



Conducting Virtual Investigations: Practical and strategic considerations for the current environment and beyond

Peter Burrell | Robert Meyer | Rita Mitchell | Simon Osborn-King | Martin Weinstein
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Introduction

- The current environment
 - Travel restrictions
 - Cost-cutting
 - Furloughed staff
 - Social distancing
 - Heightened or new risks to the business
 - Additional reporting of allegations/concerns

There are a number of reasons why companies (and their external counsel) may need to conduct investigations virtually in both the current environment and going forward.

US Enforcement Perspective

- Initial slowdown, with questions around when will return to “normal”, and with some new avenues for investigation
- Practical challenges of “teleworking”, interviewing witnesses, convening grand juries, serving subpoenas, and access to courthouses
- Both DOJ and SEC have been opening new cases and taking remote testimony in a virtual environment
- Expected Trends
 - Focus on COVID-19-related frauds and misrepresentations in the short and medium term
 - Accountability of organizations for investigating and managing compliance risks– not a “free pass”
 - Greater focus and faster movement by DOJ and SEC on existing cases that have expiring tolling agreements or statute of limitations issues
 - FCPA enforcement “not hitting the pause button”
 - Impact on individual enforcement in certain areas such as FCPA where actions tend to be against foreign nationals who are arrested and charged upon entry to US
 - Pushback from defendants against virtual testimony

US Enforcement Perspective

- **COVID-19-Related Enforcement as a Priority**
 - **CARES Act**
 - Authorizes up to \$2 trillion in government spending, including loans and other economic relief
 - Creates a “Special Inspector General for Pandemic Recovery” empowered to “conduct, supervise, and coordinate audits and investigations” of how the funds are used
 - **DOJ**
 - 16 March 2020: Attorney General William Barr directed all US attorneys to prioritize “the investigation and prosecution of Coronavirus-related fraud schemes”
 - 19 March 2020: Deputy Attorney General Jeffrey Rosen directed each US Attorney to appoint a Coronavirus Fraud Coordinator
 - 22 March 2020: DOJ obtained a temporary restraining order against a website (coronavirusmedialkit.com) offering access to a vaccine kit from the WTO that was a scam
 - 24 March 2020: DOJ established the COVID-19 Hoarding and Price Gouging Task Force to address COVID-19 market manipulation, hoarding and price gouging
 - **SEC**
 - 23 March 2020: Statement from Co-Directors of the SEC’s Division of Enforcement emphasizing the importance of maintaining market integrity and “following corporate controls and procedures”
 - SEC has opened hundreds of new investigations, many related to COVID-19
 - Since mid-March, “investigative staff has triaged more than 4,000 tips, complaints and referrals” which reflects a 35% increase from the same period last year (Steven Peikin, co-Director Enforcement, 12 May 2020)

UK Enforcement Perspective

Serious Fraud Office

- *“The SFO continues to investigate suspected fraud, bribery and corruption, adapting ways of working where necessary to adhere to Government guidance” and “continues to follow active lines of inquiry in open investigations, as well as looking into allegations and referrals at the “pre-investigation” stage.”*
- SFO facing considerable challenges now and in the future

Financial Conduct Authority

- A familiar focus
- Financial crime systems and controls
 - *“In the current climate, it is important for firms to maintain effective systems and controls to prevent money laundering and terrorist financing.”*
 - *“Focus on the importance of remaining vigilant to new or emerging threats”*
- Information security
 - *“Prioritise information security and ensure that adequate controls are in place to manage cyber threats and respond to major incidents”*
 - *“Proactively manage the increased risks”*

Prioritising Investigations

- Unique pressures giving rise to increased misconduct risk
- Detection efforts overwhelming investigation capabilities
- Challenges with senior management engagement
- Short-term increase in whistle-blowing cases - behavioural or substantive issue?
- To postpone or delay?
 - Legal, financial, reputational risks
 - Immediate and present risk to business and operations
 - A missed opportunity?
 - Likelihood of enforcement action
- Prioritise and be creative

When Investigations are Delayed or Postponed...

