

DATA RETENTION AND COMPLIANCE: EVOLVING BEST PRACTICES

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Overview

- The importance of “appropriate” retention of company data
- Increasing complexity and changing obligations
- Special issues relating to messaging apps
- Policy- and technology-based solutions
- Best practices and what’s ahead

“Appropriate” Retention of Company Data



Appropriate retention of business records, and prohibiting the improper destruction or deletion of business records, including prohibiting employees from using software that generates but does not appropriately retain business records or communications.”

U.S. Department of Justice FCPA Corporate Enforcement Policy

“Appropriate” Retention of Company Data (Cont.)

“Don’t expect full cooperation if there are no records of the misconduct.”

“It may be a risk-based approach when they did this, and we may not agree with it, but we won’t deduct a company from having done something thoughtful.”

Chief, FCPA Unit, U.S. Department of Justice
Daniel S. Kahn (May 2018)



Increasing Complexity and Changing Obligations

- Popularity of BYOD policies
- New applications, frequent updating of software features
- Remote working
- Constantly growing and evolving corporate communications and data storage systems

Special Issues Relating to Messaging Apps

- Social messaging applications are increasingly luring users from social media platforms and email
 - Popular: Whatsapp, WeChat, Line, Kik, Snapchat, Skype
 - Anonymous: Yik-Yak, Telegram, Whisper, Signal
 - Collaborative: Slack, Asana, Hipchat, Spideroak



Policy-Based Solutions

- Define and regulate permissible software
- Specify storage requirements
 - adequate preservation
 - effective collection of data in an investigation
- Training programs
- Employee consents
- Compliance testing

Technology-Based Solutions

- Software customization / enterprise installation
- Automated checking
- Blocking of unauthorized apps
- Updating and maintenance of software applications

Best Practices and What's Ahead

1. Data retention will only become more complex in the years ahead, and best practices will continue to evolve.
2. As a practical matter, “best practices” will likely continue to include both policy- and technology-based solutions.
3. Implementation may require legal and technical advice, especially when multiple jurisdictions are involved.
4. It is also important that the policies be clear to all employees, consistent across the company, and binding on employees locally, to the extent permitted by applicable law.
5. There needs to be balancing between the resources available for monitoring and preservation and the risk posed. What is important is that some risk assessment be performed and that an informed decision be documented.



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