



## Internal Investigations: Keys to Preparing an Effective Budget

Government prosecution of white collar crime has been on the rise in recent years. The uptick in enforcement activity is being felt across many industries and continues with, for instance, investigations into alleged violations of statutes carrying potentially devastating penalties, including the Foreign Corrupt Practices Act and the False Claims Act. The same trend can be seen on a global basis, with many international regulators focusing not only on local businesses but also on U.S. organizations with international operations. At the same time, organizations are increasingly relying on internal investigations to find the facts themselves and to assess any associated legal, financial, and reputational risks when evidence or an allegation of potential wrongdoing surfaces, whether or not a related government investigation is underway or anticipated. But investigation costs can escalate quickly, especially with investigations that cover much time and territory and that involve conduct that may expose the entity and individuals to serious criminal penalties and significant civil liability.

This Commentary summarizes the types of expenses that typically arise in an internal criminal investigation and offers guidance on how to budget for particular investigative activities. Although each budget

will necessarily vary in its components and values, the hallmarks described below are relevant to setting the budget in virtually every internal investigation.<sup>1</sup> We conclude by offering a “checklist” of issues and tasks to consider in preparing an effective and efficient investigation budget.

### Overview

To control costs without compromising the fundamental objectives of the investigation, corporations and their counsel may consider developing a budget at the outset of the investigation that—based on the best available information—makes appropriate assumptions about cost-influencing factors and assigns reasonable and realistic cost projections to the particular tasks that are expected to comprise the overall work plan. While developing a budget involves at least some measure of estimation, and may not be appropriate for every situation, companies frequently find budgeting helpful for understanding certain variables inherent in the investigative process, such as scope, timing, and resources, that can at times make the process seem unpredictable or even unsettling. Budgeting also facilitates communication between counsel and client about the client’s specific goals.

Once developed, the budget should be reviewed regularly throughout the investigation. In this way, the initial assumptions and the task-based budgeted amounts (and therefore the aggregate budget) can be re-evaluated and modified as appropriate based on the actual conduct of the investigation and any unforeseen developments.<sup>2</sup>

## Scoping and Planning

An effective internal investigation budget accounts for the costs of assessing the scope and goals of the investigation and developing a work plan to meet those goals. Time spent up-front gathering background information, identifying legal issues to be researched, and memorializing the scope and goals is critical to rightsizing the investigation—and budget—from the start. Like the budget, the work plan should be periodically evaluated and modified, if needed, as the investigation develops.

## Data Preservation and Collection

In this age of emails, text messages, and other forms of electronic communication, the costs of identifying, preserving, and prioritizing relevant data are often major pieces of an internal investigation budget. In particular, the budget should account for the costs of issuing and monitoring a document hold, if applicable, and initial and ongoing collection, hosting, and storage costs. In many cases, it may be advisable to retain an external vendor to perform data collection and preservation tasks. Keep in mind that analyzing and navigating international privacy and state secret laws in foreign markets may drive up related costs—in some cases significantly.

## Document Review

Depending on the nature of the investigation, the costs of reviewing and analyzing the data and hard-copy documents collected may constitute a large portion of the budget. Considerations here include (i) whether to use in-house resources, outside counsel, or contract attorneys to perform the various levels of the review, and (ii) whether the review presents foreign language challenges, such that foreign language reviewers or translators are required. In many cases, costs can be minimized by using contract attorneys to conduct the first-level review and by narrowing the universe of

data by careful selection of custodians and the appropriate use of targeted terms, date ranges, and predictive coding.

## Witness Interviews

Witness interviews are critical to extracting the facts in almost all investigations, and an effective budget accounts for the costs of preparing for, attending, and memorializing the interviews. “Scoping” interviews typically occur early and are primarily intended to discover sources and locations of relevant information, in addition to the nature and extent of the witnesses’ own knowledge. These interviews typically entail less preparation than “substantive” interviews. While substantive interviews involve more intensive preparation, they are often critical to developing a comprehensive understanding of the conduct under investigation. The budget should reflect (i) the anticipated number of scoping and substantive interviews, and (ii) the total time expected to be devoted to preparation, participation, and memorialization. This information, coupled with individualized rate and fee information and any travel expenses, will enable a good-faith projection of interview-related costs.

## Forensic Accounting Support and Subject Matter Experts

The budget should account for potential costs of involving other professionals and subject matter experts in the investigation, such as forensic accountants and computer forensic experts. Forensic accountants assist in identifying potentially problematic transactions, and the accounting treatment accorded thereto, and in reviewing related internal controls. Computer forensic experts are especially helpful when collecting and preserving large amounts of data and conducting analyses of computer data and systems. Forensic accountants and subject matter experts should be asked to prepare their own budgets in consultation with other members of the investigative team, consistent with the same principles and approach used in setting the overall investigation budget.<sup>3</sup>

## Reporting and Recommendations

Preparing reports and recommendations and meeting with key stakeholders, including outside auditors and other outside counsel (e.g., the company’s securities disclosure

counsel and counsel for individual employees), are often key elements to conducting an internal investigation, and an effective budget accounts for associated costs. In this regard, considerations include the frequency and nature of the reporting, time and resources to prepare expected work product, and potential post-reporting follow-up items, including possible consideration and execution of self-disclosure.

## Remediation and Personnel Matters

To the extent the investigative team is expected to be so involved, the budget should account for the costs of identifying, analyzing, and implementing remediation measures related to any wrongdoing uncovered, including enhancements to the corporate ethics and compliance program. In addition, personnel-related costs should also be included in the budget. These may consist of, for instance, time devoted by the investigative team (i) in connection with the discipline of or litigation with sanctioned employees, and (ii) to work with any counsel for individual directors, officers, and employees.

