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Independent Investigations in Higher Education

INTERNAL INVESTIGATIONS

Two Cadwalader, Wickersham & Taft LLP attorneys examine how higher education is now following the trend of corporate America—increasingly opting for outside counsel to handle investigations. The authors identify the motivations behind the rise of independent investigations in corporate America and explain the extent to which college administrators dealing with controversy are guided by these same motivations.

By Kenneth L. Wainstein and A. Joseph Jay III

Colleges and universities are increasingly finding themselves embroiled in high-profile controversies over allegations of serious misconduct by their staff or students, and many are now opting to commission independent investigations to find the facts and resolve those controversies. Recent examples include the independent investigation into Penn State's handling of the Jerry Sandusky scandal; the review of the University of Virginia's sexual assault policies and procedures after the later-retracted Rolling Stone article about an alleged gang rape on campus; and the authors’ investigation into allegations of academic irregularities involving student-athletes at the University of North Carolina at Chapel Hill (UNC).

This trend in higher education follows a similar movement in corporate America toward outside investigations over the past decade and a half. American companies, even those with ample legal and compliance staff, are now using outside investigative counsel to handle all sorts of allegations ranging from bribery by low-level employees to revenue manipulation by C-suite executives. They have come to recognize the value in certain cases of outsourcing this work to independent, outside counsel whose work and findings are generally accorded more credibility and deference than an internal investigation by company employees.

This article examines how higher education is now following that same trend. It identifies the motivations behind the rise of independent investigations in corporate America and explains the extent to which college administrators dealing with controversy are guided by these same motivations. It predicts that independent investigations in academia will only become more common as colleges and universities continue to confront high-stakes controversies that threaten their stature and reputation. It then concludes that this trend will continue—with the resultant societal benefits of greater accountability and transparency—only so long as those schools that choose to commission independent investigations of alleged misconduct receive sufficient credit for making that choice in any NCAA or other proceeding that judges and sanctions that misconduct.

The Motivations for Independent Investigations in Corporate America

Companies have been steadily increasing their use of independent investigations since the corporate fraud scandals—like Enron and Worldcom—of the early 2000’s and the ensuing enactment of the strong fraud-prevention measures in the Sarbanes-Oxley legislation.

Reasons for Trend

There have been two basic motivations behind this trend. The first is the interest in preventing damage to a company’s brand and reputation when misconduct allegations arise. A company’s reputation for propriety and honesty is a financially-important asset, and corporate management has a fiduciary duty to protect that reputation. When that reputation is challenged by allegations of misconduct, corporate boards and officers look for measures that will show the priority they place on compliance. Often the appointment of a well-respected outside party to investigate the allegations is the most direct way to make that showing.

The second—and more practically compelling—motivation is the desire to avoid the sanctions that have been applied to corporate misconduct over the past 15 years. The death of Arthur Anderson after the Enron fraud and the eye-popping financial penalties in recent cases—such as the $1.9 billion money laundering penalty for HSBC and the $800 million foreign bribery penalty for Siemens—have highlighted the serious and sometimes existential threat posed by such enforcement actions and have sharpened the interest of C-suite executives and corporate board members in wrapping themselves in the mantle of an independent investigation when misconduct issues arise.

1 This increasing tendency to opt for outside counsel has extended to other types of organizations as well. Over the past three years, for example, our firm has conducted internal investigations for some of the 32 clubs of the National Football League, for a prominent charity, for a private secondary school and for a quasi-governmental metropolitan transportation association.

2 It is not every misconduct allegation that requires an independent investigation. Situations often considered ripe for independent review include those where the allegations are serious or high-profile, where they potentially involve senior company executives or where the in-house legal staff cannot conduct the investigation because they had a role in or awareness of the conduct being scrutinized. Examples of such corporate investigations include General Motors’ hiring of Anton Valukas to investigate the company’s handling of an ignition switch defect in some of its vehicles and Siemens’ hiring of Mary Jo White to investigate allegations of widespread foreign bribery.

3 See, e.g., Orrin Harrison III, Conducting Corporate Investigations under the Scrutiny of Sarbanes-Oxley, 31 Sec. Reg. L.J. 299, 305 (Fall 2003).
Thanks to those massive corporate penalties, corporate leaders now have a different calculus when they weigh the benefits of a particular outside investigation against its financial costs. This calculus has been further tipped in favor of independent investigations by the federal laws and policies that provide for reduced penalties for those companies that fully investigate and disclose violations. Those provisions include the sentence reductions prescribed in the U.S. Sentencing Guidelines for companies that self-investigate and disclose criminal conduct, the Justice Department’s internal guidelines directing federal prosecutors to consider a company’s investigative efforts in their decision whether and what charges to file against a company, and the Securities and Exchange Commission’s similar guidance to its enforcement attorneys. These provisions are frequently applied to reward companies that commission independent investigations, thereby demonstrating the tangible value of an independent investigation to a company trying to stave off or mitigate an impact of an enforcement action.

