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WHITE PAPER

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Impact of the COVID-19 Outbreak on Internal Investigations: Whether and How to Investigate During a Global Pandemic

Companies face a myriad of issues as a result of the novel coronavirus (COVID-19) outbreak. One issue is how to address allegations of misconduct involving corporate personnel, including whether and how to conduct internal investigations in light of increasing travel restrictions, shelter-in-place orders, and guidance regarding social distancing. This *White Paper* presents considerations relevant to companies' calculus as to how to carry on with internal investigations that pre-date the COVID-19 outbreak, and how to address those allegations of corporate misconduct arising after the outbreak began. Companies are advised to (i) reassess their internal investigative processes to appropriately take into account the exigencies and re-ordered priorities of the day, maintaining procedures necessary for risk-management, such as a harassment reporting protocol; and (ii) in particular cases, to ensure that due attention is paid to the range of considerations relevant to determining how best to proceed in the assessment and investigation of allegations of misconduct. This ensures that allegations are treated in a manner commensurate with their seriousness, and that rational decision-making is promoted and records of the same are established in the event it ever becomes necessary to demonstrate this rationality and the exercise of sound business judgment to regulators, shareholders, or other interested parties.

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INTRODUCTION

The novel coronavirus (COVID-19) outbreak has affected every aspect of business, including the conduct of internal investigations into allegations of misconduct involving corporate personnel. As companies mobilize to address the range of operational and other issues stemming from this global pandemic, many of far more acute concern, the calculus on whether and how to conduct internal investigations has also changed. Entirely unforeseen circumstances are now rightfully driving corporate decisions about the allocation and expenditure of corporate resources. Investigations that were worthy of expeditious investigation prior to this outbreak may very well (and very appropriately) seem less so in the current environment. Moreover, the means by which governments and companies are seeking to protect the health and safety of their people—including social distancing mandates, remote work, shelter-in-place orders, and travel restrictions—present significant challenges to conducting an effective internal investigation.

And yet, there are internal investigations pre-dating this outbreak that remain unfinished, and there will be new allegations of misconduct that have to be addressed in some meaningful fashion during the pendency of this pandemic. Indeed, for some companies, the pandemic actually heightens the risk that their employees and other agents will become involved in misconduct (whether deliberately or inadvertently) that may not only necessitate some form of internal investigation, but also draw the attention of regulators.¹

Against this backdrop, companies are well advised (i) to reassess their internal investigative processes to appropriately take into account the exigencies and re-ordered priorities of the day, maintaining procedures necessary for risk management, such as a harassment reporting protocol; and (ii) in particular cases, to ensure that due attention is paid to the range of considerations relevant to determining how best to proceed in the assessment and investigation of allegations of misconduct. In this way, companies can ensure that such allegations are treated in a manner commensurate with their seriousness and in keeping with resource and other practical constraints; that opportunities to remediate actual non-compliance and the risk of future non-compliance are identified and seized

with reasonable dispatch; and that rational decision-making is promoted and records of the same are established in the event it ever becomes necessary to demonstrate this rationality and the exercise of sound business judgment to regulators, shareholders, or other interested parties.

Set forth below are considerations relevant to determining whether and how to conduct internal investigations in the context of this global pandemic.

1. Consider potential changes to investigative protocols and practices on a program basis (rather than ad hoc), and communicate prospective changes to internal stakeholders to ensure that other corporate personnel and functions are adequately apprised and have the opportunity to weigh in.

No internal investigation occurs in a vacuum, isolated from other corporate functions. Instead, internal investigations invariably involve interactions with leadership personnel and other corporate functions (e.g., Legal, Compliance, Finance, HR, Audit) as they are proceeding and/or after they have concluded. This is so because, for example, the underlying allegations in some way implicate one or more corporate functions or the investigative findings and associated remediation measures impact various functions. As corporate resources are squeezed and priorities are necessarily readjusted, all corporate functions, including the internal investigative function, may be subject to re-evaluation from a broad, enterprise perspective. In this way, companies can ensure that, tailored to the immediate context, the right effort is devoted by the right personnel to the right issues at the right time.

