



Adjusting to the “normal” of compliance during COVID-19: Conducting effective, efficient cross-border investigations remotely

Over the last several years, it's become increasingly clear that international regulators outside the US are strengthening their focus and scrutiny on issues related to corporate fraud and corruption, and companies are taking notice. During the 2019 Association of Certified Fraud Examiners Global Fraud Conference, 97% of respondents queried during a panel discussion anticipated an increase in cross-border investigations in the coming years.

The global COVID-19 pandemic and the economic disruption presents two new developments/considerations in this

area. First, as organizations quickly adapt and adjust their business to the “next normal” and face increased financial and operational pressures, there is greater opportunity (and, frankly, pressure and rationalization) for fraud and corruption to occur, as employees and third parties may seek to take advantage of weakened control environments and decreased compliance resources. Second, due to new travel restrictions and remote work environments, it can be more difficult for companies to quickly respond and investigate allegations of fraud and corruption.



This presents a unique challenge for compliance officers: In an environment that's ripe for fraud and corruption, how can they maintain a strong culture of compliance and respond to allegations of potential wrongdoing with more limited resources and an inability to follow their traditional investigative playbook? Scott Roybal, leader of Sheppard Mullin's Investigations and International Trade practice group, agrees that now is the time for organizations to prepare. "Management should reinforce and reiterate the organization's commitment to its anti-corruption and anti-fraud compliance programs. Many organizations are taking proactive steps to ensure the safety and well-being of their employees, cope with new "work from home" and "return to work" policies, and brace for the financial impact of the pandemic. While a heightened focus on these critical areas right now is understandable, it is equally important for compliance officers to remind employees, especially those involved in cross-border transactions, of the organization's commitment to ethical business practices."

Cross-border investigations (as compared to their domestic counterparts) already pose several distinct considerations, including language barriers, cultural differences, and resource limitations. The inherent unpredictable nature of these investigations makes it almost impossible to apply a "one-size-fits-all" approach, and—as a result—many organizations struggle to carry out such investigations in a thorough, yet effective, manner. The current environment further exacerbates these challenges, as companies may be unable to conduct traditional discovery and information collection procedures, site visits, and in-person interviews. Companies will need to adapt their investigative strategies so that they can productively and proactively investigate allegations of potential misconduct outside the US.

How can organizations adapt and achieve this objective? Here are four insights for compliance officers to consider in determining whether their investigative approaches are appropriate and effective in the time of COVID-19:

Insight #1. Ensure global whistleblower reporting mechanisms are tailored, readily available, and well-communicated.

Most cross-border investigations begin with a receipt of an anonymous whistleblower tip. While it may be too early in the pandemic to quantify objectively, it's conceivable that corporate whistleblower activity may increase in the near future. As employers take steps to respond to the crisis, employees may be feeling increased pressure to meet sales goals and other targets, which, combined with potentially increased opportunity for malfeasance to occur due to weakened control environments, may result in an increased likelihood of wrongdoing (as well as the reporting of such wrongdoing – either internally or externally). Regulators will be expecting companies to have

appropriate mechanisms in place to effectively capture, process, and respond to this increased whistleblower activity. Companies may want to take this time to ensure their hotlines and other channels are updated and commensurate with their operations, geographic presence, and risk profile.

Further, a whistleblower program is only effective if employees are aware of it. Companies should continue to communicate the existence of the program virtually through emails or online trainings (and its importance to the company's culture of compliance) so employees know where to turn if they suspect wrongdoing.

Insight #2. Plan, plan, plan.

When reports of misconduct do arise, the first instinct may be to spring into action quickly. However, hasty and inadequate preparation can easily get in the way of progress. This is especially true with cross-border investigations, where nuanced differences often exist from one country to another. Further, there are additional planning challenges in a world where the traditional investigative playbook may no longer be as easy to apply.

In our experience, we have seen companies fall victim to certain common pitfalls during the planning process for a cross-border investigation, including lack of a well-defined scope, lack of team members with adequate skills, and lack of consideration of local requirements – all of which inevitably cause the investigation to be less effective, thorough, and/or efficient.

In today's environment, companies should be especially mindful to devote adequate time to carefully thinking through the approach both in terms of (i) what special considerations need to be taken into account given this is a cross-border investigation in multiple countries, as well as (ii) what special considerations need to be taken into account given investigators can no longer travel or physically collect information?

For example, companies may wish to consider:

- How do we effectively define the scope of the investigation such that it appropriately responds to the initial risks and includes well-defined priorities, assignments, and deadlines to minimize confusion, duplication of effort, and other inefficiencies?
- How has COVID-19 impacted the country/ies at issue in the investigation, and what sort of restrictions may be in place that may impact the process? For example, an investigation in Italy may present additional challenges compared with one in Germany.
- How should our investigative team be staffed, particularly if we have fewer resources than we previously did? How do we ensure team members have the adequate skills that are commensurate with the type of investigation?

- What communication channels need to be implemented to enable effective remote information-sharing amongst the investigative team? Is our online site secure enough to exchange electronic documents?
- What do we need to be thinking about the various local language, business customs, and cultural differences that may impact the success of the investigation?
- What is the best approach for conducting interviews?
- How will we obtain images of desktops and mobile devices?
- Will county, state, and federal courts be open to retrieve corporate and individual filing information?

