

# Navigating COVID-19: Best Practices for Managing Compliance Risk

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The COVID-19 pandemic is forcing companies to contend with a host of issues, including quarantines, travel restrictions, supply chain disruptions and overall strains on workflow. The crisis requires companies to consider not only their short-term crisis management, but also how their business continuity plan will need to be adapted.

Compliance professionals, who often play a vital role in crisis management and emergency planning, should prepare themselves and others within their organizations to think proactively about maintaining their company's compliance and integrity program during this time.

This includes anticipating the risks associated with the immediate and secondary effects of the COVID-19 crisis and thinking of innovative ways to leverage technology to continue adherence to corporate policies and procedures.

Companies should not view COVID-19 as a compliance "force majeure event." While some measure of case-by-case compliance relief may be granted, the governmental and regulatory expectation is that companies maintain strict oversight over compliance matters during this period, particularly those related to anti-fraud, and adapt their programs to take into account risks relating to COVID-19.

We have a COVID-19 Task Force within Cleary Gottlieb that is acting as a repository for practical solutions, best practice and issue-spotting to help our clients by sharing market experience, insight and advice from across our global presence.

If you have any questions concerning this memorandum or COVID-19 more broadly, please reach out to us at [Global-Cleary\\_Covid-19\\_Taskforce@cgsh.com](mailto:Global-Cleary_Covid-19_Taskforce@cgsh.com) or to any of the following authors:

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In this alert, we identify some of the different issues that compliance professionals should keep in mind as they navigate the COVID-19 pandemic.

First, we look at how compliance teams can anticipate potential impacts to their company's compliance and integrity program. Second, we highlight how to manage corporate risk in key compliance areas that may be particularly affected: tone at the top, third party management, anti-fraud controls, operation of whistleblower channels and IT integration and management. Third, we discuss some of the implications that COVID-19 may have on ongoing corporate internal investigations. Fourth, we provide an assessment of the current international regulatory landscape. Finally, we offer guidance on preserving company culture in the face of the ongoing crisis.

## **I. Anticipating Potential Impacts on Corporate Compliance and Integrity Programs**

One of the numerous challenges posed by COVID-19 is that its timeframe is undefined and unpredictable. As a result, compliance professionals will need to be nimble and modify their existing compliance architecture in a deliberate and organized way in response to the crisis.

First, consider creating a working party group comprised of members of key compliance functions, such as procurement, accounting, legal, IT, human resources, internal audit and key business units that can meet regularly (and remotely). The group should work to ensure that the three lines of defense are effectively communicating with one another, notwithstanding that most personnel will no longer be in the same place. Critically, the organization's business units will be the first to witness and experience the challenges presented by the pandemic, and are in many ways best positioned to report immediate effects and predict any lasting effects post-crisis.

Second, as with any new risk, the company's heat map should be revisited to determine whether it accounts for COVID-19 specific challenges such as changes in law and regulations, unexpected changes in suppliers and other service providers, greater reliance on remote access to IT systems and

potentially dispersed decision-making structures. The company will need to grapple with what policies and procedures need to be adapted and which new policies and procedures might be needed. To the best of its ability, the compliance working group should map alternative paths to get to the same or similar outcomes and ensure any changes to policies and procedures are appropriately implemented throughout the enterprise, including reminding employees that the policies still apply even if in an adapted way.

Third, if not already in place, companies that have not previously been exposed to the risk of health and safety issues such as those posed by COVID-19 may consider whether it would be worthwhile to also appoint a health, safety and environmental (HSE) working group, such as those commonly relied upon by industrial companies, on an interim basis. This group would be tasked with identifying and mitigating specific risks relating to COVID-19, such as issues related to physical separateness, access to necessary hygiene supplies and additional workplace cleaning procedures.

Fourth, the compliance team should take stock of the controls it has in place for recordkeeping, procurement and payment management, financial reporting and overall adherence to the organization's ethics program to determine which controls are most susceptible to a COVID-19 disruption. For example, internal controls and monitoring may need to be adjusted to avoid a backlog of "false positives" being flagged as a result of anticipated payment delays, incomplete documentation and policy deviations. Compliance personnel may instead want to develop structures for permitting anticipated exceptions so long as they are properly justified, documented and tailored to meet the ongoing emergency situation.

Finally, internal auditors, the third line of defense, should be prepared to conduct audits focused on the areas within the company's business most vulnerable to COVID-19 disruptions. To the extent possible, compliance teams should make sure internal auditors know where expected issues may arise and what measures compliance and business personnel have developed to address them. This will allow them to factor COVID-19 related issues into the design of their audit plans. Of course, internal

audit teams should talk to the company's external auditors before making any significant changes to the company's audit plan.