- Review policies and procedures around conducting investigations
 - Fit for purpose or require amendment?
- Take steps to preserve data
 - Risk of destruction/loss
 - Coordination with IT, document holds, undertakings
 - Potential sources: hard copy, servers, laptops, phones, iPads, etc.
- Low-hanging fruit
 - Take simple steps to advance your fact/information gathering
 - Prepare interim workplan
 - Monitor the situation
- Be ready to provide explanation for what you are doing/not doing and why

Document Collection: Initial Considerations

- Determine Potential Sources of Information
 - Consider initial “scoping” interviews with IT to identify all storage locations.
 - Hard copy documents may be inaccessible due to the COVID-19 pandemic and should be secured until collection is possible.
 - Electronic information can be stored on specific employee-controlled devices, on company servers, or on the cloud, and may be stored in disparate locations.
 - If possible, work with company IT personnel to collect electronic data remotely.
 - Collect or secure data that employees may have stored offsite while working remotely.
- Determine Scope of Collection
 - General rule: collect broadly but conduct a targeted review.
 - Consider “who, what, and when” in planning collection (which custodians, what documents from those custodians, over what date range).

The Collection Process

- Physical Collection Process
 - Consider whether local personnel are sufficiently uninvolved and capable of collecting documents on their own, or whether this process should be overseen by external counsel and/or by a data vendor.
 - With the assistance of a discovery vendor, employees themselves may be able to collect data even while working remotely.
 - If data is stored in inaccessible locations, consider whether alternative locations exist that allow collection of documents with similar information (even if underlying metadata and file location is distinct).
 - Furloughed employees may be more difficult to enlist for data collection.
 - Create and maintain a tracking log that carefully documents the information gathered (custodian, date range, location, collection date and method).

Data Privacy and Protection

- When collecting, transferring, or reviewing data, always consider the originating jurisdiction's data privacy laws and blocking statutes.
- **Data Privacy Laws:** Prevent collection, transfer, and review of information deemed to be personal or private, but consent may act as an exception.
 - The EU's General Data Protection Regulation (GDPR) may limit how data is collected, transferred, stored, and reviewed.
 - UK privacy law may diverge following Brexit.
- **Blocking Statutes:** Prohibit exporting certain documents—including banking information or national security information—for use in judicial or administrative proceedings, without government consent.
 - The Securities Law of the People's Republic of China (effective March 1, 2020) governs cross-border cooperation in regulatory investigations and limits the ability of foreign regulatory authorities to investigate within China or retrieve materials relating to securities business activities.

Document Processing and Review

- Document Processing
 - Consider ways to process documents so as to limit review, through de-duplication, application of search terms, and technology-assisted review.
- Document Review
 - Use an appropriate document review platform and review personnel with suitable qualifications, experience, and language skills.
 - Use a review protocol and tagging palette to organize the review.
 - COVID-19 necessitates remote review.
 - Widely used document review platforms already permit remote review.
 - Remote review, however, creates unique data security concerns.
 - Remote review, particularly across borders, also raises legal questions as to where the data resides and who has control of or access to the data.

Witness Interviews

- A primary way to gather facts and assess credibility.
 - Use outlines to prepare for interview, but not a script.
 - May interview current and former employees as well as third parties.
- Interviews are generally conducted after completion of document review, but specific circumstances may necessitate earlier interviews.
- Interview order considerations:
 - Concentric circle theory (outside-in)
 - Interviewing key witnesses early
 - Concerns about collusion or spoliation
- Due to the COVID-19 pandemic, consider whether interviews can or should be deferred until they can be done in person.
 - Different considerations for current and former employees.

Witness Interviews

- The COVID-19 pandemic likely necessitates remote interviews of some employees.
 - Inform witness in advance that the interview will be on video, but prepare an alternative way to communicate (including phone call) if video technology fails.
 - In selecting a platform (WebEx, Teams, Bluejeans, Zoom), consider the platform's confidentiality and use passwords and virtual waiting rooms.
 - Consider the legal implications, particularly in cross-border remote interviews.
- Consider how remote interview venue bears on choice of interviewees.
 - Interviewees may try to communicate with others during the interview or during a break.
 - Consider simultaneous interviews for certain interviewees.
 - Interviewees may feign technical difficulties to avoid answering.
- Maintain formality: *Upjohn* warning; schedule breaks; require pauses for interpreters as needed.
- How do you look someone in the eye virtually?