Accordingly, in the development and implementation of deviations to protocols and practices relating to internal investigations, those corporate personnel responsible for the investigative function should solicit the perspectives of other internal stakeholders (including relevant officers, directors, and Board committees). An appropriately deliberative process should yield modifications to the corporate investigations program that have been thoroughly vetted for enterprise-wide advisability and overall practicality, and that promote reasonable consistency in the treatment of allegations of misconduct in these challenging times.²

2. Make a considered and informed decision as to whether to proceed with an internal investigation now (or to delay the investigation).

While companies may consider postponing or delaying the investigation of certain allegations until business life returns to something approaching normalcy, this may not be advisable for other allegations. Factors to consider in this regard include whether:

- The allegations carry serious legal, financial, or reputational risks, and whether a delay in investigating the allegations would materially exacerbate any such risks (e.g., by failing to stop problematic conduct by employees, including harassment, or third-parties of which the company has been put on notice);
- The allegations suggest that the company's systems, data, or other assets are at risk, or that important corporate functions are, or could be, compromised;
- The ability to make fine credibility determinations as to one or more witnesses is particularly important to the outcome of the investigation, bearing in mind that remote interviews—even if conducted by videoconference—are typically much less conducive to making such determinations;
- Delaying the investigation may substantially compromise the ability to identify sources of potentially relevant data, documents, or other information, preserve and review such information, protect against the risk of ongoing non-compliance, and/or hinder remediation as to the conduct at issue;
- Delaying the investigation may foreclose or inhibit access to key witnesses (e.g., employee layoffs, retirements, or other departures);
- Delaying the investigation may prevent stakeholders from responding to media inquiries; and
- The conduct at issue is likely to give rise to parallel investigations or legal action by relevant government agencies or other third parties (e.g., shareholders, customers or competitors).

As with changes to investigative protocols and practices generally, any decisions regarding specific investigations should include input from relevant stakeholders, including, as necessary, the company's audit committee.

3. In any event, but particularly when an internal investigation is delayed, take steps to ensure that potentially relevant data and other evidence is preserved, using available means of accomplishing these tasks remotely, if necessary.

At the beginning of any investigation, companies should move swiftly to identify and preserve potentially relevant information over which they have control. With respect to electronic data, many steps that companies typically take to do so are already conducted remotely. The remote preservation of electronic information potentially relevant to an internal investigation ordinarily occurs both at the corporate level, focusing on data maintained on company systems, and at the individual level, focusing on data in the possession of particular “custodians” who have some connection to the allegations under investigation.

Now is the time for companies to make full use of internal capabilities (or enlist the assistance of outside vendors) to preserve data that may have relevance to a pending or prospective internal investigation, if only to ensure that the data is set aside for collection and review at some later point in time. If an investigation is delayed, the investigators should evaluate whether it is more efficient and cost-effective to maintain the preserved data on the company's servers until it is time to transfer it to a third-party review platform, or whether to transfer the data immediately to the third-party platform and pay for data hosting fees until it is time to review the information.

Indeed, swift preservation of both electronically stored information and hard-copy files is especially important should the present circumstances lead to employee layoffs, as is expected.³ Special attention therefore should be paid to preserving data and documents in the possession of employees who are at risk of being separated and who are believed to have information relevant to an ongoing or prospective internal investigation. And for such employees, consideration also should be given to securing the employees' commitment, through separation agreements or otherwise, to cooperate with internal investigations that touch on their job duties and responsibilities even after they have left their companies.

In addition, despite many companies having provided employees with company-issued devices, many remote employees may be using their personal computers and mobile devices for

work-related purposes. Companies should consider whether they need to implement additional guidelines regarding the use of personal electronic devices or protocols on preserving off-network data. Any guidance or protocols should make clear that the company has the right to access work-related data on an employee's personal electronic devices.

4. If the decision is made to delay an internal investigation under the present circumstances, develop an interim work-plan for the matter.

