

# **CROSS-BORDER INVESTIGATIONS: CHOOSING THE INVESTIGATOR**

**D. Jan Duffy**

## Challenges of Cross-Border Investigations

Competent decision-making and resolution of corporate fraud, discrimination, whistle-blowing, retaliation, and other serious corporate responsibility challenges require sufficient, relevant, current, and accurate information. This is because without such high quality information, decisions cannot be made effectively or appropriately. Poor decision-making respecting such critical matters as these will almost always present substantial legal, reputational, morale-related or other major problems.

Gathering such quality information poses significant difficulties, however. Fact-finding, or as it is increasingly called, “internal investigation” must be prompt, competent, well-organized, thorough, fair, confidential, and appropriately documented and communicated. Achieving such a level of excellence is particularly challenging for a global organization, where the requisite facts or data may be lodged in widely-varying reports, records, documents, and data bases utilizing different languages and technologies, or with witnesses scattered across multiple continents, who may be driven by, and may act upon, vastly different cultural norms, values, and expectations.

Internal investigations are also driven by the particular laws or circumstances that initiate them. For example, some internal inquiries are launched as an all-out response to a criminal investigation of serious violations of anti-fraud, money laundering, securities or anti-trust laws. Others are initiated as a matter of reasonable management practice in response to an employee complaint of possible harassment or discrimination, where avoidance of civil liability or damages reduction is of principal concern. Still others are driven by the organization’s business objective of establishing and maintaining best practice regarding observance of its own code of conduct or ethics rules. In view of the great number of laws and other specific circumstances that shape internal investigations, conducting an internal investigation within even one jurisdiction can be complicated. Given the enormous variance in, and even conflict between, the national and local laws and mores that will drive internal investigations in a global environment, mounting such internal inquiries presents even more serious difficulties for the multinational organization.

As a result, responsible global employers are currently investing substantial resources in identifying, developing, and deploying the personnel and organizational capabilities necessary for their organization to conduct effective internal investigations on a cross-border or even world-wide basis. Although there are many strategic and tactical difficulties that need to be addressed in such undertakings, one of the key questions for such employers is determining who should conduct these investigations. Although the scope of the subject is too large for complete coverage here, this article examines a few of the issues that should be considered in selecting investigators capable of establishing and maintaining an organization’s investigative capability.

## Common Features of Reasonable Internal Investigations

Despite the wide variety of legal and other drivers of internal investigations, and wherever in the world they are undertaken, appropriate, effective investigations will share certain qualities or characteristics. Accordingly, in determining who should conduct internal cross-border investigations and selecting and preparing the designated personnel, organizations must first identify, and then plan how to achieve appropriate quality hallmarks in internal investigations.

First among such key qualities, reasonable investigations require demonstration of serious organizational commitment to legal compliance and to resolving the particular problem at issue in a whole-hearted and appropriate way. Regulators in many countries, for example, are trained to look at the extent to which an organization has prioritized and/or devoted resources to preventing and correcting illegal behavior in determining whether to pursue charges against it. Appropriate demonstration of commitment in identifying, preparing and selecting investigators usually means, among other things, that the organization will:

1. Develop procedures and processes to competently prepare and select investigators in terms of their relevant skills, knowledge and impartiality;
2. Select investigators who can be provided with the necessary authority and access to act effectively, efficiently, and in many cases, independently;
3. Prepare investigators capable of operating at all levels of the hierarchy so that the investigator is not of a markedly lower level of authority than (ordinarily) the target of the investigation;
4. Thoroughly educate in-house investigators in investigations-related skills and relevant laws or rules, or identify sufficient capable and knowledgeable outside investigators so as to achieve necessary coverage of the wide variety of requisite internal investigations;
5. Allow investigators sufficient authority, time and access to achieve and communicate reasonable fact-finding and conclusions.