Witness Interviews

- State at the outset that the remote interview is not recorded.
 - Ask witnesses to confirm that they are not recording the interview or copying materials shared during the interview (including taking screenshots).
- Sharing Documents
 - Consider the pros and cons of sharing PDF documents in advance, screen sharing, or even a separate, virtual, secure, read-only data room.
- Privilege and Confidentiality
 - Remote interviews create a heightened risk that the witness will break privilege or confidentiality.
 - Witnesses should be informed of the purpose of the interview, its privileged nature, and that it should be kept confidential.
 - Find a private space, particularly when an interview is done from home.
 - Power down smart devices that might be “listening,” such as Amazon Echo, Google Home, Apple Homepod, Nest devices, home security devices, etc.

Witness Interviews

- Have a witness (attorney, legal assistant, etc.) participate with the interviewing attorney.
 - Allows second individual to take notes and to observe the witness while the interviewing attorney conducts the interview.
- Limit to one questioner if possible.
 - This prevents multiple questions being asked at the same time (common issue in remote discussions).
 - Alternatively, consider formally handing off questions between interviewers to prevent issues.
- Memorialize Interview
 - Interview summaries create a strong record for the investigation and allow the entire team to understand the information obtained during the interview.
 - Draft to reflect attorney's mental impressions and do not merely transcribe a substantially verbatim record of the interview.

Internal Reporting of Investigative Findings

- Provide regular reporting throughout the investigation to management or the board.
 - Generally oral is better, but PowerPoint presentations can effectively convey interim findings during remote presentations.
 - Management or the board may depend on interim investigative reports to help navigate the COVID-19 pandemic.
 - Clearly communicate to management or the board how COVID-19 affects the internal investigation.
- Provide a final report memorializing investigative findings.
 - Consider benefits of oral report vs. PowerPoint vs. written report.
 - Written report should generally set out the following elements: allegations; scope of investigation (document preservation, collection, and review; witness interviews conducted); factual findings; legal analysis; and proposed / completed remediation.

External Reporting

- Disclosure may be required by statutes, consent decrees, or other requirements.
- Consider advantages and disadvantages of voluntary disclosure to relevant governments, including to country where misconduct took place.
 - Main advantage is leniency in treatment from government.
 - Disadvantages include the commitment of additional time and resources, providing government with a roadmap to prosecution, and potential third party litigation.
- The U.S. government continues to investigate (particularly matters related to COVID-19), albeit increasingly remotely, often with more flexible timelines, and perhaps a longer time horizon to resolution.
 - Continued communication with the government may show cooperation.
 - Communicate relevant information about a company's current finances.
 - Consider privilege and work product issues in remote presentations.



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Speaker Contacts (1)



Peter Burrell

Partner

T: +44 20 3580 4702

E: pburrell@willkie.com

Peter Burrell is a partner and heads Willkie's Litigation, Compliance and Enforcement and White Collar Defence Practices in the London office.

Mr. Burrell is recognised as one of the U.K.'s leading specialists in corporate crime and compliance matters. His practice includes advising on compliance issues relating to money laundering, bribery and corruption, sanctions and fraud; conducting complex internal corporate investigations; and defending companies and individuals in investigations and enforcement actions by the U.K.'s Serious Fraud Office, Financial Conduct Authority, HM Revenue and Customs, and other law enforcement and regulatory agencies. He also handles complex High Court litigation and arbitration proceedings in London, with a particular focus on financial fraud, securities disputes and financial reporting issues.

Chambers and Legal 500 cite Mr. Burrell as a leading practitioner in his areas of practice in the U.K. His recent representations include acting for Afren Plc in connection with an investigation concerning alleged breaches of Listing Rules and Improper Payments, acting in relation to the SFO's failed prosecution of 6 brokers concerning LIBOR manipulation, and representing Tony Allen in connection with a US prosecution for alleged incorrect LIBOR submissions.



Robert J. Meyer

Partner

T: + 1 202 303 1123

E: rmeyer@willkie.com

Robert J. Meyer is a partner in the Litigation Department of Willkie Farr & Gallagher LLP and is a member of the Compliance, Investigations & Enforcement Practice Group in Washington, D.C. He is nationally recognized for his experience conducting internal investigations and in government enforcement matters involving the Foreign Corrupt Practices Act, the False Claims Act, government ethics, accounting fraud, bribery, fraud and whistleblower allegations. As a former federal prosecutor with substantial trial experience, Bob is frequently called upon to defend criminal and civil enforcement matters involving all of these subject matter areas.

