

Managing trade investigations in a COVID-19 climate

To delay or not delay? Timothy O'Toole and Aiysha Hussain consider the myriad challenges in conducting an investigation remotely.

In the last few months, COVID-19 has rapidly spread to hundreds of countries. As a result, compliance and investigative functions have been forced to adjust to the new paradigm of social distancing and quarantine measures. Recognising the shift, the US Treasury's Office of Foreign Assets Control ("OFAC") recently issued a notice acknowledging that companies may need to temporarily reallocate sanctions compliance resources because of COVID-19, and that OFAC would evaluate this as a factor in determining an appropriate response to an apparent violation. Although OFAC appears to strike a conciliatory tone, it does not state that it will forego pursuing enforcement actions. Despite OFAC's apparent willingness to consider the surrounding economic realities, companies must remain vigilant.

How can investigations continue in the current environment? Below we discuss practical considerations for conducting a trade investigation while navigating the practical limitations imposed by the COVID-19 pandemic.

I. Timing

Many investigations are better conducted in person. The physical presence of counsel focuses attention, and helps move the investigation efficiently. The presence of counsel on site also allows for immediate and on-going discussions with data collectors, witnesses, and company decisionmakers. Managing an investigation remotely, by contrast, means that individual steps are done piecemeal, squeezed into a daily schedule, with each step often coming at a time when important details about a previous step have been forgotten. Thus, one of the first considerations in investigating potential trade violations is whether any investigation can and should be postponed, so that important steps can occur in-person after social distancing measures have been relaxed or lifted. If the investigation can be delayed, steps should be taken to immediately preserve any relevant data or documents.

Many investigations cannot be delayed, however. For example, in the trade space, some investigations involve an initial voluntary disclosure to a government agency and delaying the investigation may jeopardise any benefit that may accrue from

that voluntary disclosure. There is no one-size-fits-all solution. The bottom line is that a company should, in this climate, carefully weigh the costs of delay against the limitations imposed by a virtual investigation.

II. Video interviews

In most trade investigations, counsel interviews key witnesses in person. In the current environment, however, interviews by

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videoconference have become more common. Sometimes this works well, particularly when the interviews are likely to cover non-contentious matters. However, for key witnesses, and particularly for hostile witnesses, virtual interviews may not suffice, as it can be difficult to discuss the nuances of trade investigations, which can turn on technical factual distinctions and obscure trade regulations. Inter-jurisdictional video calls also create the potential for inadvertent exports of controlled data and technology. The video format can also make it difficult to establish rapport, thereby reducing the amount of information provided by the witness and making it difficult for counsel to judge credibility. The witness potentially can mute sound and video, can position the camera to restrict the access of the interviewer to contextual information, and even claim a bad connection and draw the interview to an end if he or she starts to feel uncomfortable with the questions.

This format creates potential difficulties in preserving the attorney-client privilege as well. The potential presence of third parties

in the background, outside the view of the interviewer, can jeopardize confidentiality. To guard against this risk, the interviewer should clarify in advance and at the beginning of the discussion that unnecessary third parties cannot be present during the interview. This is also a good way to guard against outside influence on the witness's testimony.

A final important consideration is whether to record a video interview. The format often makes recording easy, but it is important to proceed carefully. Local laws may prohibit recording interviews without permission from the party being recorded and the easy recording format also creates the possibility that the witness can secretly record the interview. The creation of a verbatim statement, moreover, can have serious consequences for the investigation, potentially weakening work-product protections and inadvertently creating discoverable material. Counsel must proactively address these issues as part of any virtual investigation.

III. Preserving data and documents

The virtual environment also can significantly affect data collection and preservation. Preserving hard-copy documents and collecting locally-stored data (cell phones, laptop hard drives, and tablets) becomes far more difficult when done remotely. Care should be given as to who will be able to collect data to ensure they are not potentially implicated by the investigation or have competing obligations under local law that could undermine confidentiality. Where appropriate, remote collection kits can be provided to the respective user to collect the data, and where data cannot be easily collected due to the pandemic, care should be taken to preserve the data to the greatest extent possible for later collection. ■



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