to be reconsidered and updated as soon as possible, with associated adjustments to relevant internal controls being planned or implemented as soon as practicable. For example:

- **Suppliers and customers:** As supply chains and markets shrink, suppliers are likely to increase the prices they charge, and customers are likely to request discounts. Such shifts may expose companies to bribery risks previously viewed as less acute, involving both governmental and commercial counterparties. These risks may be even more severe in particular industries, such as healthcare. Companies should be wary of and reject approaches by individual employees of counterparties, especially state-owned companies, that may constitute requests for improper benefits.
- **Natural resources and raw materials:** As governments seek to assert more control over certain supplies, the role of state-owned enterprises likely will increase in supply chains, especially regarding natural resources (for example, rubber used to produce gloves and other personal protective equipment). More companies therefore may find themselves dealing with "foreign official" counterparties and potentially being pressured to pay bribes.

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1. U.S. Dep't of Justice, Criminal Division, Evaluation of Corporate Compliance Programs (updated Apr. 2019), <https://www.justice.gov/criminal-fraud/page/file/937501/download>; see also Debevoise & Plimpton LLP, "DOJ Updates Guidance on Evaluating Corporate Compliance Programs" (May 3, 2019), <https://www.debevoise.com/insights/publications/2019/05/doj-updates-guidance>.

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- **Logistics and import/export considerations:** Moving goods internationally is typically a high-risk endeavor, involving numerous entities and individuals with the power to create delays. The pandemic is likely to reduce this risk in some circumstances, particularly with regard to importing healthcare-related supplies and other in-demand finished products. But export restrictions and the reduction in global freight are likely to increase risks involving exports and imports of primary materials. The enormous contraction of civil aviation also has eliminated a significant amount of logistics capacity, increasing the risk of demands for bribes at more traditional ports of entry.
- **Receipt of governmental funds:** The scale of government programs and the vast amounts being spent in response to the pandemic likewise increase the potential for fraud and abuse. In addition to the FCPA, there are other anti-corruption statutes in the United States, including 18 U.S.C. § 666, which prohibits “theft or bribery concerning programs receiving federal funds.” This statute was used alongside the FCPA in prosecuting Ng Lap Seng in 2018, in which the United Nations was considered a program receiving federal funds.² Given the massive expenditure of governmental funds (domestically and internationally) to combat COVID-19, numerous commercial organizations less accustomed to receiving such funds could find themselves subjected to scrutiny under this and similar laws.

“The pandemic has sufficiently disrupted the economy that prior risk assessments now need to be reconsidered and updated as soon as possible, with associated adjustments to relevant internal controls being planned or implemented as soon as practicable.”

2. Exercise Caution in Dealings with Third Parties

Given the economic dislocation associated with COVID-19, companies may find themselves seeking new suppliers and customers on short notice and in new jurisdictions. These commercial emergencies, including supply chain disruption, are likely to occur while international travel is severely restricted, sometimes making it difficult for companies to identify and evaluate potential business partners.

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2. See Bruce E. Yannett, Kara Brockmeyer, Philip Rohlik, Jill Simon & Leonie M. Stoute, “Second Circuit Rules that McDonnell’s ‘Official Act’ Requirement Does Not Apply to the FCPA,” FCPA Update, Vol. 11, No. 1 (Aug. 2019), <https://www.debevoise.com/insights/publications/2019/08/fcpa-update-august-2019>.

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During the COVID-19 crisis, the skills and abilities of consultants and other third parties to help navigate undoubtedly difficult waters will be in high demand, including to overcome local challenges. Although such services can be both extremely valuable and entirely lawful, countless examples of past mischief have turned consultants into the stock villains of FCPA enforcement actions.

Given the well-known risks associated with third-party agents, especially when interacting with government officials, companies considering retaining a consultant or other third party in a jurisdiction posing heightened corruption risk should seek to: (i) conduct appropriate desktop due diligence, including reference checks with other international companies; (ii) schedule more thorough due diligence for as soon as the pandemic permits; (iii) provide for, at a minimum, the contractual right to terminate the relationship after more comprehensive due diligence or in the event of a credible indication of bribery or other significant wrongdoing; and (iv) ensure sufficient oversight of the third party's work under the circumstances. All of these steps of course should be appropriately documented, as well.

