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COVID-19

Investigation Strategies During Social Distancing

By Megan Zwiebel, *Anti-Corruption Report*

Palmina Fava, a partner at Vinson & Elkins and a veteran of numerous multinational corruption investigations, is used to finding creative ways to gather evidence from afar, sometimes even working on a shifted schedule in New York to take witness interviews in China via video conference during the night. When the COVID-19 crisis hit and it became apparent that the standard operating procedures for internal investigations would be on hold for a while, we reached out to her to see how her clients are reacting, her thoughts on what companies should be doing to protect themselves and how internal investigations can still move forward during this time of social distancing.

See [“The ACR’s Guide to Mastering Internal Investigation Interviews: Logistics”](#) (Feb. 5, 2020).

ACR: What has been the immediate response from your clients?

Fava: My clients are facing the challenge of adjusting both on a personal level and on a professional level. Many people now have children at home who need to be homeschooled and entertained. They may also have loved ones who need to be cared for because they are at high risk for contracting the disease.

These additional personal challenges affect our professional lives. Everyone is more mindful of the health and safety of the people on their teams, both in terms of people getting sick and in terms of the mental impact of being isolated.

Notwithstanding these challenges, my clients have been focused on mitigating the additional risks created by the pandemic and are being creative in moving forward with investigations, compliance initiatives and business-risk mitigation.

ACR: What is the biggest challenge for you and your clients in the current situation?

Fava: The biggest challenge is not letting investigations and compliance fall victim to the virus. We may be unable to do in-person interviews, but we are finding ways to collect information and to enhance internal controls. Labor laws in certain jurisdictions require a company to act in a limited amount of time after learning of an allegation of impropriety; it is unlikely those labor protections will be suspended or relaxed, so we still need to examine issues that arise.

ACR: Do you have any advice for how compliance or investigations teams can convince businesses that may be struggling for their existence that compliance should remain a priority?

Fava: It is difficult for struggling businesses to prioritize investigations, but if certain investigations arise because of the business interruptions presented by the pandemic, it is possible that insurance policies may cover those costs. At a minimum, it is an area worth examining. Additionally, we examine internal controls from a business and legal risk-mitigation perspective: can certain controls help reduce costs, maximize efficiencies and mitigate losses?

Increased Risks

ACR: How has the current situation increased or changed the risks that companies face?

Fava: Sales teams have targets to realize full compensation. With an abbreviated fiscal year from a sales perspective, there will be added pressure to reach quotas. Employees will be tempted to cut corners which could manifest in the form of corruption issues, bid rigging or unfair trade practices, theft of trade secrets, or manipulation of the books and records.

ACR: What should companies whose employees are now working from home be thinking about?

Fava: Companies should examine their acceptable use policies for use of corporate-issued devices and implement such policies if they do not have any. Additionally, companies should examine their abilities to remotely image devices and consider ways to improve remote access to information. If employees

are using personal devices, companies should think about how they will access information on those devices should an investigation be necessary down the road and how they will protect confidential company information that employees save on and share from personal devices.

Companies also should be thinking ahead to how to shift things back to the corporate norm after the crisis is over – it might make sense for employees to use their own devices during the current crisis, but it might not be advisable for that to become the new normal. Companies should consider formalizing their policies on use of personal devices or adjusting their bring-your-own device policies in light of current events.

ACR: What cybersecurity risks are created with the shift to working from home?

Fava: Personal computers and home networks usually do not have the same types of security protocols that are available at the company level, and thus, proprietary documents may be insecure, and the system may be vulnerable to hackers and phishing attacks.

Additionally, employees may be saving documents on personal devices instead of on company servers, which can create problems regarding document retention for future investigations or litigation.

[See [“Effective and Compliant Employee Monitoring \(Part One of Two\)”](#) (May 30, 2018); [Part Two](#) (Jun. 13, 2018).]

Looking at Policies

ACR: In terms of compliance policies, what should be companies' focus?

Fava: Review existing policies and ask whether they create or mitigate risks under the current circumstances. For example, we are likely to see shareholder derivative suits arise, and some lawsuits already have been filed related to stock price drops, so companies should be thinking about those risks when communicating with customers, whether formally or informally. It might feel natural to reassure customers or clients that the business will weather the storm but remain vigilant as to corporate communications to ensure they do not create litigation exposure. Companies need to make sure they are taking every precaution to not exacerbate problems or create new problems months from now when this is in our rear-view mirror.

ACR: Thinking long term, what should companies be doing?

Fava: Now is a good time for companies to examine their disaster recovery systems. If there is no backup system in place for network data, companies should explore what would be entailed in implementing one. A company might get a pass from government enforcers for not having a system in place now, but it should not be caught flat-footed when the next crisis arises.

[See ["Using a Code of Conduct to Drive Engagement With Compliance and Ethics"](#) (Mar. 6, 2019).]