The Motivations for Independent Investigations in Higher Education

Like their corporate counterparts, college and university administrators are increasingly deciding to commission outside investigations when confronted with significant misconduct allegations. This trend is particularly apparent in relation to athletics, as evidenced by the three substantial investigations we have recently conducted in the college sports space. Those include our 2013 hiring by NCAA President Mark Emmert to investigate allegations that the NCAA’s enforcement staff engaged in inappropriate conduct in its investigation of the University of Miami’s football program; the ensuing broad review on behalf of the NCAA’s Executive Committee into potential reforms of the NCAA’s investigation and sanctions process; and our independent investigation into allegations of academic irregularities on UNC’s Chapel Hill campus.

Misconduct allegations and the need for independent investigations can arise in areas of college life other than athletics. For example, instances of sexual abuse and their handling—or alleged mishandling—by college administrators are now receiving heightened scrutiny by the Department of Education and the public at large, and are therefore becoming particularly fertile ground for the use of independent investigators.

Reputation

While college and university administrators deciding how to handle a controversy surrounding misconduct allegations may have the same concerns for regulatory exposure and reputation as their corporate counterparts, they weigh those concerns somewhat differently. In the bottom-line calculation of corporate decision-making, the concern for mitigating regulatory and enforcement exposure is typically the deciding factor. In the university context, by contrast, reputation is often the paramount concern in deciding how to respond to misconduct allegations on campus.

This is understandable given the nature of the higher education industry. Companies can sometimes have sullied reputations yet still get paying customers if they offer the best product or service for the money. That is not the case for universities, whose perceived appeal to their “customers”—students and potential students—depends largely on their reputation and on their ranking among peer institutions, a ranking that is based in large part on subjective criteria that measure a school’s reputation for academic quality and integrity.

Chief among those criteria is the school’s perceived trustworthiness. While all enterprises owe a general duty of care to their clients or customers, schools are entrusted with a special duty to protect the physical, mental, academic and emotional well-being of their students. That trust is absolutely central to the academic mission, it is critical to a school’s reputation, and it is tested whenever questions are raised about the propriety of a school’s conduct. It is the concern with protecting that trust that often compels a school to respond aggressively to such scandals and to commission an independent investigation.

The UNC investigation was a clear example of this thinking. UNC System President Thomas Ross and UNC Chapel Hill Chancellor Carol Folt deserve credit for acting decisively in the face of an ongoing controversy about certain independent study “paper classes” that had previously been used by students and student-athletes to receive high grades without a commensurate level of academic work. They recognized that this controversy struck at the core of their school’s identity as an institution of academic excellence and integrity, and that they needed a complete and unvarnished accounting of the underlying misconduct in order to remedy it and prevent its recurrence. That is why they brought us in with instructions to uncover the whole story and tell it to the world in a public report.

4See, e.g., U.S. Sentencing Guidelines Manual §8C2.5(g) (providing for credit for self-reporting, cooperation, and acceptance of responsibility).


7See, e.g., settlement between U.S. and General Motors regarding safety defects, No. 15-cv-07342 (S.D.N.Y. filed Sept. 17, 2015). In the press release announcing the settlement, the U.S. Attorney’s Office praised GM’s “swift and robust” investigation. See also United States v. Fokker Services B.V., No. 14-cr-121 (RUL) (D.D.C. filed June 6, 2014). In its memorandum in support of the deferred prosecution agreement reached with Fokker Services B.V., the government cited “the internal investigation led by outside counsel” that was thorough and complete in justifying its decision to forgo prosecution against Fokker. Memo in support of DPA reached with Fokker Services B.V. at 14, 14-cr-121 (RUL) (filed July 7, 2014).

8Similar laws, regulations and policies have been adopted by other regulators. See, e.g., Office of Foreign Assets Control Economic Sanctions Enforcement Guidelines, 74 Fed. Reg. 57,603 (Nov. 9, 2009).