3. Plan for Upticks in Particular Areas of Compliance Activity

Although COVID-19 is a global business disruption unlike anything in recent memory, past experience suggests that there are several areas relevant to compliance where an uptick in activity is likely, including:

- Whistleblower complaints typically increase in a time of layoffs, requiring resources to track, investigate, and respond to such complaints, as well as to prevent retaliation.
- Due diligence activities, including at least questionnaires and desktop research, are likely to become more urgent as companies adjust their supply chains and enroll new vendors and third parties.
- Back-office level reviews, such as spot-checking adherence to accounting procedures, are likely to become more important as the reduction in personal contact reduces oversight of front-end controls.
- Requests for exceptions to policies and procedures will become more common, sometimes after the fact, as the normal-course operation of compliance procedures is disrupted by the pandemic.

4. Maintain a Strong Tone at the Top

As a result of COVID-19, companies are battling challenging and uncertain economic forces. Regular communication and visits between headquarters and offices around the world have been disrupted by travel restrictions and social

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distancing. The compliance function, like the rest of a company, must adapt to this new situation, often with reduced resources. As the workforce's attention is focused on survival, it is important that company leaders remind everyone of the importance of compliance, including by:

- Finding appropriate venues to stress this importance (for example as an introduction to online training or during videoconferences with management and employees around the globe);
- Identifying ways to “call out” and voice support for compliance employees in company updates and newsletters;
- Stressing the importance of compliance roles, even if compliance personnel are asked to assist with other functions; and
- Accounting for geographic reach in a compliance program when making difficult budgeting decisions.³

5. Set Clear and Realistic Priorities

As COVID-19 disrupts business, a wide variety of corporate control functions and tasks will be impaired. Travel restrictions likely will limit internal audits and similar reviews, including compliance assessments. “Work from home” regimes also may make it more difficult to monitor accounting controls in real time. The personal connections that make employees feel comfortable reporting wrongdoing likewise may be weakened. All this will occur when financial resources to mitigate such disruptions are likely more limited. As a result, companies should set clear, specific priorities for compliance, and document exceptions to usual monitoring activities.

6. Focus on Tasks That Can Be Done Remotely

Maintaining a successful compliance program in a time of disruption requires, among other things, identifying compliance tasks that can be undertaken in the short term and scheduling other tasks for “as soon as practicable.” Even if budgets and resources are constrained, various compliance-related tasks can be accomplished efficiently while employees are working from home, including:

- Online training;
- Employee surveys about the compliance program and culture at the company;
- Policy reviews;

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3. See, e.g., *In the Matter of Bristol-Myers Squibb Co.*, Sec. Exch. Act of 1934 Rel. No. 76073; Admin. Proceeding File No. 3-16881 (Oct. 5, 2015), <https://www.sec.gov/litigation/admin/2015/34-76073.pdf> (faulting company for basing Asia Pacific compliance resources in the United States).

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- Gap analyses of a company's compliance program relative to best practices and associated guidance; and
- Desktop reviews and data analysis.

More broadly, compliance personnel can take the opportunity to identify areas for improvement and draft proposals for post-pandemic enhancement, such as regarding the digitization of certain corporate records.

7. But Do Not Ignore Other Mission-Critical or Time-Sensitive Tasks

Some compliance-related tasks are not as simple or resource-efficient when conducted remotely, but still can be time-sensitive and critical. For example, investigations of potentially ongoing misconduct or compliance due diligence on contemplated M&A transactions likely need to proceed, even if difficult or more expensive. Companies may need to consider creative and flexible approaches to getting the job done, such as conducting interviews by video or leveraging local staff when and as relevant travel restrictions ease. Regarding transactional due diligence, in particular, some on-the-ground diligence will be difficult given the disruption caused by COVID-19, but questionnaires and desktop background checks generally will not be as disrupted and should proceed with extra care under the circumstances.⁴

8. Securely Leverage Technology

The compliance and audit functions should liaise with a company's information technology and finance functions regarding what kinds of corporate records are available remotely. Relevant examples include accounting data, digitized corporate records, corporate email, and communications on personal and mobile devices. Legal and compliance departments will benefit from remote access to certain data in order to fulfill their mandates, and also must assure that data protection and privacy laws are followed and that employees are working securely.

