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# Creating an Effective Remote Investigations Process

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# Welcome

<b>Moderator</b>	<b>Speaker</b>	<b>Speaker</b>	<b>Speaker</b>	<b>Speaker</b>
				
<b>Jerome Tomas</b> Partner, Baker McKenzie	<b>Reagan Demas</b> Partner, Baker McKenzie	<b>Maria Zanfini</b> Vice President & Sr. Managing Counsel, Investigations, MasterCard	<b>Will Simmons</b> Head of Global Investigations and Associate Director, Ethics & Compliance, Lonza	<b>Steve Spiegelhalter</b> Partner, Forensic & Integrity Services, Washington D.C. and Virginia Metro Area Leader, EY

- All attendee lines are muted
- Submit questions using the Chat feature in Zoom
- Email with recorded post webcast sent to registrants

# Overview

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# Background

# Transitioning to remote investigations

## Background

- COVID-19 public health concerns have caused many local, state and federal/national governments to impose significant restrictions on business and personal activity.
- Businesses continue to operate, albeit under much different circumstances. Remote corporate investigations are one facet of this “new reality.”
- The advisability of conducting investigations remotely is driven by numerous considerations
  - Ongoing investigations need to be completed
  - Improper conduct may be ongoing
  - Risk losing evidence
  - Prompt investigation resolves uncertainty and allows for remediation
  - Law enforcement/regulatory expectations, including disclosure

# Timeliness of investigations and modifications

COVID-19 impact caught many off-guard but...

- Remote investigation activities are routine for some companies
  - Lack of local resources
  - Financial constraints
  - Geographic spread
- More companies switching to remote investigations in current environment
  - Remote work
  - Travel restrictions
  - Social distancing requirements

# Transitioning to remote investigations

## Background

- Need to reassess/modify investigations workflows and systems because remote investigations present unique challenges
- “Normal” practices will need to be reconsidered
  - Issue: Travel to access records and image laptops may be restricted by law or company policy
    - Solution: Use of IT to access server data, use alternative sources of data
  - Issue: In-person interviews
    - Solution: Skype, Zoom, BlueJeans, FaceTime videoconferencing capabilities (but may be harder to assess witness credibility and ensure confidentiality)



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# Remote Investigations: Legal Implications



# Modifications to regular processes

## Legal implications

- Balance the need to maintain a functioning compliance program with the current realities
- Prepare for triaging of investigation work based on risk and be ready for an influx of complaints.
- Consider the following issues when conducting remote investigations
  - cybersecurity challenges
  - privilege issues
  - confidentiality and privacy issues
  - maintaining integrity of evidence preservation and collection
  - regulatory implications

# Remote investigations

## Cybersecurity challenges

- Remote work increases cybersecurity challenges, some of which can cause disruptions and lead to subsequent litigation
- Increased risk of exposing confidential company information to hackers
  - Working from unsecured Wi-Fi and personal devices
  - Transmitting evidence containing sensitive company data via personal and unencrypted email accounts
- Insufficient security efforts may result in company data breaches or public dissemination of allegations, evidence, or findings

# Remote investigations

## Privilege issues

- Transmittal of evidence or interviews through unsecured remote means risks destroying privilege and exposing company data to third parties (e.g., eavesdroppers)
  - Taking privileged materials and company computers offsite to prepare for interviews
  - Disclosure of privileged documentation or information while interviewing by telephone or video in unsecure locations (e.g. screen shares)
- If these interviews are conducted under privilege or if materials are protected by the attorney-client privilege, it is important that employees safeguard against disclosure to third parties that may result in waiving the privilege (may be more challenging to safeguard in remote investigations)

# Remote investigations

## Confidentiality and privacy protections

- Risk of exposing confidential company information to third parties could threaten trade-secret protection
- Weakened security and confidentiality practices in remote investigations may increase the risk that such information could be required to be disclosed in litigation
- Increased risk that allegations of impropriety become public, which increases the likelihood of regulator disclosure
- Privacy concerns when sending devices outside the jurisdiction
- Real-time monitoring and privacy concerns
- Review information security and BYOD policies and guidelines, and remind employees of company expectations while conducting interviews

# Remote investigations

## Integrity of evidence preservation and collection

- Emails can often be secured and collected remotely through servers, but other evidence can be harder to secure remotely
  - Hard copy documentation
  - Imaging of devices – in particular, ephemeral messaging application usage
- Collection of accounting data for forensic review should be monitored to ensure integrity of data pull
- Non-simultaneous collection of evidence through discrete remote channels can tip off employees and result in spoliation of evidence
  - Coordination on timing and processes important

# Remote investigations

## Discipline

- Promptly stop any improper conduct and take appropriate action against suspect employees
  - Garden leave, contract suspension
- Disciplining employees in digital world
  - Digital signatures
  - Regulations vary; consult employment counsel
- After investigation completed, upgrade compliance policies and guidelines
- Remote compliance training and communications (keep employees informed of outcomes of investigations/any policy changes)



# Remote investigations

## Government Investigations

- US law enforcement and regulatory investigations remain active, but many other jurisdictions have slowed
- However, closures and remote work may require certain aspects of government investigations to be delayed or extended
  - In person-meetings, grand jury testimony, Meetings postponements
  - Request extensions, if needed, with explanations
- Highlight solutions e.g., relying on video and written depositions, testimony from alternative witnesses, using alternative remote discovery collection methods

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# **Practical recommendations**

# Remote investigations

## Recommendations

- Primary focus should be on stopping improper conduct and preserving evidence
  - Remote data collection, but ensure preservation of devices through local contacts and means workable given local situation
- Ensure integrity of financial and account data pulls where done remotely or by company employees
  - Use screenshots (“virtual presence”) when financial data is pulled
- Some jurisdictions already returning to more “normal” practices (e.g., China); rely on local counsel where possible
  - Constantly changing landscape as COVID-19 wave moves jurisdictionally

# Remote investigations

## Recommendations (cont'd)

- If conducting remote interviews, avoid sharing sensitive or privileged materials electronically (consider screen share or alternative methods)
- Create clear protocols for phone and video interviews – when they will be used, when they won't, and how they will proceed
  - Train investigative team on remote investigation processes
- If matter is before regulators, keep regulators updated on status and adjustments to typical protocols
- Consider appropriate safety measures where onsite work is necessary and possible, and follow all applicable guidance and rules on essential work and social distancing
- Stay in regular contact with your investigative team using technology
  - Weekly “virtual” meetings and status conferences



**Questions**