# Introduction

The undertaking of corporate internal investigations has been one of the fastest-developing areas of legal practice globally during the 21st century. Driven by increased regulatory and enforcement scrutiny in a world of rapidly expanding global commerce, their occurrence is now commonplace. In what has been termed a privatization of investigative responsibility, corporations are now expected universally not only to explore, but to embrace the opportunity to self-scrutinise. Frequently, an instigation is initiated by a whistleblower or a finding of irregularity that needs to be understood or can be requested by an enforcement agency or undertaken in conjunction with them. It can also be conducted without any outside knowledge and indeed with only a limited group aware of its existence. How the process is undertaken is paramount to its success.

At the heart of the purpose of an internal investigation is protecting the interests of the corporate body, as the risk of financial and reputational damage is high. Effective management of the investigative process can increase the probability of a company's survival and result in commensurate, rather than excessive, enforcement action. A proper investigation allows a company to test its integrity and obtain benefit from the experience. The process examines management systems and compliance controls and allows the corporate body to emerge fitter for its purpose. An internal investigation is a key developmental event in the life of any corporation. Many corporations now dedicate entire teams to a program of constant testing and investigating as part of their compliance function.

The purpose of an investigation is often misunderstood. It is not solely to find "the truth," or at least its purpose does not stop there. Nor is it merely to find and discipline those accountable for wrongful or illegal conduct, which is not always possible. It is instead to act in the client's overall best interests. The aim of this guide is to provide an ethical and legal roadmap to enable this objective. It is a practical guide for external counsel to consider when conducting corporate internal investigations in a number of jurisdictions.

Corporate investigations are increasingly global in nature and inextricably linked across different legal jurisdictions. This creates its own challenges. Best practice requires a different but complementary approach in each

jurisdiction. This means the practitioner will in the least need to have regard to the landscape in any jurisdiction touching the one where they are principally engaged. Local legal advice will almost inevitably be required.

This book is written by and gathers the experience and knowledge of over 40 practitioners from 11 key jurisdictions, all highly skilled and experienced in the field. It is an introduction to a complex and developing area and is not designed to be complete or prescriptive. An investigation may uncover a myriad of issues for additional legal consideration and advice. This might include issues of sanctions, money laundering, and labor laws, for example. None of these additional areas are considered in full here. The guide does however consider the landscape and legal framework of the specific jurisdiction and provide a practical narration as to best practice in each. The law is considered and cited as appropriate, but the emphasis is to enable the reader to understand the approach to be taken to an investigation in that country and highlight key considerations. Emphasis is necessarily different given the political, legal and developmental landscapes that engage with the practice of investigations in each country.

This book illuminates several key recurring themes that have become prevalent in investigations:

1. the importance of planning, structure, and management;
2. the role of the external enforcement agency;
3. the choice or obligation to report misconduct and its impact;
4. the independence and role of legal advisors;
5. the applicability of legal professional privilege ("LPP");
6. the role of multi-disciplinary teams and technology-aided review;
7. the conduct of witness interviews;
8. the role of data privacy laws;
9. the status of corporate liability; and
10. the availability of reduced sanctions for corporate misdemeanors, such as deferred prosecution agreements ("DPAs").

As a whole, in addressing these areas, common guidance emerges that has permeated globally and is now embraced by leading investigations lawyers worldwide. By way of illustration, key considerations emerge for the practitioner in establishing the scope of the investigation almost notwithstanding the jurisdiction:

1. the regulatory and legal laws and guidance relevant to the corporate entity;
2. the role of shareholders and other stakeholders;

3. existing internal governance guidelines;
4. available budget and resources; and
5. available time.

The assessment of a client's best interests will be measurable in several ways. Ultimately advice as to how to proceed is dependent on the weight given to those variables. In many jurisdictions the following factors will bear consideration:

1. whether a criminal, serious regulatory, or civil offence has likely been committed;
2. the probability of the misconduct leading to enforcement and sanction or other economic loss;
3. the severity of likely sanctions and penalties;
4. the collateral effects of an investigation and subsequent sanctions including to reputation, loss of profit and opportunity, and legal and professional costs; and
5. whether the investigation will be supported by, and ultimately be of assistance to, the corporation's governance function.