Companies and compliance personnel also should recognize the limitations of working remotely. The ability to extract accounting data and digitized documentation works well for a desktop review, but is not the same as an audit during which one may easily follow up and question personnel and review supporting documentation available only in hard copy. Additionally, while videoconferencing works well in many situations, compliance professionals understandably will prefer in-person meetings for some discussions.

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4. See Andrew M. Levine, Philip Rohlik & Kamy B. Mehta, "Mitigating Anti-Corruption Risk in M&A Transactions: Successor Liability and Beyond," FCPA Update, Vol. 10, No. 5 (Dec. 2018), <https://www.debevoise.com/insights/publications/2018/12/fcpa-update-december-2018>.

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9. Coordinate Effectively with Local Resources

Effectively deploying these compliance strategies across multinational companies requires close coordination between the corporate compliance function and personnel operating locally. Given the constraints of remote working and limited travel, headquarters must extend extra effort to ensure that regional and local managers appropriately attend to relevant compliance risks. In prioritizing activities, it is important to remember that lockdowns and closures are not universal or without end. Internal or third-party resources are likely to come back online sooner in some jurisdictions than in others and may be leveraged to support compliance activities in other jurisdictions.

10. Document Everything

At all times, and certainly during a crisis, carefully documenting compliance activities is critical. This includes memorializing, as mentioned above, exceptions to established policies and procedures, including sometimes after the fact. In times of disruption, internal controls can slip for both legitimate and nefarious reasons. For

“A company, in order to protect itself, should transparently and thoroughly document decisions about prioritizing its compliance resources, including the reasons for any delay *and* the circumstances under which additional measures will be possible.”

example, multinationals operating as good corporate citizens may be encouraged to donate funds or goods (like personal protective equipment) to assist in combatting COVID-19. Local management may forget to obtain required approvals from headquarters or find it difficult to do so given social distancing measures. While such deviations may be understandable, it will be necessary for compliance personnel ultimately to document the appropriateness of such donations and the rationales for failing to obtain any necessary approvals.

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More broadly, regulators have been known to second-guess corporate decisions regarding the use of compliance resources.⁵ Once lockdowns begin to ease, such second-guessing is likely to resume. A company, in order to protect itself, should transparently and thoroughly document decisions about prioritizing its compliance resources, including the reasons for any delay *and* the circumstances under which additional measures will be possible.

Kara Brockmeyer

Andrew M. Levine

Philip Rohlik

Kara Brockmeyer is a partner in the Washington, D.C. office. Andrew M. Levine is a partner in the New York office. Philip Rohlik is a counsel in the Shanghai office. Full contact details for each author are available at www.debevoise.com.

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5. See, e.g., *In the Matter of Beam Inc., n/k/a Beam Suntory Inc.*, Sec. Exch. Act of 1934 Rel. No. 83575; Accounting and Auditing Enforcement Rel. No. 3944; Admin Proc. File No. 3-18568 at ¶ 22 (July 2, 2018), <https://www.sec.gov/litigation/admin/2018/34-83575.pdf> (“However, Beam did not then expand the review to other third parties or other markets that presented similar risks”).

Tips for Handling Internal and Government Investigations When Everyone Is Working Remotely

Despite the pandemic, internal and external investigations must go on. In fact, we have not seen during this time a reduction in the level of government interest or activity in FCPA investigations.

As discussed below, COVID-19 is likely to complicate providing certain data to regulators and (especially) making witnesses available for questioning. Nevertheless, certain types of interactions with regulators are well suited to the work-from-home environment created by COVID-19. For example, assuming security concerns are addressed, videoconferencing makes it possible to deliver presentations to regulators, including regarding background facts, a company's compliance program, and preliminary findings from an investigation.

We offer below ten tips to keep investigations moving, even when everyone – including the government – is working remotely.