Second, effective investigations must be reasonably prompt both in initiation and completion. “Promptness” is a relative term, of course. The practical human and travel-related considerations involved in cross-border investigations that cover a lot of geography are obvious. Additionally, more complicated or more serious investigations simply take longer to accomplish. Nevertheless, global employers should remember that some jurisdictions, for example, Spain, impose strict time limits on certain types of employee investigations. Some national laws require accused employees to be notified immediately of any allegations made against them. Others require immediate involvement or at least notification of employee representatives. Accordingly, organizations should prepare, or be prepared to find, and deploy, sufficient numbers of trained and locally-savvy investigators so that prompt and efficient inquiry is not dependent upon the availability of a single or few individuals located at great geographic distance from the heart of the necessary fact-finding effort.

Reasonable investigations are also accurate, thorough, and precise. Findings of fact and conclusions must be backed by relevant, reliable and sufficient information or the decisions based upon them will be potentially defective and certainly difficult to defend. Achievement of such necessary results is as much art as science, however, and typically depends upon the capabilities and personal qualities of the investigator. Accordingly, organizations must employ

internal investigators who are intelligent, analytical, methodical, and focused. They must be thoroughly grounded in the concepts they are investigating and knowledgeable about both the law and internal policy considerations implicated by their findings. They must be tough-minded and capable of making and communicating appropriate, if unpopular, judgments and conclusions. They must be easy to talk to, as they will be attempting to extract often-sensitive information from a wide variety of individuals. They must also be persistent, however, as few corporate wrongdoers or employee witnesses who fear retaliation, as many do, will yield information easily. Investigators must also be “emotionally intelligent,” that is perceptive, empathetic, open-minded, and particularly in cross-border investigations, culturally sensitive. In brief, good internal investigators must possess a multitude of high quality talents, skills, and personal characteristics. Selecting, training, and preparing them must accordingly be done well ahead of the need to deploy them.

Although notions of “fairness” vary from culture to culture (witness the divergence in attitude toward anonymous complaints between the United States and France or Germany) certain aspects of “fairness” are also considered crucial attributes of virtually any effective and reasonable internal investigation. The first of these is that fact-finding will be open-minded. That is to say that the investigator selected and deployed by the organization will be capable of, and insistent upon, finding actual facts, rather than seeking to prove a pre-determined conclusion. Requisite fairness also generally means that the investigator will be impartial, that is willing and capable of even-handedness in seeking, documenting, and weighing information and reaching and communicating conclusions. Finally, although greater cultural variations exist here, and specific circumstances will always dictate the degree to which particular measures can be provided, reasonable investigations are expected to be conducted in conformity to general notions of fair process. These include such matters as providing such confidentiality and privacy as reasonably possible under the circumstances; giving the accused or targeted individual an opportunity generally to know and rebut the charges and evidence against him or her; providing reasonable assistance to parties to pursue and defend against complaints; and informing the parties about the outcome of the investigation. Creating and maintaining fairness and the appearance of fairness in investigations thus also requires considerable care in selecting, preparing and deploying investigators.

### Selecting the Investigator

Among the “usual suspects” in the pool of possible internal investigators or investigative team leaders are in-house human resources; legal; internal audit; or security personnel. Outside the organization, regular outside counsel, whether business, criminal, or labor and employment lawyers; accountants; or security firms have, at least in the past, often acted as internal investigators. More recently, several new groups have arrived upon the scene. In-house, this includes compliance or ethics personnel and, in some larger organizations, specially-designated multidisciplinary investigation personnel. Outside, more and more of the larger law firms are offering, often to non-clients, specialized investigation teams consisting of business, criminal, ex-government, and labor and employment lawyers. In addition, an entirely new breed of professional independent investigators, usually former attorneys but occasionally experienced HR or compliance professionals, has also arisen to handle the need for impartial and independent internal investigations.

Each of these different types of personnel offers advantages and disadvantages. Briefly, they include the following:

1. Inside human resources, legal, internal audit, or security personnel. First among the advantages offered by these personnel is low cost. Because they are typically already on the payroll, their principal additional expense to the organization in an investigation is their time and travel. Speed of deployment, both because they are conversant with the organization and may already be located in or near the locus of the necessary fact-finding, is another key advantage of choosing such personnel as investigators.

