

## LITIGATION, DISPUTE RESOLUTION AND INVESTIGATIONS

# Conducting Internal Investigations Remotely

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Notwithstanding the ongoing Government restrictions on travel and meetings, companies may use remote technologies to continue internal investigations already underway or to initiate new investigations, where necessary, provided they comply at all times with the latest Government and public health guidance.

Internal investigations can be critical to mitigating business risk and liability and indeed in certain circumstances, directors and managers may be duty-bound to carry out investigations in order to protect the interests of the company and its shareholders. The COVID-19 pandemic does not diminish these duties and, although the logistical challenges are greater, companies should endeavour to maintain their typical approach to risk management.

## INTERNAL INVESTIGATION COMMENCED PRIOR TO THE GOVERNMENT RESTRICTIONS

When considering whether to continue an internal investigation that was commenced prior to the introduction of the Government restrictions, here are some questions to ask:

- Does the issue under investigation carry serious legal, financial, or reputational risks and will a delay in finalising the investigation exacerbate any such risks?
- Will a decision to delay impact any pending or potential litigation or transaction?
- Do you still have access to relevant data/witnesses and is this likely to change if a delay occurs?
- Do you have the resources to continue and, if so, will more time likely be required to complete the various actions?

- Is the issue under investigation likely to trigger a reporting obligation or to bring about a parallel investigation (see **below**)? If a parallel investigation has already started, are you required to keep the investigating agency or other bodies apprised?
- Are there likely to be further or ongoing related issues?
- Are there implications regarding your internal controls (such as financial reporting) that need to be identified and resolved?
- How might a decision to delay be perceived both internally and externally?

If you decide to continue the investigation, you should:

- Reassess the suitability of your terms of reference and consider whether they need to be refreshed in light of the Government restrictions.
- Reissue any document preservation notices to ensure that relevant documents which may be held by relevant personnel or on-site are not disposed of while individuals are working from home.
- Ensure that all relevant parties (both internal and external) are contacted and that they feed into the agreed approach.
- Consider whether extensions of time are required and, if so, seek to agree these with all stakeholders.

## POTENTIAL NEW INTERNAL INVESTIGATION

If you become aware of a potential issue (such as an allegation of fraud or a financial discrepancy) while the Government restrictions are in place, you should:

- Consider whether an internal investigation is required, and, if so, whether it will be possible to conduct the investigation remotely. Many of the same questions and considerations set out above will apply.
- Contain the impact of the issue if necessary/possible.
- Preserve relevant evidence and maintain privilege.
- Consider any reporting obligations at an early stage.
- Assess whether legal advice is required to mitigate risk and to advise on any regulatory/legal consequences and obligations.

If you choose to initiate an internal investigation using remote work practices:

- Establish a steering group to oversee the handling of the issue. Relevant information should be made available to the steering group via secure online platforms and the steering group should meet frequently by private video conference.
- Prepare a terms of reference, having regard to how Government restrictions may impact the conduct of the

investigation.

- Document the decision-making process so that you can explain any decisions taken at a later stage, if necessary.

If, having considered the relevant factors, an internal investigation cannot be properly conducted through remote work practices, it is important to isolate the issue as much as possible. Alternative approaches to assess and remediate the issue should also be considered as a decision to 'do nothing' may, where the issue is serious in nature, be harshly viewed by stakeholders or regulators.

## PARALLEL INVESTIGATIONS

In circumstances where there is a parallel investigation by a regulatory or supervisory body or other authority, you should consider at all times any ongoing regulatory obligations (for example, to meet certain deadlines or provide certain information), the benefit of cooperating and litigation risk.

Assume that regulators and supervisory bodies will continue their investigations and do not assume that any delay in responding to a potential issue will be considered reasonable or acceptable in light of the current circumstances. Relevant timelines should be adhered to, unless notified or agreed otherwise.

You should also notify the regulator of any change to the terms of reference of the internal investigation.

## INVESTIGATING REMOTELY

### Document collation

The identification, collection, review and maintenance of electronic data can readily be carried out remotely.

Identify any relevant hard copy document

or data which is held on physical devices such as USB devices or external hard drives that may not be accessible at the present time. It may be possible to delay the collection of hard-copy documents until the current restrictions have been lifted or relaxed.

### Remote interviews

While video-conferencing technology means it is possible to conduct remote interviews, there are some additional matters to consider:

- As a precaution, the interviewee's consent to a remote interview should be sought in advance and the interviewee should be offered reasonable assistance in the practical arrangements for giving an interview remotely.
- Use readily available technology. If required, provide any necessary hardware (i.e. a laptop or tablet) or training to the interviewee in advance. Ask the interviewee to test the software in advance of the interview to prevent any technical difficulties.
- Special care should be taken to ensure that any sensitive or confidential information that needs to be provided to the interviewee in advance of the interview is provided in a secure manner.
- Establish, and inform the interviewee of, the ground rules in advance, including as to:
  - » where they should locate themselves for the interview (i.e. ideally in a private space with no distractions);
  - » how questions are to be raised and answered to avoid people speaking over each other;
  - » how documents are to be referred to and shared during the interview; and

» who will be joining the interview.

- Consider what steps will be required to facilitate the interviewee's independent legal advisors, union representatives or translators (if required).
- Be mindful that interviewees may be under added stress and strain at the current time and be willing to accommodate them in whatever way may be appropriate.
- Agree the process for noting the output of the meeting.

If an interviewee is considered particularly important, it may be advisable to leave their interview until the end, perhaps even until the Government restrictions have been lifted.

### Privilege

As with all investigations, access to emails, documents, video and audio conferences and work spaces created in the course of the investigation should be limited to the investigation team and other necessary parties. Access to legal work product should also be limited to those who are considered to be the 'client' for the purposes of the investigation, as set out in the terms of reference.

### Reporting the investigation's findings

It may not be appropriate or possible to provide hard copies of the investigation team's report and consideration should be given to alternative ways of communicating its findings. For example, the investigation team may be able to present a summary or distilled version of its findings using video conferencing, or, rather than producing a typical end-of-investigation report, it may be able to communicate its findings at agreed intervals.

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## KEY CONTACTS



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