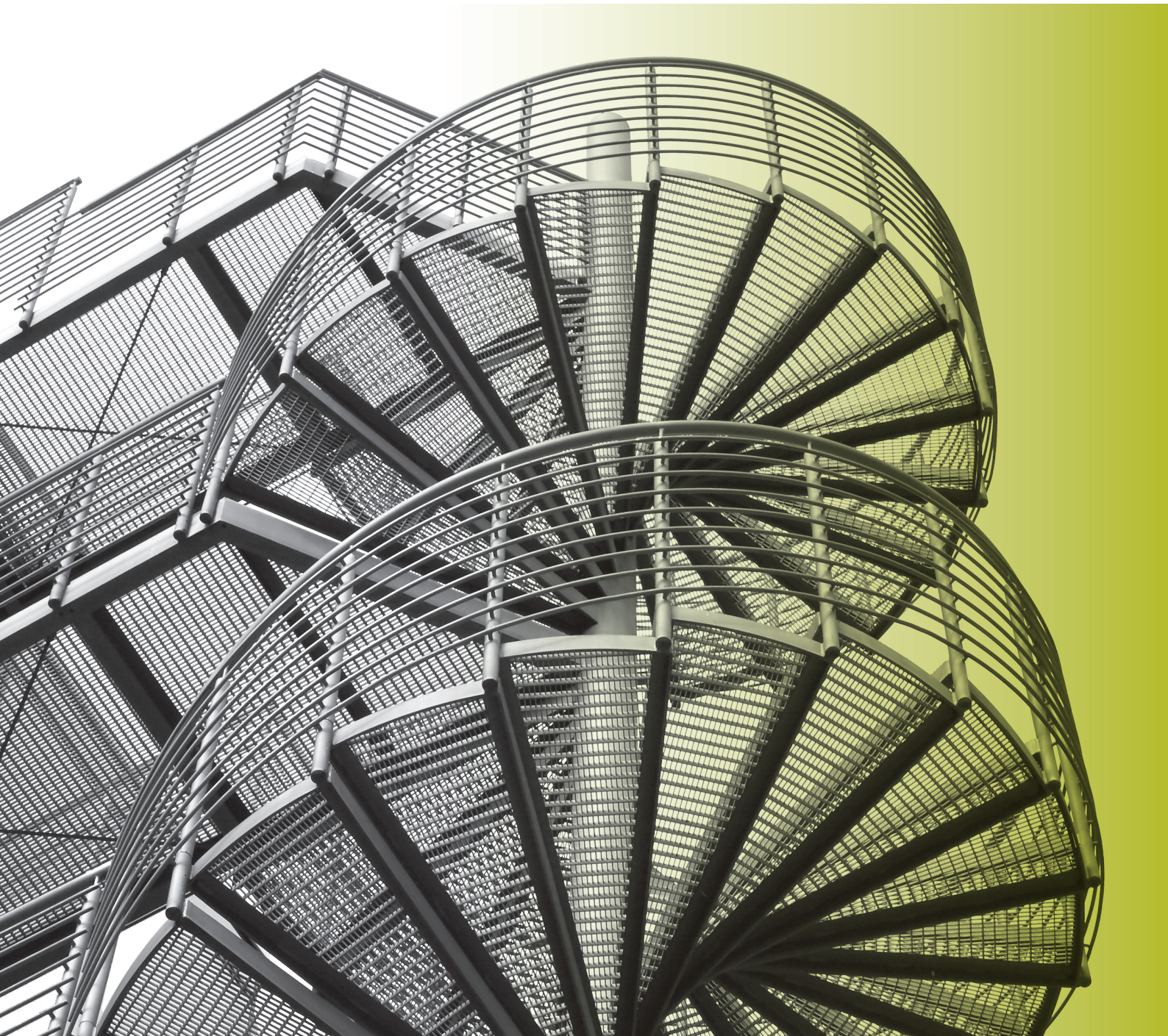
Corporate Compliance
Global

BAKER & McKENZIE

Responding to Misconduct



There are few things senior management dreads more than receiving a government subpoena — for good reason.

When conducted improperly, internal investigations can be expensive, time-consuming and deemed unacceptable by the U.S. Department of Justice, Securities and Exchange Commission or other regulatory body.

While company management and boards sometimes resist launching internal investigations, they are legally obligated to press forward. Anti-corruption laws such as the FCPA and the UK Bribery Act require companies to implement appropriate controls, monitor their effectiveness and follow up on alleged breaches.

The hard truth is that corporate investigations are an unavoidable cost of doing business. Despite best efforts, corporate misconduct can and does occur. In today's vigorous enforcement environment, taking allegations seriously by responding quickly and effectively is critical.

