

### THE COMPLIANCE COLLECTIVE

TEXTING TROUBLES - TACKLING THE MOUNTING LEGAL AND COMPLIANCE RISKS OF BUSINESS COMMUNICATIONS ON PERSONAL PHONES

**AUGUST 15, 2024** 

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### Who We Are



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### The Compliance Collective

- This webinar is a part of our monthly webinar series, "The Compliance Collective"
- The webinar series is hosted by a team of cross-disciplinary Perkins Coie lawyers who provide a monthly overview and discussion forum on a critical hot topic in ethics and compliance. Each topic provides a look at emerging issues and offers creative solutions to potential compliance problems.
- The webinar is hosted at the same time each month: 3rd Thursday at 10:00 a.m. PT/12:00 p.m. CT/1:00 p.m. ET
- Sign up on <u>our website</u> to receive invitations to our future webinars!



### Agenda

- Off-channel communications / personal devices have become a hot topic in recent years
- Implications for cooperation in government investigations
- Implications and considerations for civil litigation
- Implications for employees
- Recommendations for navigating these challenges



## SEC/CFTC Sweep



#### **WELLS FARGO**





**JPMORGAN** CHASE & CO.



JPMorgan -\$200M in fines for "firm-wide" failure to preserve business-related communications.

### September 2022:

16 broker dealers and 11 swap dealers - \$1.8B in fines for "widespread and longstanding failure" to maintain and preserve electronic communications.

#### **August 2023:**

15 financial institutions -\$550M in fines for pervasive and longstanding "offchannel" communications.

#### February 2024:

16 financial advisory firms -**\$81M** in fines for failure to preserve off-channel electronic communications "firm-wide and involved personnel at various levels of authority."



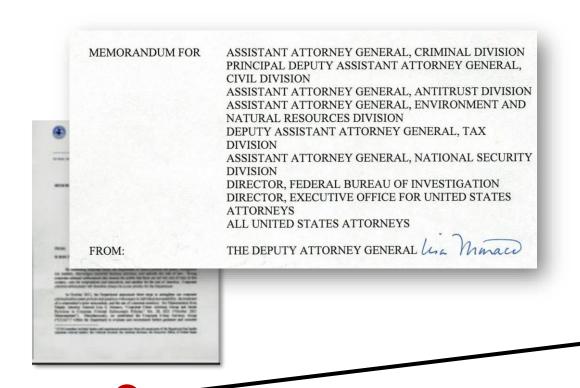
September 2020:

JonesTrading -





### **DOJ** Guidance



U.S. Department of Justice
Criminal Division

Evaluation of Corporate Compliance Programs
(Updated March 2023)



DOJ Evaluation of Corporate Compliance Programs

September 2022: DOJ Monaco Memo



## Civil Litigation



- Federal Rule of Civil Procedure 34(a)
  - A party to a civil litigation may serve on any other party a request to produce electronically stored information "in the responding party's possession, custody, or control"

### What Constitutes "Control"?

When is a party required to produce documents not in its

possession?

- Legal right test
- Practical ability test

 Company may need to show that it requested the documents from former employees



# Implications for Employees



- Company may need to collect employees' text messages to conduct a complete investigation and respond to document demands
- Personal phones contain private and potentially privileged communications
- Foreign privacy laws

## Maintaining Employees' Privacy

- Custodian interviews
- Individual counsel where appropriate
- Targeted collections
- Filter for business contacts
- Destroy non-relevant and personal data





## Key Takeaways



- Assess technological needs and solutions
- Maintain clear policies
- Train employees
- Monitor compliance
- Discipline violations

