



Crisis Risk Management: Key Compliance and Litigation Risks Arising Out of COVID-19 and How To Manage Them

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Introduction

- Some Thoughts on Compliance in the Covid Era
 - Post-survival tone at the top
 - In-person training – virtually
 - Decentralization vs centralization
 - Supply chain/distribution urgency vs. due diligence process
 - Remote auditing using data analytics
 - Privacy vs. public health
 - Contact free corruption

Examination of tone at the top

1. Where was senior management?
2. Was the compliance message still enforced amidst messages to stay home or be safe?
 - Has there been a virtual “townhall” to emphasise compliance as well as “stay home/stay safe”?
 - Have senior management engaged in the virtual training exercises?
 - Has business ethics featured in business messaging?
 - Have compliance personnel been invited to virtual team meetings?
 - Has the risk agenda been de-prioritised in favour of other Health & Safety or “crisis” risks?

Compliance Processes and Framework

Were adjustments made to the compliance processes and framework? How did supervision and communication stay effective?

1. Was a new risk assessment undertaken as a result of virtual working?
 - What new risks were identified? For example:
 - Easier side bar discussions
 - Enhanced or different ABC risks due to absence of G&H or conference travel
 - Removing the ability for face-to-face diligence
 - Ability of your distributors to manage their compliance programme remotely
 - Lack of face-to-face training
2. Do the revised processes work as well?
 - Virtual committee meetings to approve new relationships
 - Video training
 - Virtual drop ins
 - Remote compliance audits

Will the adjusted systems/controls become the status quo?

Why?

- Budgeting constraints on international travel
- Limited human resources due to cost cutting

How?

- Training could remain virtual (as opposed to electronic)
- Attending business meetings by Zoom/WebEx/Teams/BlueJeans
- Attending committee meetings virtually
- Virtual audits

But...

- Lack of attention in virtual meetings
- Reinforcing a message by a physical presence
- Casual conversations raise awareness
- Raising concerns remotely can seem more serious

Impact on Third Party and Supply Chain Risk

- New and enhanced compliance risks arising from crisis
 - Interruptions to supply chains
 - Changes to 3rd party suppliers and partners
 - Bankruptcy or restructuring may impact ability to support your needs
 - Ownership changes and impact on risk profile
 - Diversification in event of a second wave/local outbreaks
 - Opportunists
 - Increased risk of kickbacks, unusual rebate arrangements, suspect commissions, related party transactions
 - Forced labour/modern slavery risks
 - UK Home Office: *“it is essential that businesses continue their activity to identify and address risks of modern slavery in their operations and supply chains”*
 - Impact on internal compliance resources
 - Remote working and (more) limited resources may impact how compliance teams are able to manage and mitigate both new and existing risks
- Previous/existing compliance risks around third parties and supply chain

Virtually Managing Third Party and Supply Chain Risk

- Due Diligence
 - Leveraging existing partners/relationships
 - Reviewing and recalibrating risk assessment
 - ABC, Tax Evasion, AML, Sanctions, Modern Slavery
 - Risk-based vetting of new suppliers/partners
 - Overcoming 'virtual' challenges and creating efficiencies
- Tone at the Top/Messaging
 - Engagement with the business
 - Engagement with third parties/suppliers
- Policies and Procedures around Third Parties
 - Are you able to follow your own policies and procedures?
 - Exigencies vs. long-term impact on programme
 - Documentation (contracts, diligence records, approval process)
 - Training and certification
 - Monitoring/Audits

Commercial Pressures Giving Rise to Increased Bribery, Corruption and Fraud Risks

- Unique set of pressures
- Attitudes, “bending the rules” and rationalisation
- Heightened risks of, for example:
 - Improper sales practices and falsified sales figures or performance metrics
 - Manipulation of books and records
 - Contract rigging
 - Compliance reporting reduced or ignored
 - Overriding of usual controls
 - Misleading public statements

Addressing the Risks and Staying Ahead of the Compliance Challenge

- A joint effort: Compliance, Legal, Audit and Finance
- Creativity and flexibility
- Adapting the control environment
- Maintain record-keeping and reporting standards
- Reiteration of approach to bribery, fraud and corruption
- Manage anxieties, uncertainties and confusion
- Enhanced monitoring and diligence, where appropriate
- Post-crisis review?

Compliance Risks Related to Government Aid Programs

- Government aid programs to support businesses during the COVID crisis can create a “perfect storm” for corruption and fraud:
 - Governments all over the world are making huge amounts of money available through aid programs
 - Not just US, UK, and Europe, but countries like Russia, India, Brazil, Malaysia, South Africa, and Saudi Arabia have made billions of dollars available
 - Programs may be hastily designed, with shifting requirements and guidance
 - May prioritize speed over transparency and competitive processes
 - Government enforcers and watchdogs will be under pressure to deliver results
 - Company employees’ actions will be judged in hindsight, often long after the crisis, and any crisis mentality, has passed
- More government money in economies means more government control, regulation, and risk:
 - Legal – criminal and civil investigations and actions
 - Financial – fines, penalties, and disgorgement
 - Reputational – one misstep can create a public relations nightmare