Gathering Data

ACR: How has working remotely affected your practice?

Fava: The nature of this practice is that I work with people in different offices on a regular basis so not seeing my team face-to-face is not much of a change for my practice.

The bigger challenge has been adapting to not having boots on the ground for an investigation. We may not have the ability to collect and image laptops and other devices, or to interview witnesses in-person for months. And, on a personal level, there are more boots on the ground in my home as I try to work!

ACR: How do you make up for the inability to physically capture evidence during an investigation?

Fava: We are making sure that the data in our control is imaged, secure and accessible. We also are investigating ways to access laptops and phones in communities that are not under shelter-in-place restrictions. We are very mindful that we do not want to introduce a contagious disease into somebody's home by retrieving laptops or phones, but at the same time, we need to be diligent about collecting evidence in our ongoing investigations where and when able.

ACR: Are there some places where it will just not be possible to gather data and evidence and, if so, what do you do then?

Fava: Yes. In many instances, we just might not be able to get the data for the next several weeks. In those situations, we are documenting the efforts made to find alternative means of collecting information. Additionally, because our investigations will be delayed, we are taking steps to ensure that during this time when we cannot gather information, we are not alerting people that an investigation is underway, giving them the opportunity to delete evidence. Once social distancing restrictions are lifted, we want to be able to move quickly and to capture all of the evidence that was out of reach during the crisis.

[See [“Strategies for Preserving Data Before and During an FCPA Investigation”](#) (Nov. 14, 2012).]

Video Interviews

ACR: Can internal investigation interviews still be taken during the crisis?

Fava: Yes. I have found that interviews using a remote meeting application like Zoom or Skype can be quite effective. Even before this crisis, I used videoconference interviews to keep costs down during an investigation. It sometimes requires keeping odd hours if the interview subject is in a different time zone, but that can work out nicely right now when internet systems are reaching capacity during the day!

ACR: What tips do you have for video interviews?

Fava: The important thing is to create a human connection even when technology resources do not work seamlessly. Try to minimize the

number of people involved and the number of jurisdictions dialing in to a video conference. Be sure you understand how to use the chat feature so you can communicate with your team during the interview. Also, try to choose times of the day when your system will be less taxed. With four children at home taking online classes, there are times in my day when a video interview will be far less effective than other times, even if we are each using personal hotspots.

ACR: What are the challenges of taking interviews via video conference?

Fava: The main challenge is that the more people speaking, the more disjointed the conversation becomes and the greater the risk of people talking over each other. Additionally, with several people in attendance, the screen continuously shifts to whoever is speaking so you may lose the continuity of the connection you are trying to build with the interviewee. On my last international trip in early March, we had seven people participating in some meetings; it worked in-person, but in a video interview, it becomes unruly if everyone is participating.

ACR: How do you manage that?

Fava: It is important to minimize the number of people speaking during the interview to avoid everyone speaking over each other. My preference is to have just two people on the screen during a remote interview – the interviewee and the interviewer. Other people can watch the interview and provide feedback to the interviewer using the chat function, but I encourage minimizing the number of speakers. Anyone who is not speaking should turn off their sound and camera during the interview.

ACR: How does this work when the interview subject does not speak English?

Fava: My goal in every interview is to get as much information as possible, and I have found that the best way to do that is by ensuring the interviewee feels comfortable speaking in his or her native language and is interrupted as infrequently as possible.

Often, in my video interviews, the interviewer is the person who can ask questions in the interviewee's native language. If that is not me, then the notetaker simultaneously takes notes in English for my view on a separate screen. I read the notes in English as the interview is happening and send follow up questions in real time. This process allows me to participate but without interrupting the flow of the discussion to rely on translation or to introduce another voice – in another remote location – into the dialogue.

ACR: Did the interview subject know you were participating?

Fava: Yes, at the beginning of the interview everyone on the call is introduced – we never want to engage in any kind of subterfuge about the process. But having a new voice introduced every other question in a new language is very distracting so I try to reduce the frequency of that happening.

ACR: What do you do if you do not have two associates who speak the same language as the interview subject?

Fava: I have not confronted that situation, but if that were the case, I would rely on translation and, if it were a video interview, I would ensure that every participant is on the screen simultaneously so that we can create a connection among all participants.

ACR: Are there any silver linings you can see coming out of this time?

Fava: On a professional level, this situation requires lawyers to more deeply understand our clients' businesses and the impacts of various factors on those businesses.

[See the Anti-Corruption Report's four-part series on audit committee responsibilities before, during and after an investigation: "[Five Steps to Take Before the Investigation Begins](#)" (Feb. 19, 2014); "[Determining When and How to Proceed](#)" (Mar. 5, 2014); "[Retaining Counsel, Gathering Information and Documenting the Investigation](#)" (Mar. 19, 2014); and "[Remediating and Disclosing the Investigation to the Government and the Public](#)" (Apr. 2, 2014).]