

JENNER & BLOCK

*Practice Series*

Preventing, Investigating and Addressing  
Misconduct in the  
Corporate Environment

Anton R. Valukas

Robert R. Stauffer

**PREVENTING, INVESTIGATING AND ADDRESSING  
MISCONDUCT IN THE CORPORATE ENVIRONMENT**

I.	THE CONTEXT: CONSEQUENCES OF MISCONDUCT .....	1
A.	Civil liability .....	1
1.	Lawsuits by alleged victims of corporate misconduct .....	1
2.	Civil claims by the government .....	2
3.	Actions by qui tam plaintiffs .....	2
B.	Criminal liability .....	7
1.	Criminal liability of employees .....	7
a.	Employee liability for the employee's own conduct .....	7
b.	Employee liability for conduct of the corporation .....	8
2.	Criminal liability of corporation .....	11
a.	Corporate liability for acts of employees .....	11
b.	Liability for conduct of independent contractors .....	16
c.	Liability for conduct of affiliated entities .....	17
d.	Liability after a change in ownership .....	17
3.	Parallel liability of employees and corporation .....	17
4.	Liability of service providers .....	18
5.	Consequences of criminal charges .....	19
a.	Costs of indictment and trial .....	19
b.	Types of sentences .....	19
c.	Computation of sentence .....	20
d.	Impact of conviction on future criminal proceedings .....	23

- e. Administrative sanctions ..... 24
    - f. Adverse publicity ..... 25
    - g. Collateral lawsuits ..... 26
  - 6. Prosecutorial discretion ..... 27
- II. CORPORATE COMPLIANCE PROGRAMS ..... 28
  - A. History of corporate compliance programs ..... 28
  - B. Reasons for adopting a corporate compliance program ..... 30
  - C. Elements of a corporate compliance program ..... 36
    - 1. Standards of conduct ..... 36
    - 2. Assignment of responsibility for oversight ..... 38
    - 3. Care in selecting and promoting employees ..... 39
    - 4. Education and training ..... 39
    - 5. Auditing and monitoring compliance ..... 40
    - 6. Enforcement ..... 41
    - 7. Corrective measures ..... 41
    - 8. Crisis management plan ..... 41
- III. INTERNAL INVESTIGATIONS ..... 42
  - A. History of internal investigations ..... 42
  - B. The decision to perform an internal investigation ..... 43
    - 1. Circumstances in which an internal investigation may be initiated ..... 43
    - 2. Reasons for performing an internal investigation ..... 44

a.	Duty imposed by statute or regulation .....	44
b.	Common law duty of management to investigate .....	46
c.	Duty of counsel to investigate .....	47
d.	Minimization of vicarious liability for employee misconduct .....	49
e.	Government incentives to conduct internal investigations .....	50
f.	Use at sentencing .....	53
g.	Information gathering .....	53
h.	Public relations .....	53
3.	Costs and risks of investigations .....	54
4.	Determining when to initiate an investigation .....	55
C.	Conducting an internal investigation .....	56
1.	Establishment of guidelines .....	56
2.	Strategic considerations .....	57
3.	Selection of the investigators .....	58
4.	Maintenance of confidentiality .....	60
5.	Document review .....	62
6.	Witness interviews .....	63
7.	Use of experts .....	69
8.	Conflicts of interest .....	69
9.	Fair Credit Reporting Act .....	71

D.	Preparation and presentation of a report .....	72
E.	Internal responses to the investigation .....	73
F.	Disclosure of the results to the public or third parties .....	77
G	Liability of investigators arising from the conduct of the investigation .....	77
1.	Lawsuits by victims of corporate wrongdoing or by the corporation's successor in interest .....	77
2.	Lawsuits by persons investigated .....	79
3.	Criminal liability .....	79
a.	Secondary liability (aiding and abetting) .....	79
b.	Failure to disclose misconduct .....	79
IV.	DEALING WITH THE GOVERNMENT .....	80
A.	Reporting to the government .....	80
1.	Disclosure obligations .....	80
2.	Voluntary disclosure .....	83
B.	Handling a government investigation .....	86
1.	Responding to document subpoenas .....	86
2.	Preparing employees for government interviews .....	87
C.	Negotiating a resolution with the government .....	88
1.	Persuading the government not to prosecute .....	88
2.	Settling with the government .....	90
V.	CONFIDENTIALITY CONCERNS .....	91
A.	Parties who may seek access to investigative materials .....	91
1.	Government .....	92

a.	Criminal proceedings .....	92
b.	Civil enforcement proceedings .....	92
c.	Settlement negotiations .....	93
2.	Private litigants .....	94
a.	Victims of alleged misconduct .....	94
b.	Shareholders .....	94
c.	Qui tam plaintiffs .....	94
d.	Collateral litigation .....	95
3.	The general public .....	95
a.	FOIA requests .....	95
b.	Access to litigation materials .....	96
B.	Sources of protection .....	104
1.	Statutory privacy rights .....	104
2.	Confidentiality of grand jury proceedings .....	104
3.	The Fifth Amendment .....	106
4.	Attorney-client privilege .....	107
a.	Privilege belongs to the client .....	107
b.	Communications must be with attorney or attorney's agent .....	114
c.	Communications must relate to legal advice .....	115

d.	Communications must be confidential .....	118
e.	Importance of documentation .....	120
f.	Fact of representation not privileged .....	121
5.	Work-product immunity .....	121
a.	Protects materials prepared in anticipation of litigation .....	121
b.	Protects materials prepared by party or party's representative .....	125
c.	Overcoming work-product immunity .....	126
6.	Self-evaluative privilege .....	129
7.	Ombudsman's privilege .....	131
C.	Exceptions to privileges .....	132
1.	Waiver .....	132
a.	Parties to whom disclosure operates as waiver .....	132
b.	Other conduct that may waive privilege .....	138
c.	Implied waiver - effect of disclosure on related materials .....	144
d.	Limited waivers - extension of waiver to non-recipients .....	149
2.	Crime-fraud exception .....	154
3.	Common interest exception .....	158
4.	Public interest and other exceptions .....	160