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# **Amplified Anti-Corruption Risks During COVID-19: Navigating Compliance and Investigation Challenges, Addressing Misconduct**

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THURSDAY, APRIL 30, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

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Miller & Chevalier

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**Addressing Corporate Misconduct During a Pandemic:  
Anti-Corruption Compliance and Investigations  
Considerations in the Time of COVID-19**

Matt Ellis, Andy Wise, and Ann Sultan

April 30, 2020

# Agenda

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- Enforcement
- Continuing to run a compliance program
- Investigations practices

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# ENFORCEMENT

# Enforcement

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- Working from home: what does that mean?
- U.S. District Courts closed: implications and future impacts?
- More flexible in other ways

## Compliance Program Enforcement: Eni S.p.A.

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- SEC Cease-and-Desist Order (April 17, 2020)
  - Disgorgement of \$19,750,000 and prejudgment interest for a total of \$24,500,000
    - In related proceedings in Italy, Eni was acquitted and although its subsidiary, Saipem, was initially found guilty in Italy and ordered to pay a penalty of approximately €198 million, that finding was overturned in January 2020
- Between 2007 and 2010, Eni’s subsidiary Saipem S.p.A. entered into four sham contracts with an intermediary to assist in obtaining contracts awarded by Algeria’s state owned oil company. Payments were incorrectly reported in books and records.
- Sample compliance program alleged failures:
  - Saipem conducted little or no due diligence before entering into the contracts
  - Executive A bypassed contracting procedures at Saipem
  - Falsely characterized its payments to the intermediary as lawful “brokerage fees” in its books and records
- Intent matters: “because Eni’s CFO was aware of and participated in Saipem’s conduct, Eni failed to proceed in good faith to use its influence to cause Saipem to devise and maintain a system of internal accounting controls.”

## Compliance Program Enforcement: MTS

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- Last year, the DOJ entered into a Deferred Prosecution Agreement and the SEC announced a Cease-and-Desist Order with Russia's largest telecommunication provider, Mobile TeleSystems PJSC (MTS), and Uzbek subsidiary, in connection with alleged violation of the criminal and civil anti-bribery and books-and-records provisions of the FCPA
  - Penalty: \$850 million dollar criminal fine and forfeiture
  - Three-year monitor
- Alleged payments to Gulnara Karimova, the daughter of the former president of Uzbekistan, in exchange for support for MTS's business operations in Uzbekistan
- Sample compliance program alleged failures:
  - Failure to “comply with management approval requirements” [Commitment by Senior and Middle Management]
  - Failure to follow “established corporate government protocols with respect to the Board of Directors” [Policies and Procedures; Commitment by Senior and Middle Management]
  - Failure to “implement an adequate system for conducting, recording, and verifying due diligence on third parties” [Third Party Management; Continuous Improvement, Periodic Testing, and Review]

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# COMPLIANCE PROGRAM CONSIDERATIONS

# DOJ Expectations for Effective Compliance Programs

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- Is the company's program **well designed**?
  - Be able to articulate resource allocation decisions based on risk
  - Provide measures to show effectiveness of training and communications efforts
  - Show real actions and consequences for third party due diligence and investigations
- Is the program being applied earnestly and in good faith? In other words, is the program being **implemented effectively**?
  - Be able to demonstrate concrete actions by management showing adherence to the program
  - Be able to provide evidence of consistency of the program's application
  - Show reasonable commitment of resources to monitor implementation
- Does the corporation's compliance program **work in practice**?
  - Be able to show thoughtful and honest root cause analysis for violations
  - Be able to defend decision-making rationale
  - Demonstrate self-evaluation and programmatic changes following misconduct

# Compliance in a Pandemic

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- Risk assessments
- Third party due diligence
- Internal controls
- Compliance continuity plan

## Risk Assessments

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- The “starting point for a prosecutor’s evaluation”
- Credit will be given to a compliance program that devotes appropriate attention and resources to high-risk transactions, even if it fails to prevent an infraction in a low-risk area
- Prosecutors should therefore consider, as an indicator of risk-tailoring, “revisions to corporate compliance programs in light of lessons learned”

## Risk-Tailored Resource Allocation

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- Does the company devote a disproportionate amount of time to policing low-risk areas instead of high-risk areas?
  - Is the Company focusing on low-hanging fruit as opposed to the most poisonous fruit?
  - Are resources drawn from other functions outside of Compliance?
  - Is Compliance getting what it needs to police the higher risk areas?
- Does the company give greater scrutiny, as warranted, to high-risk transactions (for instance, a large-dollar contract with a government agency in a high-risk country) than more modest and routine hospitality and entertainment?
  - What does the Company consider to be high-risk transactions?
  - How has the Company evaluated which activities are high-risk?
  - What scrutiny is given and would the Company be able to identify and effectively remediate risks found as a result?