## II. Identifying the Compliance Areas Most Likely to Be Impacted and How

The public health emergency has affected, and will certainly continue to affect, certain core aspects of any compliance and integrity program. Below, we've identified some of the most likely areas to experience such effects.

### a. *Maintaining strong "tone at the top."*

With a view towards maintaining strong "tone at the top," compliance professionals should engage with their senior management on business integrity matters related to the COVID-19 outbreak.

Initial corporate communications on COVID-19 matters are likely to be focused on health, safety and business continuity matters. Thought should also be given to issuing communications on the importance of organizational values and any measures that the company is taking on an interim basis that may affect its compliance program, such as changes in appointments of compliance personnel.

Care should be also taken in assessing the company's external media strategy from a compliance perspective, particularly in connection with public-facing interviews, monitoring social media accounts held by the company or its management and reviewing communications on measures taken in response to the COVID-19 outbreak.

### b. *Keeping vigilance on anti-fraud controls.*

Anti-fraud should be a particular concern for companies during this period. The U.S. Department of Justice has warned against a number of fraudulent schemes that have already been identified, including online sales of fake pharmaceutical and medical equipment, "phishing" emails appearing to be from the World Health Organization and solicitations for donations from illegitimate or non-existent charitable organizations.<sup>1</sup> In addition, the high numbers of

employees working remotely also increases the risk of more classic fraud attempts, including fake signature attempts, falsified invoices or other accounting records and fraudulent wire payment requests.

Legal and compliance personnel may consider reminding employees of the company's anti-fraud procedures, particularly employees who have responsibility over areas of the business that may be more exposed to fraud due to remote working conditions, including accounting, treasury and IT personnel.

### c. *Third party due diligence.*

Compliance, legal and procurement teams should consider their third party providers' capacity to address COVID-19 impacts. In practice, this requires them to:

- Evaluate whether third party suppliers have a contingency plan in place, how quickly they can adjust to new circumstances and how dependent they are on human capital versus automation.
- Request back-up documentation from critical suppliers on how they are managing their own risks with respect to COVID-19, including with respect to sub-contractors or other companies in their supply chain.
- Determine whether third party providers have suspended or modified their policies and procedures to account for new challenges, and how that may affect their risk. For example, if a company or its third party provider has elected to source materials or services from a new provider located in a new country, how does this alternative meet other applicable compliance thresholds and risk measures?
- Understand what diligence is appropriate in hiring new vendors under exigent circumstances. Choices may be limited, and it may prove difficult to assess the current risks that any entity faces when presented with this crisis. The engagement of interim or replacement suppliers will certainly become more likely, which

<sup>1</sup> U.S. Dep't of Justice, "Report COVID-19 Fraud", available at <https://www.justice.gov/coronavirus>.

increases the risk of price-gouging and kick-backs. Companies that require competitive bidding processes may be required to move to single-source purchasing on an exceptional basis, and compliance teams should be prepared for enhanced diligence aimed at preventing such risks.

- Advance information-based protections such as auditing rights over suppliers' financials and/or expand the scope and timeline for auditing third parties.
- Consider requiring suppliers to adhere to, and certify compliance with, supplier codes of conduct and maintain grievance mechanisms to report any matter of concern.

*d. Monitoring whistleblower channels.*

Whether internally managed or operated by a third party provider, a company's whistleblower channel will still need to be monitored throughout the pandemic. Companies should have systems in place to separate the urgent from the less urgent and avoid backlogs or unattended reports. To that end, compliance professionals should:

- Confirm that their whistleblower channel remains accessible, operational and effective.
- Consistent with applicable regulations on data privacy, leverage data analytics to ensure that information is quickly and efficiently digested. Whether or not a whistleblower report is COVID-19 related, being able to track topical and/or regional trends will allow for better allocation of compliance resources.
- Prioritize time-sensitive, high-risk and high-impact issues first, given the possible overall strain on resources.

*e. Information technology integration and management.*

Amid the COVID-19 crisis and its ripple effects, compliance professionals should work closely with IT to ensure that relevant information from their compliance program is readily available, integrated with other departments and continuously updated. More than ever, making sure information is current and accessible will be key for efficient

communication among company stakeholders. Compliance professionals should also consider taking the following actions in the context of the current crisis:

- Develop guidance on best practices in the telecommuting context, including maintaining confidential information and any restrictions on access to systems and servers, detecting and reporting data threats and protocols to be followed in the case of breach. This can also include reminders as to what constitutes appropriate use of company technology and resources, reminders on the use of personal email and any specific security requirements for personally-owned computers and smartphones.
- Engage with IT service providers on how they are managing risks relating to the COVID-19 outbreak, with a particular focus on data storage and cloud service providers.
- Evaluate how technology can help collect, centralize and organize information to allow companies to shift resources as needed among regions to relieve those areas most affected by COVID-19.
- If other departments (e.g., procurement, accounting and legal) need to adapt their current systems in light of the pandemic, compliance professionals should remain informed so they can monitor and evaluate the company's compliance and integrity program effectively.
- Many organizations have already moved to an online model for their compliance training and for the operation of their whistleblower channels, and there are a number of technology solutions for making those functions fully operational on a remote basis.