Among the principal disadvantages is the lack of apparent impartiality and independence of such investigators. This is not always important, for example, with more routine problems that do not pose significant risk to the organization's reputation, attainment of key business objectives, legal compliance or liability. However, where these issues are implicated, or the investigation will be evaluated by a potentially critical outside party, such a deficiency can be serious. Another disadvantage is lack of speed in completion of the inquiry. Unless the organization is large enough to dedicate sufficient numbers of these employees to investigation work, the regular duties of such persons, ordinarily already full-time, make efficient conduct and completion of complex investigations difficult. Although creation of a multi-disciplinary investigation team can minimize the problem, another drawback of using such in-house personnel is that such employees' knowledge or training may be too narrow to achieve the necessary accurate, thorough, and reliable fact-finding in many internal investigations.

2. Regular outside counsel, accountants, or security personnel. These individuals offer certain of the advantages of in-house employees as investigators. They tend to be familiar with the organization and already deployed in the geographical areas where the company regularly does business. They do not typically suffer from the problem of being otherwise unavailable when the need for sustained attention to an investigation arises.

However, they possess two distinct and substantial disadvantages, of which the first is obviously high cost. The second is less obvious and will not invariably prove a problem but in some cases will be serious. That is the potential lack of apparent impartiality and independence that is inherent when such professionals act as investigators. Because lawyers and certain accountants and security personnel in many countries have significant duties to represent the interests of their clients, actively seeking facts that will prove wrongdoing or could damage the reputational, financial, legal or other interests of their clients may well prove a conflict of interest for them. Certainly, in the US for example, lawyers who perform defensive investigations for clients are generally "conflicted out" of representing them in subsequent litigation. This issue will, however, prove to be less of a problem in certain locations, such as civil-law European countries, where lawyers and other professionals have strong responsibilities to act as independent officers and experts to the court. An additional disadvantage for accounting and security professionals is often lack of knowledge of relevant laws or legal principles.

3. In-house compliance and ethics personnel or specially-designated internal investigators. For the organizations that have sufficient resources to train and support these types of

employees, the disadvantages are few and the advantages great. Such professionals possess all of the attributes of the in-house employee, and, at least if the organization is willing and able to afford them the authority, access, and independence that effective internal investigations require, few of the disadvantages. Finding, training, and supporting such professionals as regular employees is still difficult for many organizations, as dedicated compliance and ethics professionals are a relatively new phenomenon in many industries. Nevertheless, the number of these employees is increasing and as investigations continue to grow in frequency and importance, such professionals will often prove to be the most appropriate selection for achieving effective internal investigations.

4. Non-regular outside lawyers, accountants, and security firms. These types of investigators, who typically act in multi-disciplinary teams, are a growing phenomenon in the US, at least. They offer the advantage of availability and extensive expertise.

Although their prime disadvantage is usually extreme cost, for bet-the-corporation reputational, liability, or criminal investigations, they are the usual investigators of choice. For certain other circumstances, however, particularly in the US where, for example, discrimination, wrongful termination, and many retaliation cases are determined by juries, investigations conducted by such outside investigators may also suffer from apparent lack of impartiality and independence. This is because even though investigators from such firms do not have the same responsibilities to their clients that regular counsel, accountants, or security professionals may have, they are often perceived by juries or critical outside parties such as regulators to possess experience and mindsets that are not conducive to independence and impartiality in investigations. Further, they can be tainted by the suspicion that they are seeking future business in undertaking such investigations and may be inclined as a result to avoid difficult findings and conclusions.

5. Independent internal investigators. Like in-house compliance and ethics personnel, these investigative professionals are a relatively new phenomenon. They tend to possess the disadvantages of any other outsiders such as high cost, lack of deployment speed, and lack of familiarity with the organization. Qualified and experienced independent investigators are also sometimes difficult to identify and vet, and they often lack ready availability.

These investigators possess the advantages of specialized investigative expertise and are well grounded in the concepts they are handling. The successful ones, at least, also tend to possess the personal characteristics required of effective investigators and generally produce high quality results. Most important, they provide the assurance and appearance of impartiality and independence. Like in-house compliance and ethics professionals, the numbers of such investigators are growing, and, at least in circumstances placing a premium on independence, will likely often in future be the professionals of choice for effective internal investigations.