Enforcement Efforts Related to COVID

- The CARES Act created a Special Inspector General for Pandemic Recovery (SIGPR) to “conduct, supervise, and coordinate audits and investigations” of how the funds are used and provided \$100 million in funding to the SIGPR
- The Act also created a Congressional Oversight Commission and provided funding to numerous federal agencies’ Inspector Generals
- DOJ announced that it will prioritize the investigation and prosecution of coronavirus-related fraud schemes
- The SEC has stated that between mid-March and mid-May, its investigative staff has triaged more than 4,000 tips, complaints and referrals, a 35% increase from the same period last year

Mitigating Compliance Risks Related to Government Aid

- Compliance risks related to government aid programs:
 - Certifications regarding financial or other eligibility criteria
 - Changes to criteria or guidance after aid has been received
 - Restrictions on how aid can be used
 - Public officials responsible for approving or disbursing aid may seek to use the crisis as leverage to extract corrupt payments
- Steps to mitigate these compliance risks:
 - Ensure centralized Legal and Compliance involvement in decisions to seek or accept government aid
 - Continue to monitor changing requirements and guidance
 - Document decision-making for actions taken in the face of ambiguity to establish good faith
 - Where government program restricts the use of funds:
 - Train relevant employees on permitted use of funds
 - Adjust internal audit and compliance monitoring plans in order to track use of funds
 - Include these new risks in compliance training, committees, and messaging

Confidential Information

- As a result of COVID-19, more workers than ever are working remotely. Companies must balance the need to protect their Confidential Information with the need to ensure employees can work productively from home.
- **Risks** posed to Confidential Information by increased telework:
 - Information that may previously have been restricted to in-person discussions or board meetings are now taking place over the phone, email, and videoconference.
 - Personal devices and at-home Wi-Fi may lack adequate protections and controls and, thus, may make the Company more vulnerable to outside attacks.
 - Employees teleworking may share devices and workspaces with spouses and roommates increasing the risk of inadvertent exposure to Confidential Information.
 - Companies risk losing control of Confidential Information when remote employees are separated from the Company.

Confidential Information

- **Preventive measures** to protect Confidential Information
 - Adopt a formal telework policy.
 - The policy should identify the types of information the Company considers confidential and the steps necessary to safeguard that information at home, including proper disposal of confidential waste.
 - Remind employees of their obligations.
 - Employees should be trained on how to recognize Confidential Information and be reminded regularly of their obligation to protect Confidential Information.
 - Limit use of personal devices and private communication platforms.
 - Use company-provided devices and FTPs for the transfer of Confidential Information and prohibit communication via private email accounts, text messages, and social media.
 - Establish protocols for termination of access and information recovery.
 - The Company should be able to immediately terminate remote access and have procedures for recovery of company devices and information.

Insider Trading

- Statement from Co-Directors of SEC Enforcement on March 23, 2020:
 - *We wish to emphasize the importance of maintaining market integrity and following corporate controls and procedures. For example, in these dynamic circumstances, corporate insiders are regularly learning new material nonpublic information that may hold an even greater value than under normal circumstances. This may particularly be the case if earnings reports or required SEC disclosure filings are delayed due to COVID-19. Given these unique circumstances, a greater number of people may have access to material nonpublic information than in less challenging times. Those with such access – including, for example, directors, officers, employees, and consultants and other outside professionals – should be mindful of their obligations to keep this information confidential and to comply with the prohibitions on illegal securities trading. Trading in a company’s securities on the basis of inside information may violate the antifraud provisions of the federal securities laws.*

Source: <https://www.sec.gov/news/public-statement/statement-enforcement-co-directors-market-integrity>

Insider Trading

- **Preventive measures** to reduce Insider Trading risks
 - Draft robust disclosures.
 - Limit dissemination of market-moving information.
 - Adopt and/or update Insider Trading policy.
 - Communicate standards to employees.
 - Conduct virtual trainings and re-trainings.
 - Remind company spokespersons about risks of selective disclosure (including with respect to impact of COVID-19).
 - Adopt/enhance Insider Trading controls.
 - Blackout Periods / Closed Periods / Insider Lists
 - Preclearance procedures / 10b5-1 trading plans

Cybersecurity

- COVID-19 has increased the **Risk** of cyber attacks. Hackers understand that more Confidential Information is being communicated virtually. IT teams may have their focus diverted from security monitoring.
- **Preventive measures** to reduce Cybersecurity Risks
 - Minimize risks posed by employee devices and remote access
 - Encourage employees to install all patches and upgrades on personal devices.
 - Implement multifactor authentication.
 - Password protect video conferences.
 - Identify and address security weak points (e.g. printing)
 - Educate employees on how to detect phishing attacks and known trends.
 - Ensure your IT team is properly resourced.
 - Update your Incident Response Plan for a virtual working environment.

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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.



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Jeffrey D. Clark is a partner in the Litigation Department and is a member of the Compliance, Investigations & Enforcement Practice Group.

Jeffrey represents corporations and individuals in a wide variety of criminal and civil investigations and enforcement matters, including DOJ and SEC enforcement actions. His practice includes conducting complex, worldwide internal corporate investigations and providing advice to corporate management and directors regarding compliance and enforcement matters. He also counsels companies on designing and implementing corporate compliance programs. Jeffrey focuses on Foreign Corrupt Practices matters, and also has substantial experience in other types of international business and white collar litigation.

Chambers USA (2020) ranks Jeffrey as a leading individual practicing in the FCPA field in the United States. He is co-author of *The Foreign Corrupt Practices Act: Compliance, Investigations and Enforcement*, a comprehensive book covering all aspects of FCPA compliance and enforcement.

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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.



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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.

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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.