Willkie's FCPA practice group has been named by *Law360* as an "FCPA Powerhouse." *Chambers USA* and *Chambers Global* rank Bob as a leading individual practicing in the FCPA field in the United States, with clients stating, "He is fantastic and a delight to work with."

Speaker Contacts (2)



Rita Mitchell

Partner

T: +44 20 3580 4726

E: rmitchell@willkie.com

Rita D. Mitchell is a partner in Willkie's Litigation and Compliance, Investigations & Enforcement Practices in London. Her practice includes advising and defending corporations in a variety of criminal and civil investigation and enforcement matters, conducting complex, worldwide internal investigations in relation to bribery, corruption and fraud, advising on and developing and benchmarking compliance programs, conducting pre-merger and third party due diligence, and providing day-to-day counseling and training on compliance with U.S., U.K. and other anti-corruption laws, including the U.S. Foreign Corrupt Practices Act (FCPA) and U.K. Bribery Act 2010 (Bribery Act).

Rita was featured in Global Investigations Review's Women in Investigations 2018, which honours 100 investigations specialists from around the world, and was also recognised in the 2019 and 2020 editions of *Who's Who Legal Investigations: Future Leaders* as an "up-and-coming star in the field."

Rita is the co-leader of the London Chapter of the Women's White Collar Defense Association, a group of women attorneys and other professionals who represent clients facing government enforcement actions, criminal or civil, and who conduct global internal investigations and handle other compliance and ethics matters for clients.



Simon Osborn-King

Partner

T: +44 20 3580 4712

E: sosborn-king@willkie.com

Simon Osborn-King is a partner in Willkie's Litigation and Compliance, Investigations & Enforcement Practices in London. Simon has a broad-ranging domestic and cross-border investigations, commercial litigation and arbitration practice. Simon has significant experience in complex regulatory, criminal, and internal investigations and enforcement proceedings facing multinational corporations, financial institutions and individuals across a wide spectrum of business sectors including before the U.K. Financial Conduct Authority and Serious Fraud Office, US Department of Justice, European Commission, Italy Public Prosecutors' Office, Japan Financial Services Agency and Korea Fair Trade Commission.

Simon also represents a range of clients, including financial institutions, funds, major corporates, shareholders, and high-net worth individuals in high value and complex commercial litigation and arbitration proceedings, often with parallel UK and US dimensions. He has particular experience in relation to disputes where allegations of fraud, conspiracy or misconduct are central issues.

Simon is frequently called upon to provide urgent advice on compliance issues relating to anti-corruption, sanctions, whistle-blowing, money-laundering and data protection.

Simon was recognised in the 2020 edition of Global Investigations Review's '40 under 40', which celebrates the next generation of leading investigations specialists from around the world.

Speaker Contacts (3)



Martin J. Weinstein

Partner

T: +1 202 303 1122

E: mweinstein@willkie.com

Martin J. Weinstein is a partner in the Litigation Department, Chair of the Compliance, Investigations & Enforcement Practice Group and a member of the firm's Executive Committee. For more than two decades, he has represented corporations, organizations and individuals in a wide variety of sensitive matters ranging from bribery, fraud, whistleblower and corruption matters worldwide to Congressional inquiries into campaign contributions, as well as conducting investigations on behalf of the Commissioner of Major League Baseball. His practice has covered almost every major enforcement, compliance or financial fraud topic in almost every industry, spanning over 60 countries in every region of the world. Martin is a widely recognized authority in the US Foreign Corrupt Practices Act (FCPA) and has been an expert witness on a number of occasions. He has tried more than 50 cases, and he has argued over a dozen appeals.

Chambers USA and *Chambers Global* ranked Martin every year since 2007, stating he is "very effective" and "fabulous at strategizing and is very personable and very client-oriented.... He has industrywide FCPA expertise and regularly represents leading corporations under investigation by government agencies." He has been named one of the "100 Most Influential People in Business Ethics," and as one of the "Attorneys Who Matter" by *Ethisphere Magazine* seven years in a row. Martin is co-author of *The Foreign Corrupt Practices Act: Compliance, Investigations and Enforcement*, a comprehensive practitioner's book covering all aspects of the FCPA and the creator of the Willkie Compliance Concourse app.