If an investigation is delayed, investigators should still regularly monitor the matter and related circumstances for significant developments. Examples of significant developments include:

- Additional similar allegations;
- The actual or threatened disclosure of the allegations through whistleblowers, media reports, or other means;
- Government activity on the topic (e.g., subpoenas or interviews by government officials); and
- Indications that other industry participants may have engaged in similar conduct.

Any such developments may constitute good cause to reassess the initial decision to delay the investigation and to initiate or resume the investigation sooner than originally anticipated. In any event, all delayed investigations should continue to be tracked and annotated with any relevant developments to ensure that none “fall through the cracks,” and that investigators may pick up the investigation whenever appropriate with the benefit of knowing any interim developments.

In addition, from the available information, and recognizing that the ultimate investigation will likely provide substantially more insight into the allegations at issue, companies should also determine whether to implement any interim compliance measures to address compliance risks presented by the allegations. These may include suspending employees or vendors alleged to have engaged in misconduct, placing a pause on payments to third parties implicated in wrongdoing, or discontinuing certain other non-essential business activities.

5. When conducting an investigation in the midst of this pandemic, use available techniques and tools to compensate for the inability to conduct certain investigative activities more conventionally.

A. Collecting and Reviewing Documents and Data

In some instances, restrictions on travel and access to corporate facilities and personnel will make it difficult to collect evidence potentially relevant to an internal investigation. This is most obviously the case with hard-copy documents and other tangible items, as well as locally stored electronic data (e.g., data existing only on laptop hard drives, cellular telephones, and tablets). If the collection of such items and data can proceed safely notwithstanding applicable travel and access restrictions, then a sensible collection plan should be developed and executed. At a minimum, on top of instructing personnel to preserve relevant items and data, thought should be given to how best to secure the locations in which relevant physical evidence is located to prevent its loss or destruction until such time that the evidence may be safely and properly gathered.⁴

It should be the rare case in which existing travel and access restrictions prevent the collection of *any* physical evidence or data potentially relevant to an internal investigation. In most corporate internal investigations, digital forensic tools and other technology allow for a great deal of electronic data (e.g., email and other electronic communications, financial and accounting data) to be collected, processed and reviewed entirely remotely. Here, too, maximum use of such tools, which are often capable of remotely extracting data from hard drives, is generally well advised. And once collected, forensic analytics and more traditional review techniques can be applied, also remotely, to examine the data for investigative purposes (e.g., identifying hallmarks of fraud, detecting intrusions, and assessing data leaks).

B. Interviews

With the use of appropriate technology, it should be possible to plan and execute an internal investigation so as to substantially mitigate the downsides of remote interviews and other deviations from standard practice, while achieving the benefits of not delaying the investigation.

It is undeniable that current public health advice to practice social distancing and limit travel presents obstacles to conducting effective witness interviews. For many internal investigations that proceed under the current circumstances, interviews will have to take place, if at all, by videoconference or teleconference. Equipped with videoconference technology available on laptops, Jones Day has already begun conducting witness interviews through applications such as Webex.

While certainly not preferable to in-person interviews, in comparison to purely telephonic interviews, videoconferencing allows counsel to better assess the witness's credibility and to share documents with the witness for questioning.

Set forth below are just a few of the many issues to consider when conducting interviews remotely:

- Generally, the interview should not be video- or audio-recorded.⁵ In the United States, witness interview notes generally qualify as protected work product.⁶ A recording, by contrast, may be discoverable in future litigation.⁷
- The investigators should consider whether the witness has the ability to record the interview. Although unilateral recordings are prohibited in some states, the majority of states allow the practice.⁸ While this may be difficult to prevent during a telephonic interview, the investigators should take steps to ensure that the videoconferencing software does not allow for unilateral recording. A witness may also need to be admonished not to record the interview in any form.
- Investigators should be thoughtful about how to use, and ask witnesses about, documents during interviews. For example, if the investigators do not want to provide a witness with documents in advance, the interviewer(s) could present documents to the witness through software technology such as Webex during an interview. As always, companies should be mindful of data privacy laws when using documents for interviews and confirm that sharing documents with a witness or interviewer in another jurisdiction does not run afoul of data privacy protections.
- The limitations of remoteness may be used by the witness as an advantage. For example, a witness could drop the video or teleconference or feign technological issues as a tactic during the interview to avoid responding to a difficult question. A witness could also communicate with other parties during the interview in an effort to “get their stories straight.”
- Prior to the interview, the investigators should consider establishing an alternative means of communication in case the preferred method suffers from technological issues. A trial run-through is also advisable to address technological obstacles.

