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CLIENT ALERT

Tips for Compliance Departments During the COVID-19 Pandemic

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Without question, the primary focus for many companies in this unprecedented healthcare crisis is the need to protect and save lives. However, following that comes the need to continue business operations, obtain much-needed supplies, and transport products on a global scale. And "business as usual" is anything but, with operational challenges creating a nightmare scenario for many compliance officers. Existing supply chains have shut down, new suppliers have entered the market, and competition is fierce.

To adapt to meet these new demands, companies are finding new or untested suppliers, using the services of new or untested agents, and doing all of this at record speed. In the midst of this pandemic, the time pressure and perceptions of "new liberties" arising from work from home atmospherics may lead to requests to skip critical compliance steps and controls. While there is some solace and forgiveness from customers "in the same boat," there is little doubt that the federal government will closely scrutinize business decisions once this crisis subsides. Indeed, in certain compliance areas the federal government is not waiting for the crisis to subside. The Department of Justice (DOJ) has already announced a task force to combat fraud, hoarding, and price gouging, and has even brought an action against a company in Austin, Texas for "illegal conduct related to the pandemic." On the international side, on April 14, the International Criminal Police Organization (INTERPOL) announced that it had identified an international fraud scheme offering non-existent COVID-19 masks for sale. The scheme worked by using compromised emails, advance-payment fraud, and money laundering – and was identified by financial institutions and authorities across Germany, Ireland, and the Netherlands.

The pandemic has created a complicated and risky compliance environment for companies.

First, there is no "crisis cartel" exception to illegal antitrust agreements. Businesses should therefore remain cognizant to not engage in any behavior that could be construed as communicating with competitors to fix prices, rig bids, or allocate markets or customers. Those behaviors are *per se* illegal and are subject to severe penalties, including significant criminal fines and substantial prison time. Both the DOJ and the Federal Trade Commission (FTC) have explicitly stated that they "will not hesitate" to bring cases against corporations and individuals that violate antitrust laws during this time of crisis. Attorney General William P. Barr, himself, recently emphasized that the DOJ is

looking to aggressively prosecute criminal antitrust violations related to the pandemic. In addition, the DOJ and FTC just on April 13 issued a joint warning that the agencies are on alert for "collusion or other anticompetitive conduct in labor markets, such as agreements to lower wages or to reduce salaries or hours worked." The DOJ may criminally prosecute such conduct and the FTC can even pursue invitations to collude in the labor market.

Second, the federal government is focused on preventing companies from hoarding and profiteering. On March 24, the White House issued Executive Order 13910, which criminalizes the hoarding and price gouging of critical items during the pandemic, including ventilators, face masks, and gloves. Violations of the Defense Production Act are punishable by up to a year in prison, a $10,000 fine, or both. On the same day, Attorney General William Barr issued a memorandum to all U.S. Attorneys with guidelines about how to enforce federal anti-hoarding and profiteering laws and announcing the COVID-19 Hoarding and Price Gouging Task Force. The Task Force aims to "develop effective enforcement measures to combat COVID-19-related market manipulation. By April 2, the FBI had already discovered hoarded supplies "during an enforcement operation" conducted by the Task Force. The government announced that this was "the first of many such investigations that are underway."

The bank regulators also have provided guidance on increased exposure to financial crimes related to the COVID-19 crisis. In particular, financial institutions have been put on notice of the following COVID-19 emerging trends:

1. imposter scams;
2. investment scams;
3. product scams; and
4. insider trading.

Following the trend from prior natural disasters, the Financial Crimes Enforcement Network has also flagged its "2017 Advisory to Financial Institutions," where financial institutions were warned of benefits fraud, charities fraud, and cyber-related fraud. The April 14 INTERPOL announcement of fraud typifies the heightened risk profiles as governments and the private sector look to new supply chains for much-need medical supplies.

Though the immediate concerns of the federal government appear focused on protecting access to critical items, the U.S. financial system, and preventing individual harm in the workforce, there is little doubt that anti-competitive conduct flowing from other forms of corruption will result in similar criminal proceedings once this crisis has passed. It is axiomatic that corruption and fraud opportunities, whether related to private or government conduct, are increased during times of crisis and economic destabilization. The need to clear supplies or products through customs, find ways to reduce economic losses, obtain lucrative contracts, speed drug studies in foreign markets, utilize financial institutions, or donate to government or charitable relief efforts are replete with corruption and fraud opportunities. And delays in any of these efforts can lead to catastrophic results. In this type of environment, standard processes may need to adjust to emergency procedures.

With the current landscape in mind, compliance officers can help keep businesses safe and compliant by focusing on a risk-based, practical approach. By creating emergency procedures, compliance can be seen as part of the ethical solution and not simply as a roadblock that individuals in the organization may seek to circumvent. As you assess your risks, we suggest you focus on the following:

1. Use your normal procedures wherever possible, including making independent decisions about pricing, customers, and markets;
2. Where time is of the essence, abbreviated procedures should continue to require basic due diligence to confirm that the supplier or counter-party is a legitimate business – particularly where the counter-party is an untested business partner. A review for potential red flags specific to the crisis should be implemented, including whether the supplier is demanding payment in advance, offering unusual delivery terms, refusing to use letters of credit, has no known track history in the business, requires payments to third parties, or appears "too good to be true";
3. Put all agreements in writing. If the business must prepare emergency agreements that lead to less review time, create a template and stick by it. Make certain there are sufficient protections in all agreements, including clauses

that require post-engagement due diligence. Such clauses will allow the company to quickly terminate the agreement if needed;

4. If a company does not have time to conduct full due diligence on every vendor, supplier and agent, at a minimum the company should have due diligence conducted on any agents before they begin working for the company. It is critical, however, that abbreviated due diligence should never exclude sanctions or embargo checks;
5. Do not delay post-engagement due diligence, including collection of beneficial ownership information;
6. Conduct post-transaction testing;
7. Educate company personnel that even a pandemic does not excuse otherwise illegal or high-risk conduct under U.S. laws; and
8. Reinforce the "Tone from the Top" and ethical commitment of the company via electronic reminders to company personnel ***and*** third parties.

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