This book considers a global review of the current state of play in different jurisdictions and their development of best practice. Some have decades of experience. Others have only recognized the discipline over the last few years and have little or no published guidance. All have their different factors that affect how to approach an investigation. Some issues in particular require a different approach in the various jurisdictions. This means they must be considered carefully. For example, in addition to the key differences highlighted in the Foreword to this book, the following should be understood:

1. The role of the state authorities in self-reporting. In the United States there is a longstanding culture of investigation, self–reporting, and cooperation with law enforcement, which leads to tangible and often measurable benefit. There may also be a legal duty to report, for example, under the United Kingdom ("UK") Suspicious Activity Reporting regime. In the People's Republic of China ("PRC") however, there is no established channel to self-report.
2. Blocking statutes may criminalize the investigation of criminal offences by foreign lawyers in certain jurisdictions, for example, in Switzerland.
3. The laws of corporate criminal liability differ. There is a narrow concept of corporate liability in Brazil. In the UK there are specific corporate offences concerning the failure to prevent bribery and tax evasion.

In Germany the impact of the Corporate Criminal Sanctions Act is hotly anticipated.

4. The availability of DPAs or a similar suspension of prosecution. In France non-prosecution agreements are available. In the USA, and increasingly in the UK, DPAs are well used. In Brazil corporate leniency agreements are available, but as is the frequency of instances of disbarment from government projects for offending corporates. In India and the PRC there is no formal process to allow a DPA.
5. Best practice around conducting interviews of witnesses. In the USA the use of Upjohn warnings is well established. In Argentina and Brazil employees have specific rights, as so the PRC where it is illegal to record witness interviews. In the UAE particular cognizance of local custom is advisable.

Where this fascinating comparison leaves us is with the ability to assess and analyze the trends in global best practice. What are the most commonly occurring notes of guidance? What should the practitioner be considering in their investigation virtually anywhere in the world? What advice is so critical that it has permeated international practice and appears regularly within the "top tips" of these leading practitioners from around the world? Below is an amalgamated summary guide to best practice in global corporate internal investigations:

1. clearly identify the client and from whom instructions are to be received;
2. identify the investigation team, including external counsel and other experts as soon as possible and ensure information is confined to that group;
3. draft a detailed investigation plan including the scope, purpose, and method of the investigation. It should contain defined targets and goals, sometimes limited by time and budget. That may need to be adjusted as the investigation progresses;
4. preserve data at the outset of the investigation, including issuing data preservation orders and maintaining records of when they were circulated and to whom;
5. when collecting information, adhere to relevant data privacy laws including legal restrictions on transferring data out the country. Where there is a voluminous amount of data, technology-assisted review should be considered;

6. LPP differs by country and careful consideration should be given as to what documents, advice and records attract privilege. Care should be taken to ensure disclosure to any third parties is limited to circumstances where it is required, including the way in which any findings are communicated to regulators;
7. employee interviews should adhere to local labor laws and follow any additional processes and procedures detailed in company literature, such as employee handbooks. Additionally, employees should be made to feel as comfortable as possible by conducting the interview in their language and taking into account any cultural nuances. Interviewers must be transparent regarding the status of the interview and to whom any privilege belongs. A US style *Upjohn* warning is now commonplace;
8. consider whether reporting any misconduct is a legal requirement and where voluntary reporting is possible, weigh the risks and benefits of doing so as soon as possible and on a continuing basis. This will allow the company to determine the proper course of action to ensure that minimal penalty or maximum credit is applicable. If the company operates in multiple jurisdictions, consideration should be given to cooperation between authorities both domestically and internationally, and whether disclosure will be required or advantageous in other jurisdictions; and
9. use investigations as an opportunity to check existing compliance and governance measures and inform remedial measures the corporation might put in place to strengthen its systems and controls.

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I hope that you enjoy the book and find it helpful.

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