### **III. Implications for Corporate Internal Investigations**

Ongoing corporate internal investigations will inevitably be impacted by COVID-19. This does not mean that these investigations need to or should be suspended. Companies and their investigation teams, whether or not they involve external advisors, should adapt their investigation to social distancing

and travel restrictions. There are a number of measures that investigation teams can implement to achieve this goal:

- Adjusting the initial investigation plan and timeline to account for the current scenario and holding the investigation team accountable to the new schedule by utilizing an online project management structure. Investigators should expect timing delays within and outside of their organizations, but should not lose sight of the ultimate purpose of the investigation already underway.
- Moving forward with the tasks that can easily be done remotely, such as the communications and document review and transaction testing, while staying in close contact to ensure information is bubbling up and the review team's goals are aligned.
- Using technology to conduct interviews remotely but planning ahead to allow witnesses who want to engage their own counsel to do so, and feel comfortable with how their counsel will advise them in connection with interviews. Planning will also involve setting up structures such that any information or documents shared by way of electronic platforms are appropriately protected and secure.
- Keeping relevant stakeholders updated on the progress and results of the investigation to make sure that timely decisions can be made concerning, among other things, reporting to the Board of Directors, notifying the auditor or self-reporting to authorities.

#### **IV. Assessing the Regulatory and Enforcement Landscape**

It remains unclear how the COVID-19 outbreak will affect the regulatory and enforcement landscape in the long-term. However, initial reactions from international authorities suggest that the COVID-19 crisis will, at the very least, influence the strategy, priorities and working methods of international regulatory and enforcement authorities.

Regulators with oversight over banking and financial services matters have already issued

extensive guidance in the United States and the European Union. As discussed in [previous alert memos](#) issued by Cleary Gottlieb, this includes interim relief designed to provide some measure of flexibility on compliance matters during the initial period of assessing the impact of COVID-19.

The U.S. Department of Justice has also issued guidance on the importance of anti-fraud measures at this time, and has already issued its [first enforcement action](#) against a company fraudulently claiming to offer a vaccine against COVID-19.

The French Anti-Corruption Agency (the “[AFA](#)”) has also published guidance on COVID-19, notifying companies that no new regulatory inspections will be initiated by the AFA and no new audit reports will be issued during the mandatory confinement period; companies may also be granted additional time to respond to outstanding audit reports. The AFA also clarified that its personnel is continuing to advance existing matters on a remote-work basis and that companies may respond to questions and information requests by email.

The Italian National Anti-Corruption Authority (“ANAC”) has also announced that all ongoing proceedings are suspended and no new proceedings will be initiated – unless urgent circumstances arise – until April 15, 2020. Additional time has also been granted to comply with certain obligations under the Public Contract Code and ANAC regulations. The Italian Competition Authority, however, has not suspended its enforcement activities; two price-gouging investigations have already been initiated against Amazon and eBay regarding COVID-19-related products, including surgical masks and antibacterial gels.

#### **V. Preserving the Company's Culture in the Face of the Ongoing Crisis**

The challenges of the COVID-19 crisis are particularly difficult for compliance professionals to prepare for because of their global reach, their indefinite timelines and unpredictable scale. Compounding this, corporate budgets will be affected as businesses experience new pressures and service interruptions, which will certainly affect compliance departments. Compliance officers also



may find it increasingly difficult to keep their finger on the pulse of the company's compliance and integrity program.

Maintaining a unified corporate culture for a geographically-dispersed workforce requires significant focus and creativity in the current context and is the most critical function that compliance professionals can play. One way to maintain the corporate culture is to ensure that there continues to be a consistent and clear message from senior management about the values to which the company holds itself notwithstanding the current crisis. In many ways, compliance departments are in the best position to support executive leadership in maintaining calm and fostering a sense of shared corporate culture throughout the outbreak. Employees look to their compliance teams to help them navigate uncertainty and to tell them what is right or wrong in the ordinary course. Compliance professionals should continue to play that critical role by supporting executive management, reinforcing the company's culture of compliance and integrity and helping employees adjust to disruptions to their business.

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