# General Best Practices for Risk Assessments

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- Bottom-up approach
  - Leverage non-compliance functions (e.g., Internal Audit, Finance, Investigations) and existing processes and procedures
  - Look for commonalities and similarities in risks presented by different corporate actions – do not silo risks based on hallmark delineations
- Continuous improvement
  - Ensure that risk assessments are updated consistently to capture changes in the Company's business/commercial profile and ensure that they incorporate lessons learned
  - Ensure that updates to risk assessments incorporate lessons learned and proactive solutions
- Document
  - Be able to show documented analysis behind decision making in risk assessment

# Adapting Your Risk Assessments for Today

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- Regularly scheduled risk assessments
  - Delay?
  - Modify?
- Assessing emerging risks from business changes, such as disruptions in supply chain or approval process
- Questions to ask in a risk assessment:
  - Are we (still) addressing all of our obligations?
  - What are our greatest compliance risks?
  - Do we have any gaps and which gaps should we address first?
- Document, document, document

## Emerging Risk Areas

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- Revenue generation risks
- Donations/charitable contributions
  - PPE and other products
- Sanctions
- Onboarding of third parties
- Approval process disruptions from employee unavailability
- Manual entry to ERP system(s) that now have fewer checks because of remote/solitary work
- Compliance professionals not necessarily being in the loop on business issues

# Third Parties

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- **Business Justification**
  - Be able to articulate why the third party was necessary
- **Due Diligence**
  - Expand third party due diligence responsibilities across the business and integrate the due diligence into existing or more comprehensive processes
- **Monitoring**
  - Assign primary responsibility for monitoring third parties outside of compliance and ensure that there is cross-functional collaboration
  - Hold relationship managers responsible for monitoring behaviors and red flags in third parties
- **Manage**
  - Articulate and enforce expectations on third parties

## Third Parties: Due Diligence

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- Due diligence on high risk third parties generally includes the following components:
  - Information collection from the third party
  - Information collection from other sources, such as references, background checks, on-the-ground intelligence providers
  - Interviews
  - Benchmarking terms and conditions
  - Negotiating safeguards in contracts (e.g., audit rights)

# Working with Third Parties Today

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- Weigh need for the third party against risk level
- “Should have” vs. “must have” processes
  - Consider:
    - Availability of on-the ground business intelligence
    - In-person vs video/phone interviews of third parties
    - Training third parties
    - Government interactions by third parties
- Best practice tips
  - Document decision-making and circumstances
  - Third parties who are onboarded more quickly than usual should be flagged for close follow-up monitoring
  - Carefully track third parties (and rejected third parties)

# Internal Controls

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- Design
  - Map controls to corresponding risks and relevant policies and procedures
- Good faith implementation
  - Invest time in training control gate-keepers and develop their compliance-related skills
  - Educate the board, senior management, and relevant personnel on the importance of faithfully adhering to controls
- Effectiveness
  - Assign personnel with responsibility to audit the internal controls related to the compliance program

## Internal Controls Today

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- Assess existing controls landscape (part of risk assessment process)
  - What controls are automated? What controls are manual?
    - For automated controls, are they still getting the right inputs? Do people have access in their modified work environment?
    - For manual controls that required in-person presence, what other safeguards should be in place?
- Best practice tip: Maintain the integrity of your files and processes by making sure that adaptations are documented and adhered to – modifications should not be on an *ad hoc* basis

# Compliance Continuity Plan

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- Assess how your plan has performed, if you had one
- Periodic evaluations of plan – even as we move towards “normal”
- Plan should be comprehensive and include plans of action if:
  - Approvals are tied up because people are ill or unreachable
  - Forms cannot be properly executed
  - Need to make an emergency decision
- Best practice tip: take the opportunity to demonstrate Tone at the Top (and Middle)

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# INVESTIGATIONS

# DOJ Guidance on Confidential Reporting Structure and Investigations Process

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- Internal Reporting
  - Prosecutors will evaluate:
    - Effectiveness of reporting mechanism
    - Properly scoped investigations by qualified personnel
    - Investigation response
    - Resources and tracking of results
- Investigations process
  - Prosecutors will ask:
    - “How does the company determine which complaints or red flags merit further investigation?”
    - “Does the company apply timing metrics to ensure responsiveness?”
    - “Does the company have a process for monitoring the outcome of investigations and ensuring accountability for the response to any findings and recommendations?”

# DOJ Guidance on Investigation of Misconduct

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- Investigations
  - “Well-functioning and appropriately funded mechanism for the timely and thorough investigations of any allegations or suspicions of misconduct”
    - “How does the company determine who should conduct an investigation, and who makes that determination?”
    - “Are the reporting and investigating mechanisms sufficiently funded?”
  - Prosecutors will evaluate:
    - Properly Scoped Investigation by Qualified Personnel
    - Response to Investigations

# Emerging Investigations Challenges

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- Maintaining, testing, and publicizing reporting mechanisms
- Preserving and collecting data
  - Remote imaging
  - Self-collections
  - Accessing data in accordance with data privacy regimes
- Conducting interviews
  - Videoconferencing considerations
  - Communications limitations
  - Local resources
- Limiting ongoing bad behavior

## Overall Considerations

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- Seek to meet all guidance
- Act in good faith
- Plan as much as possible
- Document decisions, processes, and circumstances

# Questions?

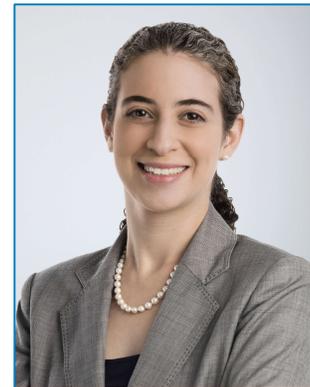
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