While it may be tempting to quickly respond to allegations of improper conduct, investing proper time upfront to ensure the investigation is well thought-out can pay dividends later on.

Insight #3. Increase use of tools, technologies, and analytics to enable a more effective remote investigation across countries.

Almost everyone is familiar with the typical approach to conducting a cross-border investigation. After planning and scoping, teams typically perform some type of physical data collection (which may include imaging computers and mobile phones), travel to the site/country in question, perform in-person interviews of relevant personnel, etc. It's clear to see how this typical approach may no longer be possible in today's world, yet the underlying risks still remain the same.

The good news is that there are solutions to these challenges, which rely on various advanced tools, technologies, and data analytics that are specifically designed to be used in virtual/remote environments. For example:

- **Centralized tracking**—Leveraging a centralized custodian and matter tracking system can be a key enabler for success. Investigation teams spread across the country and across continents may rely on a custodian tracking system as the single-source repository to track, report, and share information across workstreams in real time. Teams may need to supplant in-person or live interviews by sending electronic questionnaires. Interview responses can be quickly be captured and ingested into the system through automated import functionality, with aggregated responses immediately indexed and searchable without manual review. Stakeholders can leverage dashboards and other automated reporting functionality to bolster remote workflow management and performance monitoring at any given time.
- **eDiscovery collections and document review**—Data collection should run in a near normal state since enterprise collections, such as email, are typically done remotely. Custodian devices, which can be imaged remotely or physically shipped in, present a larger, yet solvable logistical challenge. After identifying relevant data sources,

discovery specialists can coordinate with IT teams to access and download enterprise or cloud data sources. With custodian devices, to the extent enterprise collection capability for PCs are in place, there should be little to no impact to collections beyond internet upload speeds. In the absence of enterprise collection capability, collections will require custodian notification, increasing the risk that information may be deleted or destroyed. In those situations, a typical approach would involve mailing an encrypted hard drive preloaded with scripts directly to custodians to connect to their devices. Devices can then be accessed and controlled remotely, or even automatically, to securely extract and collect the data. Server eDiscovery software solutions further enable for the digital production, review, and tagging of documents.

- **Forensic accounting analysis**— Electronic access to enterprise resource planning systems data and supporting documents are generally available for remote forensic accounting analyses. Advances in data analytics have expedited the acquisition of large amounts of accounting and financial data, and predictive capabilities have significantly shortened the time required to identify relevant transactions. Secure share sites enhance collaboration between investigative and client teams and can facilitate the transfer and review of potentially sensitive information.
- **Business intelligence searches**— Business intelligence research is predominantly conducted through online databases and telephone interviews, except where court or business filings have not been digitized.
- **Investigative interviews**—Although the use of teleconferencing or videoconferencing software has become the new normal within most businesses, attorneys and investigators must carefully weigh the advantages and disadvantages of conducting investigative interviews remotely. Many software programs offer document sharing and face-to-face communication capabilities, allowing interviewers to observe interviewees' reactions and assess credibility. Still, for certain key or essential witnesses where timing is not urgent, the ability to better control the interview's circumstances— including environment, pace, and ease of access to potentially voluminous documents—in-person interviews may be the preferred route.

Insight #4. Don't forget about remediation.

With increasing fraud risks and likely increasing regulatory scrutiny/enforcement as a result of the current crisis, the manner in which companies respond to allegations of wrongdoing will certainly be under the microscope. In that respect, the actual investigative process is only one part of the story; the other is remediation – what has the company done to mitigate the risk of such misconduct occurring in the future and/or in other parts of the organization?

Remediation is more than simply terminating the bad actors from the organization; it also involves addressing the breakdown in internal controls that allowed the misconduct to occur. Investigation teams should put a remediation action plan in place following an investigation, which can help demonstrate (to both internal and external stakeholders) the company's priority of enhancing compliance and preventing similar incidents in the future. While it is certainly important for companies to respond promptly in these situations, "getting it right" is perhaps more important. Investigation teams should draft a remediation plan that is well thought-out and includes detailed specific action steps, names of accountable/responsible owners, and key milestone dates to track progress and implementation.

Another important consideration is that the same faulty internal controls that led to the initial misconduct may exist in other areas of the company (e.g., geographies, business units). Therefore, organizations may want to conduct some level of testing to assess whether a problem may exist elsewhere. Further, in the current environment, companies should determine whether remediation plans take into account and reflect new remote settings and aspects of virtual compliance.

Lastly, companies cannot forget to follow up. Investigation teams should be able to virtually provide local, in-country management with instructions for remediation using virtual capabilities. If management doesn't act on those instructions, the same types of issues may reappear. If this is the case, organizations should consider leveraging analytics (as outlined in Insights #2 and #3) and other monitoring tools (along with knowledge gained during the investigation) to identify indicators of potentially similar activity.

Our take: Strategy is key to keeping cross-border investigations on track.

When facing a global economic crisis of this magnitude, the approach required to make an investigation successful needs to be adjusted. While companies face additional nuances when these investigations cross international borders, the current economic environment only heightens these challenges. It is critical that companies invest sufficient time and resources to fully understand, prepare for, and respond to these complexities in order to navigate their way to a successful outcome.

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