1. Accurately Assess Investigative Resources

Companies should consider what resources – both in-house and from outside advisors – are available for conducting internal investigations, as well as how such availability may change in the near to medium term. Consideration should be given to how those resources are allocated across the company, by function and geography, particularly while travel restrictions remain in place. Before deciding to undertake or delay an internal investigation, a company should consider the status of the pandemic, including if on-site investigative steps likely can be undertaken soon and if additional local resources may become available in the near future.

2. Carefully Prioritize Among Internal Investigations

Once a company understands its available resources, it can determine how to prioritize existing investigations and plan for new internal investigations and potentially external inquiries. Among others, the following factors should be taken into account and carefully documented, particularly given the potential for regulatory second-guessing years from now:

- **Seriousness of the allegations:** Allegations involving large or unusual payments, or involving senior management, or those that already have attracted (or are imminently expected to attract) regulatory attention normally should be prioritized. More generally, conduct that poses serious litigation or regulatory

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exposure typically merits prompt and careful attention. Investigations of allegations involving more minor infractions may need to be delayed, though that does not mean nothing can be done.

- **Whether alleged misconduct is ongoing:** Unless there is existing regulatory scrutiny of particular allegations, limited compliance resources may be best targeted at ongoing and future conduct. In severely resource-constrained circumstances, priority often should be given to stopping current misconduct and protecting against prospective wrongdoing.

3. Reassess How To Handle Self-Reporting and Cooperation in Government Investigations

Corruption-related internal investigations always carry the risk of implicating the FCPA, and inquiries (or subpoenas) from regulators can force a company to conduct an investigation not previously planned. In the short term, U.S. authorities will have somewhat reduced capacity to conduct their own investigations given court closures, the inability to convene grand juries, the need to focus on more pressing matters, difficulties coordinating with foreign counterparts, travel restrictions, and the same work-from-home and lockdown hindrances confronting almost everyone else. Regulators therefore may rely more immediately on companies' internal investigations, self-reporting, and cooperation, and place an even greater premium on such factors. Nevertheless, whether to self-report remains a fact-dependent decision best taken with the advice of experienced counsel.

4. Communicate Early and Often with Regulators

When dealing with a government investigation, ensure constant communications with the relevant authorities. In particular, keep regulators apprised of limitations on the ability to respond, such as any pandemic-related difficulties associated with document collection and production or witness interviews. For example, if a country is in lockdown, forensic auditors and e-discovery vendors may be unable to perform on-site data collection.

Companies and their counsel should assume that regulators are also working from home, which complicates conducting interviews (as discussed below), but is ideal for reviewing documents. As a result, companies under investigation should expect more pointed questions regarding particular documents at an earlier stage than in the pre-pandemic era.

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5. Attend to Data Collection Constraints

Document review is normally at the core of any investigation, providing the raw material for later interviews and related findings. As an initial matter, investigators should work closely with a company's information technology function to ascertain what documents are stored centrally or accessible remotely. If documents are inaccessible, delaying an investigation may be best to conserve scarce resources. In any event, to the extent possible, documents and electronic records should be locked down, either with tailored or blanket document holds.

More specifically, COVID-19 raises a number of concerns that can complicate data collection:

- **Unavailability of data:** In an era of economic dislocation, companies are laying off and furloughing large numbers of workers. Due to lockdowns and social distancing, companies also may be unable to collect company-issued devices or company data on personal devices. If possible, companies should try to include requirements for the return of devices and data in severance arrangements.
- **Implications of working from home:** As millions of employees have been instructed to work from home, a significant amount of business is being carried out on personal computers and other devices, potentially resulting in corporate records being created and kept outside of company-owned systems. Companies should begin planning for how to identify and collect such data after work-from-home restrictions are lifted.

“Although regulators likely will provide some leeway, we see no evidence thus far – nor do we expect – that they will view COVID-19 as a blanket excuse, either for corporate wrongdoing or the failure to satisfy regulators’ expectations regarding cooperation in an investigation.”