## Cross-Border Considerations

Wherever an internal investigation extends into multiple jurisdictions, the budget should allow for specific costs that are needed to ensure that the investigation is conducted effectively, in compliance with local laws, and in such a way that any evidence collected can be properly relied on by the organization. Another key consideration is whether evidence collected can be protected from disclosure to the maximum extent permitted by local law.

Budgeting in these circumstances normally includes consideration of (i) the involvement of outside legal counsel, (ii) whether local laws require engagement with employee representatives (such as unions or works councils) as part of an investigation process, (iii) limitations on the processing and transfer of data from the local jurisdictions to the U.S. or elsewhere, and (iv) specific local laws that may affect the investigation process in certain jurisdictions. For example, compliance with state secret laws in certain jurisdictions (e.g., China) and the trend in Europe to tighten up data privacy regulations may be relevant factors in preparing an effective budget for cross-border investigations.

## Tips for Containing Costs

If managed carefully from start to finish, an internal investigation—even a sizable, protracted one—does not have to devolve into a money pit. To the contrary, through some basic steps, internal personnel directly managing the investigation can instill appropriate discipline on the investigative process, and the organization as a whole can expect reasonable certainty as to budget projections.

Consider the potential advantages and disadvantages of engaging outside resources such as outside counsel, forensic accountants, and computer forensic experts. Depending on the circumstances, and assuming the availability of sufficiently capable internal resources, cost savings may be achieved by forgoing some or all outside resources. However, cost savings should not be dispositive in preparing a budget for a criminal internal investigation. The analysis should also involve a careful assessment of the nature and scope of the issues under investigation, the benefits of independent work product from outside resources, and privilege issues.<sup>4</sup>

- Have in place, and enforce, clear billing guidelines that cover, among other things, the manner in which outside professionals are to record time and expenses and the items for which billing is (and is not) permitted.
- Investigate in phases—identify priorities and key tasks at the outset of each phase, and ensure that the learning from one phase is considered when planning and budgeting for successive phases.
- Conduct scoping interviews early to understand the location of potentially relevant documents, data, and witnesses, and to protect against chasing what could be readily identified as false leads.
- Set priorities for electronically stored information (“ESI”) collection and review and witness interviews, and, if possible, stagger the review such that decisions about whether to collect and review additional ESI can be made on a rolling basis and unnecessary ESI work can be avoided.
- Use targeted search terms for ESI review and consider a database vendor that offers “predictive coding.”
- Consider using contract attorneys—with appropriate training and supervision—for first-level ESI review.

- Obtain periodic budget reports (e.g., time incurred versus budget).
- Frequently (re)evaluate the scope of the investigation and when to stop investigating (e.g., performing a “sampling” approach, instead of a review of all potentially relevant events or transactions, is often sufficient, as not all allegations that may hint at a possible violation of law or conduct standards necessarily merit the devotion of investigative time and effort).
- Consider the nature and extent of periodic substantive reporting on interviews and investigative findings or observations, balancing the need for information flow with the costs involved.
- Consider options on final substantive reporting from a cost perspective<sup>5</sup> (e.g., a narrative summary or slide deck, in lieu of the typically more expensive narrative report).

## Budget Checklist

In sum, it is important for organizations to ensure not just that they get to the bottom of compliance concerns but also that this process is undertaken in a responsible, cost-effective way. In conjunction with the tips set forth above, a budget that touches on the items below can help achieve these ends.

### Scoping and Planning

- Initial fact gathering (including scoping interviews)
- Legal research
- Developing work plan

### Data Preservation and Collection

- Document hold
- Capturing ESI, hard drives, mobile devices, and servers
- Copying hard-copy documents
- Data archiving

### Document Review

- First- and second-level reviews
- Training and monitoring
- Review platform
- Foreign language reviewers
- Translations

### Witness Interviews

- Preparation and follow-up
- Foreign language translators
- Travel expenses

### Subject Matter Experts

- Forensic accountants
- Computer forensic experts
- Industry experts

### Reporting to the Client and Other Stakeholders

- Analysis and reporting to client and other stakeholders, including outside auditors
- Potential government disclosure analysis

### Remediation

- Compliance program and training
- Personnel changes

### Personnel Matters

- Individual or pool counsel for personnel
- Potential employee severance negotiations and parallel litigation

## Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com](http://www.jonesday.com).

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## Endnotes

- 1 Alternative fee arrangements (e.g., flat fees or “success” fees) should be evaluated with great care in the context of internal investigations and should generally be avoided if they reasonably may be viewed as inducing corner-cutting in the fact-gathering process or otherwise creating incentives inconsistent with the basic, truth-seeking objective of the investigation.
- 2 To ensure protection under the attorney-client privilege and work-product doctrine, the investigation should be undertaken by the corporation’s legal team or outside counsel, and the investigation budget and supporting materials should clearly state that they have been prepared in anticipation of potential litigation and that the purpose of the investigation is to provide legal services and advice. Budgets that are prepared for investigations undertaken by a non-lawyer or undertaken in the ordinary course of business, regardless of whether legal advice is sought, may not be protected under the attorney-client privilege and work-product doctrine.
- 3 In attorney-client privileged investigations, external experts should be retained by counsel so as to maintain the privilege.
- 4 A full discussion of issues and circumstances that may be relevant to a determination of whether to engage outside counsel and other third-party vendors in a particular matter is beyond the scope of this Commentary.
- 5 Note that other considerations may also influence the format of final substantive reporting (e.g., privilege concerns and concerns over maintaining confidentiality generally).

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