9Other schools seeking independent investigations include American University in response to allegations of excessive spending by its president, see American University Chief Is Investigated Over Spending, N.Y.Times, Sept. 23, 2005; and the University of Texas at Austin in response to allegations of inappropriate influence in the undergraduate admissions process, see University of Texas at Austin – Investigation of Admissions Practices and Allegations of Undue Influence, Feb. 6, 2015, available at https://www.utsystem.edu/sites/utsfiles/news/assets/kroll-investigation-admissions-practices.pdf.

10A recent list from the Department of Education’s Office of Civil Rights identified more than 100 post-secondary schools that were being investigated in response to complaints about their handling of alleged sexual assaults. Concerns about sexual assault on college campuses have even reached the White House. In January 2014, President Obama formed the White House Task Force to Protect Students from Sexual Assault.

11When University of Virginia officials were faced with allegations in a now-debunked Rolling Stone article that their administrators had mishandled a victim’s report of an alleged fraternity gang rape, they wisely turned to a highly-respected team of lawyers at O’Melveny & Myers to conduct a fully independent investigation. K. Bumell Evans, High-ranked Firm Hired to Scrutinize UVA’s Sexual Assault Policies, Procedures, The Daily Progress, Nov. 29, 2014. Similarly, the University of Colorado at Boulder hired outside counsel to inquire into the campus’s handling of a sexual assault complaint and to review the school’s sexual assault and harassment policies, Adrian D. Garcia, Feds Target University of Colorado for Handling of Sexual Assault Case, The Denver Post (July 24, 2014).

12Although the school had previously conducted several legitimate inquiries into the “paper class” allegations, questions remained and detractors were suggesting that the administration was simply trying to hide its dirty laundry. As explained in our report, Investigation of Irregular Classes in the Department of African and Afro-American Studies at the University of North Carolina at Chapel Hill (Oct. 16, 2014), (available at http://www.cadwalader.com/resources/reports-independent-investigations), however, these detractors were wrong about the previous investigations. Those investigations were sincere efforts to get to the truth, but they were ultimately unable to answer a number of the key questions, largely because the two staff members who operated the “paper classes” had been facing the possibility of criminal charges at the time of these earlier
We did exactly that, and now most observers give the school credit for dealing forthrightly with the paper class controversy. Although it is weathering criticism for the academic irregularities we found, UNC’s thorough and transparent response to the allegations achieved the school’s primary objective—it reaffirmed UNC’s trustworthiness and its paramount commitment to academic integrity and student well-being. As a result, UNC is now in a position to move beyond this controversy with its head held high.\(^{13}\)

\(^{13}\) Indeed, the headline in the UNC Chapel Hill student newspaper the day after the release of our report proclaimed “The Beginning of the End: A 136-page report might be the conclusion of UNC’s academic scandal.” Bradley Saacks, Wainstein Report Might Be the Conclusion to UNC’s Academic Scandal, Daily Tar Heel, Oct. 23, 2014, available at http://www.dailytarheel.com/article/2014/10/wainstein-report-might-be-the-conclusion-to-uncs-academic-scandal.

The Future of Independent Investigations in Higher Education

The question now is whether the motivation of schools to self-investigate and disclose will be further sharpened by the use of sanctioning schemes—like those used in corporate enforcement proceedings (see above)—that give schools credit in the punishment process for having conducted their own investigation. Historically, schools have had insufficient incentive to self-investigate and disclose misconduct. In the NCAA context, for example, there was no direct analogy to the mitigation provisions in the federal sentencing guidelines that would reward them for taking those steps.\(^{14}\) In fact, in a number of cases, schools investigated and self-disclosed misconduct in their sports programs, only to receive a punishment that did not seem to give them much credit therefor.\(^{15}\)

\(^{14}\) In a small number of cases, the NCAA’s Infractions Appeals Committee has reversed penalties that did not “acknowledge or discuss the nature or extent of the institution’s cooperation, nor specify what weight, if any, it was given.” See, e.g., NCAA news release, Howard University Head Women’s Basketball Coach Appeals Committee Report (July 16, 2012), at 29; NCAA news release, University of Oklahoma Appeals Committee Report (Feb. 22, 2008), at 8. Such reprimands have been rare, however, and have provided relatively little incentive for schools to self-investigate and disclose misconduct.