- **Investigative considerations:** A balance must be struck between preserving and collecting data and potentially tipping off employees who could attempt to destroy data. To the extent data is available remotely, companies should be able to collect it, subject to legal considerations, though lockdowns and social distancing may delay such collections. If companies lack the technical infrastructure to collect data remotely without informing custodians (which may be legally required), they may want to consider delaying until in-person collections become possible.

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- **Legal risks:** While remote data collection will be an important part of internal and regulatory investigations where face-to-face interaction is discouraged, there may be legal impediments to doing so. In particular, remote data collection across borders can be frustrated by data protection regimes and, in countries like China and Russia, data localization requirements. Even as countries adopt privacy-invasive tracking procedures, they may be more attentive to privacy concerns elsewhere. Companies should consult with local legal counsel as to what is permissible.

6. Manage Considerations Regarding Internal Video Interviews

In an era of remote working, witness interviews are more likely to be conducted on commercial apps installed on personal devices than in specially designed corporate videoconference facilities. Although videoconferences are today replacing in-person meetings, use of the technology for investigations presents various challenges, including as to security, confidentiality, privilege, utility, and effectiveness:

- **Security:** Investigators should consider how secure videoconference options are, and whether and how to implement greater security, including options these platforms may offer. Insufficient security could expose interviews or other investigative activities to spying or monitoring by third parties, leading, for example, to leaks to the media, inadvertent disclosure of privileged communications, or other highly damaging consequences.
- **Confidentiality:** In a face-to-face interview, an interviewer can maintain some control over whether an interview is taped and physically maintain control over copies of documents shown to the interviewee. Certain videoconferencing software would permit the interviewee (or interviewer) to record the conference. Even if not, an interviewee theoretically could take screenshot copies of documents virtually shared. These risks could warrant delaying certain interviews until they can be conducted in person.
- **Additional privilege considerations:** It is important to review the terms and conditions of videoconferencing apps to determine: (i) whether those apps automatically retain copies of videoconferences; and (ii) who owns those copies, if made. To the extent the app maintains a copy or reserves for itself a license to use the copy, privilege potentially could be threatened, even if security concerns are addressed.

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- **Utility:** Videoconference interviews are not possible for everyone in this period of remote working and social distancing. For example, some employees, particularly in developing jurisdictions, may not have access to the required broadband connection. In other jurisdictions, increased numbers of people working from home can stress already overloaded bandwidth, imperiling connections and interrupting the flow of an interview.
- **Effectiveness:** Even where a videoconference interview is possible from an interviewee's perspective, it may not be desirable from the interviewer's perspective. Allegations relating to senior employees (especially key employees) may benefit from in-person meetings for corporate and diplomatic reasons, including building rapport and trust. Similarly, investigators may need to consider the entire demeanor of an interviewee, something easier done in person than on a videoconference. It is of course possible to begin with a remote interview and conduct an in-person interview later, but doing so risks making the later, in-person interviews less effective.

7. Be Cautious with Witness Interviews in Government Investigations

Formal witness interviews by regulators investigating allegations of corruption traditionally have been conducted in person. But COVID-19 temporarily has eliminated that possibility, given both safety concerns and travel restrictions. The longer these conditions persist, the more likely regulators are to request to interview witnesses by videoconference. However, counsel for witnesses will want to consider carefully whether such interviews with regulators are in their clients' best interests and whether they can be delayed until at least the lawyer and the client can be in the same room. Related considerations include the following:

- **General fairness:** The ground rules for a government interview, and the legal risks presented, may be clearer in person than when conducted remotely. For example, in the United States, lying to regulators is a federal crime under 18 U.S.C. § 1001. Although witnesses can be reminded of that prior to an interview, many witnesses will be more attuned to the danger when sitting across from a government investigator than when at home and looking at a screen.
- **Presence of counsel:** The gravity of the situation and other risks might be addressed at least partly by having counsel in the same physical location as the witness. But even that step is unlikely under the current conditions created by COVID-19. Another potential option is to use the chat function of a videoconferencing app, but this is not a substitute for personal contact.

