

# The Importance of Evaluating Intent

## situation

A case of alleged internal misconduct has been investigated. The general counsel examines the findings and decides the circumstances suggest fraud.

## in-house counsel challenge

The challenge is twofold:

The general counsel must first evaluate the employee's level of intent. Did intentional fraud occur, or did the individual simply violate internal procedures or make a mistake? Is there a regulatory compliance issue? Can it be prosecuted by the government, and, if so, will the misconduct expose the company to criminal, civil or administrative liability? Once the intent is evaluated, the general counsel can assess the organization's liability and determine the corrective action and resolve the matter.

Once the matter is resolved, the general counsel should then apply this evaluation to the organization's regulatory compliance risk analysis to 1) identify potential compliance patterns and/or vulnerabilities and 2) implement new safeguards throughout the organization.

## approach adopted

The linchpin is intent. How do you know the individual intentionally committed misconduct, or crime, as opposed to making a mistake? There are obvious indicators of intent, such as a confession or lying to investigators. However, "badges of fraud" can be less obvious, so consider the following questions:

The individual will often claim he was operating in good faith and didn't realize he was doing something wrong. Was the conduct consistent with its business purpose, or did he misrepresent the true purpose of his conduct to deceive the organization?

Is there a pattern of wrongful activity by this employee? If someone does something only once, it's a mistake. Twice, it's questionable, but three times establishes a pattern of misconduct and intent.

Was there an effort to conceal the misconduct by systematically disseminating misleading information or failing to provide relevant information? For example, did the individual make the accounting so complicated it couldn't be understood, or was it so incrementally small that it was likely to avoid detection?

Once the intent is established, the general counsel can determine whether the misconduct exposes the organization to any liability. Is the problem an ethical issue or a violation of the company's code of conduct? Or is there intentional misconduct and potentially a criminal act?

The general counsel can then make recommendations to the organization's governing body. Voluntary disclosures may come into

## implementation steps

- Determine whether the evidence validates the allegation of misconduct.
- Evaluate the individual's degree of fraudulent intent.
- Determine the potential liability.
- Report your findings and recommendations to the governing body.
- Conduct regulatory compliance risk analysis to predict patterns and organization vulnerabilities.
- Implement new procedures, policies or training, as needed.

play. If it's a heightened finding of intentional misconduct, you do what the law requires because the company may be criminally liable. The organization may choose to be proactive and report it to the government in an effort to mitigate its liability.

## measuring success

Success is not measured by uncovering fraudulent activity. It is not outcome determinative. True success is using the evaluation and investigation results to identify and predict regulatory compliance patterns and vulnerabilities on all organizational levels, including:

**Tactical.** The general counsel or compliance officer can use the information to establish new systems and processes that will prevent similar problems from occurring in the future.

**Strategic.** Senior management, such as the CEO, CFO, COO and/or general counsel, can make strategic determinations regarding the organization's risk and compliance budget.

**Governance.** The governing body can use the patterns/trends/vulnerabilities information to fulfill its governance obligations.



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