Ignoring these requirements increases a company's odds of government enforcement and the likelihood that executives and board members may find themselves personally liable for failing to take action.

When allegations arise, the most effective defense against an enforcement action is to conduct a credible internal investigation. Based on our experience, there are five primary steps you should take to define the scope of the inquiry, strengthen your case in the event of government disclosure and mitigate fines and penalties.

step 1

Receiving the Allegations

How you react to a whistleblower complaint, subpoena or dawn raid sets the tone for the entire investigation. Early on, the most important thing you can do is respond quickly. Whistleblower complaints should be promptly reported to general counsel or internal compliance counsel to determine the validity of the allegations and whether they can be handled internally. When responding to government subpoenas or requests for information, waiting until the last minute can hurt your credibility. The government may question whether you are committed to taking the allegations seriously and become more aggressive. At this stage, the best practice is to bring in experienced outside counsel who can immediately contact the government to acknowledge receipt of the request, elicit more details about the allegations, build a rapport and establish a reasonable timeline for responding.

step 2

Preliminary Assessment

Your preliminary assessment should consider three factors: the credibility of the allegations, the seriousness of the accusations and whether they warrant immediate action. To determine credibility, you should consider the source of the allegations and assess whether they are valid by conducting preliminary interviews and reviewing relevant company documents such as email, written correspondence and business contracts. To determine the level of seriousness, you should evaluate whether the alleged misconduct is simply a violation of company policy or rises to the level of violating the FCPA or other anti-corruption laws. If the allegations are serious enough and seem to merit further scrutiny, you may need to take immediate action such as halting transactions with certain business partners potentially involved in the misconduct.

step 3

Initial Planning and Preparation

Deciding whether an internal investigation should be conducted by in-house or outside counsel depends on the availability and capability of your company resources, as well as potential conflicts of interest and attorney-client privilege issues. The government expects those responsible for running internal investigations to maintain a high level of independence to ensure complete and credible disclosure. That's why it's best to have your audit committee or a designated special committee work directly with outside counsel to run the investigation. By limiting oversight of the investigation to committee members and outside counsel, you have the best chance of keeping information confidential and preserving attorney-client privilege. At this stage, it is also important to distribute a formal document retention directive to employees in the business units under investigation that instructs them not to destroy potential evidence such as relevant email, correspondence, company records, transactional documents and electronic data.

step 4

Developing an Investigative Plan

Creating a detailed plan that carefully defines the scope of your internal investigation and estimates how much it will cost shows that you are taking the allegations seriously. If the government is involved, a comprehensive plan also demonstrates your determination to cooperate. That plan should include an assessment of which company operations are involved in the alleged misconduct and what countries will be the focus of the investigation. It may also provide a general overview of what company documents and data will be reviewed, who will be interviewed and which financial records and business accounts will be targeted in the forensic audit component of the investigation. In gathering this information, you must account for data privacy laws in many countries that prohibit the collection of certain types of data, such as personal employee email, or impose restrictions on transferring data across borders.

step 5

Analysis and Resolution

Throughout an investigation involving the government, it's crucial to establish a good working relationship by communicating your investigative plan, providing regular updates and informing prosecutors of any unanticipated issues. Once you are ready to report your findings to the government, your presentation will generally include a legal analysis of the conduct that violated anti-corruption laws, a calculation of the estimated harm and an explanation of the actions you have taken to address the misconduct. Your remediation plan may also include a proposal to introduce compliance program enhancements such as establishing a stronger corporate compliance department, updating the code of conduct and anti-corruption procedures, training officers and employees on the enhanced policies, and developing protocols for screening and monitoring third-party intermediaries. Your ability to demonstrate all the actions you have taken to address the allegations, prevent future misconduct and implement a more robust compliance program may ultimately determine the outcome of your case. By following these five steps, you have a much greater chance of reaching a fair settlement, putting the investigation behind you and moving on towards a more compliant future.

Why Companies Avoid Investigating Misconduct:

- Inadequate legal/compliance staffing resources
- Concern about what could be uncovered
- Fear of reputational damage
- Cost
- Potential for government disclosure,enforcement and penalties

Responding to Misconduct:

Critical steps in internal investigations

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Baker & McKenzie has been global since inception. Being global is part of our DNA.

Our difference is the way we think, work and behave – we combine an instinctively global perspective with a genuinely multicultural approach, enabled by collaborative relationships and yielding practical, innovative advice. Serving our clients with more than 3,800 lawyers in 42 countries, we have a deep understanding of the culture of business the world over and are able to bring the talent and experience needed to navigate complexity across practices and borders with ease.