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- **Interview logistics:** Where videoconference interviews proceed, counsel and the witness should consider carefully the logistics. Given that many witnesses in corruption investigations are in different time zones, counsel should insist that the interview be arranged at a time accommodating to the witness. In light of the legal risks involved, the witness also should not be expected to take part in an interview that starts too early or carries on into the middle of the night. If counsel expects more than one questioner to be present from the regulator, counsel should make sure that the witness is prepared for that possibility and comfortable responding.
- **Comfort with the relevant technology:** In preparing for the interview, counsel and the witness should test the application and ensure comfort with it. Counsel also will want to ensure there is a separate secure channel to communicate directly with the witness during the interview (and inform the regulators that such a channel will exist). As it can be easy to make mistakes with the chat function on videoconferencing apps, counsel should consider having the witness use a separate device entirely.

8. Seek Help Balancing Requests from Multiple Authorities

While there can be advantages to coordinated multijurisdictional investigations, the involvement of more than one regulator during the pandemic is likely to strain the investigative resources of most companies. Obtaining the assistance of a primary regulator to coordinate with other regulators and negotiating to avoid duplication of work can be critical.

9. Preemptively Consider Discipline and Related Employment Issues

An investigation may result in recommendations regarding employee discipline and personnel action. Companies that have modified their investigative procedures due to the pandemic should consider local labor law implications, including whether a videoconference interview provides sufficient basis to take employment action.

10. Do Not Expect Too Much Pandemic-Related Leniency

Although regulators likely will provide some leeway, we see no evidence thus far – nor do we expect – that they will view COVID-19 as a blanket excuse, either for corporate wrongdoing or the failure to satisfy regulators' expectations regarding cooperation in an investigation. In fact, product and service shortages and

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obstacles in shipping logistics, among other areas, present ample opportunities for wrongdoing in connection with COVID-19 and may be the subject of future investigations. The pandemic may affect how and the pace at which regulators investigate, but we should not expect changes in the relevant anti-corruption requirements or whether authorities investigate particular types of misconduct.¹

Kara Brockmeyer

Andrew M. Levine

Philip Rohlik

Kara Brockmeyer is a partner in the Washington, D.C. office. Andrew M. Levine is a partner in the New York office. Philip Rohlik is a counsel in the Shanghai office. Full contact details for each author are available at www.debevoise.com.

1. See Ines Kagubare, "FCPA officials urge companies to communicate pandemic-related difficulties quickly," Global Investigations Review (Apr. 23, 2020), <https://globalinvestigationsreview.com/article/jac/1226073/fcpa-officials-urge-companies-to-communicate-pandemic-related-difficulties-quickly>.

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Debevoise & Plimpton LLP

919 Third Avenue
New York, New York 10022
+1 212 909 6000
www.debevoise.com

Washington, D.C.
+1 202 383 8000

London
+44 20 7786 9000

Paris
+33 1 40 73 12 12

Frankfurt
+49 69 2097 5000

Moscow
+7 495 956 3858

Hong Kong
+852 2160 9800

Shanghai
+86 21 5047 1800

Tokyo
+81 3 4570 6680

Bruce E. Yannett
Co-Editor-in-Chief
+1 212 909 6495
beyannett@debevoise.com

Andrew J. Ceresney
Co-Editor-in-Chief
+1 212 909 6947
aceresney@debevoise.com

David A. O'Neil
Co-Editor-in-Chief
+1 202 383 8040
daoneil@debevoise.com

Jane Shvets
Co-Editor-in-Chief
+44 20 7786 9163
jshvets@debevoise.com

Philip Rohlik
Co-Executive Editor
+852 2160 9856
prohlik@debevoise.com

Kara Brockmeyer
Co-Editor-in-Chief
+1 202 383 8120
kbrockmeyer@debevoise.com

Andrew M. Levine
Co-Editor-in-Chief
+1 212 909 6069
amlevine@debevoise.com

Karolos Seeger
Co-Editor-in-Chief
+44 20 7786 9042
kseeger@debevoise.com

Erich O. Grosz
Co-Executive Editor
+1 212 909 6808
eogrosz@debevoise.com

Andreas A. Gliemenakis
Associate Editor
+1 202 383 8138
aagliemen@debevoise.com

Please address inquiries regarding topics covered in this publication to the editors.

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