

INTERNAL INVESTIGATIONS

Practice Profile

At McKenna Long & Aldridge, we believe that the objective of an investigation is to provide the facts as to any misconduct whether or not it is illegal or potentially so, the causes and implications of any such conduct, and any failures in a company's systems, controls and responsibilities. The end result of such an investigation should be to advise and counsel the company or audit committee on appropriate remediation (both locally and enterprise-wide) in response to the incidents giving rise to an investigation.

The typical investigation is reactive, conducted with a prosecution mindset and imposes legalistic rules and a watchdog. Because every investigation is triggered by misconduct, and in the most extreme cases the misconduct is illegal and sometimes criminal, it is tempting to conduct every investigation as if it were an incipient prosecution. The more effective model employed by our attorneys is to conduct the investigation as a proactive tool to solve a business problem and add significant value by effecting cultural change and remediating ineffective business practices with as little disruption as possible.

Because of our focus on the business practices, our investigative teams include corporate attorneys who are well-versed in the internal workings of corporations and sensitive to the disruptive effects of an investigation. Although the nature of an investigation and the presence of outside lawyers is disruptive in itself, we believe that a properly managed investigation can minimize disruption and leave the company in a healthier place.

However, if the investigation's focus is to solve the business problem, the end result can be not only to understand and fix the problem but also to bring the added value of remediation of business practices – changes which, in turn, enhance operations and performance. Whether conducted internally or by external professionals, this kind of investigation can deliver all the evidence of wrongdoing and at the same time develop and install a thorough, effective plan of remediation.

The Four Stage Model



Although the scope and objectives of any investigation are captured and conducted in the stages described below, this does not mean that each stage is completed before the next is begun. The investigation is conducted along a continuum so that it can be efficiently

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completed. This means that document review that is related to one stage may still be ongoing while another stage is in process. In particular, the basic components of a remediation program will begin to present themselves at the earliest stages of the investigation, although the development of the full remediation program and plan for its implementation will always be the final step.

A “business solution” investigation and an effective remediation plan can be accomplished by using a four-stage approach:

Inquiry: Stage One is an inquiry into the identified misconduct. The investigative team inquires as to the conduct itself so that it can understand fully whether an illegal act has occurred, the actual conduct that did occur and the resulting consequences. This stage is important because it provides the core information about the type of conduct involved. This identification triggers the following stages:

Review of the Environment: Stage Two is a review of the environment in which the conduct occurred. This part of the investigation is designed to accomplish two primary goals:

1. To understand the conditions within the environment in which the conduct occurred. This is important in order to address the question of remediation. For example, the questions can be, did a particular control fail, did management override the control or was there no control that might have intercepted the issue in an early stage. Remedying a failed control is one thing; constructing new controls and culture is another.
2. To explore other aspects of the overall company environment which may contribute directly either to the conduct itself or to the immediate environment in which it occurred. For example, if the issue is one of revenue recognition, did it result from a weak policy at the parent corporate level?

In the course of either Stage One or Stage Two, it is often the case that the investigation also will unearth indications of the probability that the issue may or may not exist in other areas of the company and in which additional areas the company may be exposed. Exploring those leads in order to develop an overall picture for the company is the object of Stage Three.

Pervasiveness of the Incident: Stage Three establishes the pervasiveness of the issue throughout the company. In other words, is the given instance of misconduct unique and isolated, or is it an indication that there are issues of a similar kind in other parts of the company?

Stage Three is unique to any investigation. What the company needs from Stage Three is knowledge that the conduct under review was isolated or, if not, that an investigation of those other environments in which the issue may exist has been conducted.

The plan of action for Stage Three is usually derived from the basis of the information gathered in Stages One and Two. With the help of the company, the investigative team constructs a plan for evaluating other relevant areas of the company. For example, it may be relevant that

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employees who were once in the job function of the operating unit where the conduct occurred are now stationed in the same or similar function in another operating unit, or even in a different function in a different operating unit. Alternatively, there may be similar conditions in another operating unit.

The starting points for Stage Three are the specific facts provided by interviewees and documents obtained in Stages One and Two. Stage Three is completed when the plan designed for Stage Three has been executed, and Stage Three has not itself uncovered still more environments that need exploration.

In Stage Three, working closely with company management is particularly critical. The investigative efforts in Stage Three must be conducted in the least disruptive manner possible. To ensure minimal disruption, a great deal of thought and planning goes into the analysis of other environments in which the same conduct may occur and the investigation itself is undertaken with a strategy of maximum efficiency: as few interviews as possible, as little intrusion upon files and operations as possible.

Remediation: Stage Four is the development, in conjunction with the company, of the remediation program and the plan for its implementation. In developing the program, the investigative team works closely with personnel identified by the company as responsible for implementing and subsequently overseeing the program. The program is reviewed carefully with and by appropriate company management with an eye for completeness, but also cost and efficiency of installation. Remediation plans can include steps as simple as terminations of particular employees, to redefinition of job functions, to the design of controls, to establishing training. Remediation plans almost always implicate a component of the company's compliance program and the company's control systems. It is important to emphasize prevention over detection (although both are necessary) with the goal of having prevention built into the business model as a value add. Detection alone tends to encourage "going underground" with undesirable practices.