Unlike in-person interviews, remote interviews obviously raise the possibility that they may be regarded as having occurred

in multiple locations simultaneously (e.g., at least in the specific locations from which the interviewer(s) and the witness participated). Conducting an interview in multiple locations may also have implications for the attorney-client privilege. For instance, the hallmark of privilege—confidentiality—can be destroyed if the witness uses the remoteness of the interviewer as an opportunity, perhaps surreptitiously, to bring a third party into the interview. This issue can be even more complex in international investigations with different legal regimes. Additionally, the location(s) of the interview may be a factor that courts look to in determining which privilege law should apply. Conducting an interview across jurisdictions thus underscores the need to thoughtfully analyze multiple privilege frameworks when conducting an investigation that touches on more than one jurisdiction.

CONCLUSION

The current COVID-19 pandemic presents numerous challenges to companies, including the investigation and remediation of misconduct involving corporate personnel. While some work activities are foreclosed entirely, or nearly so, by the limitations on travel and access now in place across much of the world, internal investigators are not necessarily so constrained. Many companies have equipped employees to work and be available remotely and have in place technology that allows for the remote collection and review of corporate data. And in-house investigators and outside counsel focusing on corporate investigations have already largely adopted procedures to perform remotely these and all tasks typically called for by an internal investigation.

This provides most companies with some measure of flexibility to carry on effective investigations where the company has determined it is necessary to do so. In light of the challenges presented by COVID-19, internal investigation protocols may be modified to reflect when and how to conduct investigations remotely and practical considerations to address in doing so. Such protocols can also provide guidance with respect to the types of allegations that need to be investigated and cannot wait until the pandemic has passed. Putting such policies in place expeditiously provides necessary guidance and ensures continuity of compliance efforts despite these challenging circumstances. Policies that create flexible and tailored investigations may also prove useful in other exceptional circumstances such as natural disasters or civil unrest.

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ENDNOTES

- 1 See, e.g., Press Release, Dept. of Justice, “Attorney General William P. Barr Urges American Public to Report COVID-19 Fraud” (Mar. 20, 2020); Press Release, Dept. of Justice, “Justice Department Cautions Business Community Against Violating Antitrust Laws in the Manufacturing, Distribution, and Sale of Public Health Products” (Mar. 9, 2020).
- 2 In the employment context, however, a company should not make any changes that will risk its ability to show that the employer exercised reasonable care to prevent and promptly correct any harassing behavior and that the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer. For example, the company should avoid a situation where an employee could show that the reporting procedures outlined in an anti-harassment policy would not have been followed at the time because of modifications.
- 3 See Note, Int’l Labour Org., “COVID-19 and World of Work: Impacts and Responses 3” (Mar. 18, 2020).
- 4 It bears emphasis that COVID-19 can survive on physical surfaces for days, making it imperative that investigators take proper safety precautions when handling physical evidence. See Neeltje van Doremalen et al., “Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1,” *New Eng. J. of Med.* (Mar. 17, 2020).
- 5 This primarily applies to investigations that are performed for the purpose of rendering legal advice related to U.S. law. Outside of the United States, recording witness interviews is sometimes preferred.
- 6 See *generally Upjohn v. United States*, 449 U.S. 383 (1981).
- 7 See 10 Fed. Proc., L. Ed. § 26:188 (2019).
- 8 “Recording Calls and Conversations,” *Justicia* (Jan. 2018).

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