\(^{15}\) In one such case, the California Institute of Technology (Caltech) self-disclosed what many considered to be a minor infraction resulting from a class registration system that allowed an add-drop period for three weeks at the start of each semester, thereby rendering technically ineligible any student-athlete whose credit hours temporarily dipped below the NCAA-mandated 12-hour minimum while they were finalizing their schedules. Despite Caltech’s self-disclosure and the technical nature of the violation, the NCAA cited the university for “lack of institutional control”—among the most serious NCAA violations—placed the school on three-years’ probation and imposed post-season bans for several sports. See Bil Pashke, Caltech is on NCAA probation. No, really, L.A. Times, July 15, 2012; see also, Adam Himmelsbach, Caltech Gives New Meaning to Academically Ineligible, N.Y. Times, July 13, 2012.

There is reason to think that we might now be seeing a movement toward incentivizing self-investigation, remediation and disclosure in higher education. In the sexual offense context, for example, the Office for Civil Rights (OCR) in the Department of Education makes a point of according significant credit if a university under investigation has scrutinized its own practices and taken steps to remediate any failings.\(^{16}\)

\(^{16}\) In its investigation of Yale University, for example, the OCR gave credit to the university for its cooperation with the investigation and its quick implementation of remedial processes and procedures. (See Dep’t of Educ., Office of Civil Rights, Voluntary Resolution Agreement, Yale Univ., Complaint No. 01-11-2027, (June 11, 2012). Similarly, in a recent Title IX compliance review at Ohio State University, the OCR commended Ohio State for conducting a comprehensive investigation of alleged sexual harassment, and incorporated the university’s own corrective actions into its resolution. (See Dep’t of Educ., Office of Civil Rights, Resolution Agreement, Ohio State Univ., OCR Docket R15-10-6002 (Sept. 11, 2014); (see also press release, U.S. Department of Education Reaches Agreement With the Ohio State University to Address and Prevent Sexual Assault and Harassment of Students (Sept. 11, 2014), available at http://www.ed.gov/news/press-releases/us-department-education-reaches-agreement-ohio-state-university-address-and-prevent-sexual-assault-and-harassment-students).

Similarly, in the athletic context, the NCAA amended its Division I Manual in 2012 to specifically provide that “[e]xemplary cooperation by an institution or involved individual may constitute a mitigating factor for purposes of determining a penalty for a violation.”\(^{17}\)


It is still an open question, however, how far the NCAA will go in incentivizing schools to take these remedial steps, in light of the NCAA’s foundational “cooperative principle” that obligates each member school “to assist … in developing full information to determine whether a possible violation of NCAA legislation has occurred (Bylaw 19.2.3).”\(^{18}\) The concern is that the NCAA’s Enforcement staff and sanctioning officials will not distinguish between the different levels of effort that schools devote to “developing [that] full information,” i.e., that they will simply lump aggressive self-investigation in the category of “cooperation” that is considered a prerequisite of NCAA membership under the “cooperative principle” and thereby fail to sufficiently recognize those schools that go the extra mile to root out and disclose athletic misconduct.\(^{19}\)


\(^{19}\) A basis for that concern can be found in the notice of allegations filed by the NCAA’s enforcement staff in the UNC Chapel Hill matter. As part of every notice of allegations, the enforcement staff lists the aggravating and mitigating circumstances that it finds applicable to that matter. Despite the exceptional effort made by UNC to self-investigate and disclose its violent conduct, the enforcement staff did not include that effort as a mitigating circumstance.

An important test case for this issue will be the NCAA enforcement action involving the “paper class” allegations we investigated for UNC Chapel Hill. Many will be watching to see if UNC gets sufficient credit for its extraordinary effort to investigate and disclose its athletic-related misconduct. If UNC does get significant credit, we can expect that other schools will follow that same playbook in the future, with the result that more transparency will be brought to the issue of athletic misconduct. If it does not, we can expect that school administrators considering how to react to allegations of potential misconduct will be less inclined to follow the UNC playbook. That would be an unfortunate result, and would only add fuel to the current criticism directed at the NCAA and at big-time college sports.

Conclusion

Regardless of the outcome of the UNC Chapel Hill case, it is clear that the independent investigation model has permanently expanded beyond the corporate world and into higher education. With the high reputational stakes at play in these misconduct issues, it is not surprising that schools facing misconduct-related controversies—like those at Penn State, Chapel Hill and UVA—are increasingly opting to wrap themselves in the credibility of an independent investigation.

The trend toward independent investigations in corporate America over the past 15 years has been accompanied by significantly heightened compliance
standards among the companies in our private economy. We have reason to hope that the same trend in higher education will bring about stronger compliance efforts among our country's colleges and universities, and ultimately a re-affirmation that the first obligation of every academic institution is to serve as an example of integrity and trustworthiness to its students.

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