

CORPORATE COUNSEL

Managing the Budget of an International White-Collar Investigation

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Over the past several years, the number of international, multi-jurisdictional, white-collar investigations has been on the rise.

The Foreign Corrupt Practices Act ("FCPA") — a statute that outlaws corrupt payments to foreign officials — is just one of the many tools that U.S. prosecutors are using to open such investigations. Just recently, the U.K. enacted the Bribery Act of 2010, which makes investigating international bribery a priority there.

Meanwhile, a recent study shows that active to moderate anti-bribery enforcement is now in place in more than 16 countries, including Italy, Germany, Argentina, and Japan. Thus, the rise in international white-collar cases means corporations are simultaneously defending themselves in multiple venues and jurisdictions.

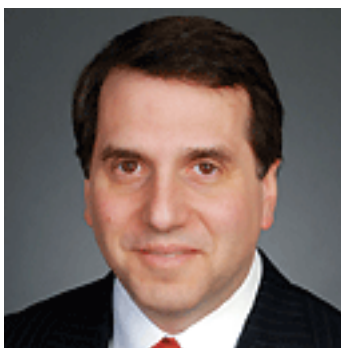
This increased criminal enforcement poses important compliance issues for international corporations. But there is another troubling concern that has crept into general counsel's offices around the world: The costs involved in defending these cases. A few examples from a recent *Forbes* article prove the point:

Siemens AG, Europe's biggest engineering firm, paid more than \$850 million in legal and accounting fees and expenses over two years to defend itself in a multi-jurisdictional investigation involving the FCPA.

- A five-year investigation of Daimler cost the company \$500 million in legal and accounting fees.
- Weatherford International Ltd. paid lawyers more than \$106 million to defend it in a recent FCPA investigation.
- And Avon Products Inc. — a current target of a DOJ FCPA investigation — expects to pay \$95 million this year alone to defend itself.

Obviously, the stakes are high in these and other cases like them, and the need to ensure compliance with the law is at a premium.

However, when running a business in a difficult economic environment, the need to control costs is also critically important. The sheer cost of the defense can be so onerous that it contributes to the litigation fatigue that some-



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times pushes clients to compromising compelling defenses.

Here's a rundown of some of the mechanisms clients are using to control the costs of investigations. Which method is best for your company depends on what your goals are: Lowest price, best quality work; quick turnaround; predictable bills; or strong control over the investigative team. Any engagement can achieve some of these goals; rarely can it encompass all of them.

Regardless of the particular vehicle you choose, it will work best if both client and counsel always keep in mind a simple rule: The best way to control costs, as with every other aspect of the client-outside relationship, is to make a strong commitment to a two-way partnership.

Firms have the greatest flexibility on fees with long-term clients. They will invest in a client, i.e. willingly work for far less than the normal fee structure, when they know they are building a long-term relationship.

Clients are entitled to expect, and firms ethically committed to deliver, representation that puts the client's best interests ahead of an adverse fee arrangement. Thus, both sides need to be reasonable with each other, communicate openly, and revisit arrangements that become unexpectedly lopsided.

Have a Plan

Once you realize that you need to investigate or defend a matter, one of the first things you should do is request counsel to submit a draft investigative plan.

Experienced counsel can assess the potential magnitude of the problem, the various directions it could follow, and the potential resolutions. Reverse engineer from the potential results and develop a plan to get there. Don't allow months to pass before you start this process, but develop a plan in the beginning — a detailed, written, outline of what needs to be done, by when, and what kind of resources should be brought to bear to accomplish these defined tasks.

Corporate counsel should review and revise the plan on a regular basis to ensure that it reflects recent developments and growing insights. Problems usually get bigger and last longer than originally expected.

Talk About Price Up Front

With a plan in place, next determine the fee structure and a budget. The fee structure should be tailored to the client's priorities. For example:

- Capped Fee: It may not be the road to the lowest bill, but a capped fee provides the most predictable cost. It may be hard to provide one in a major criminal investigation because the government rarely sets out a road map for how it will proceed. Capped fees are generally too insensitive

to a large case's needs. Some clients have been assigning a category of internal investigations to a firm for a set period — a year — and putting it within a capped fee. Others try to cap a part of the representation — a volume of document production, or a group of interviews or training sessions, or a simple internal investigation.

- Discounts: The most common way to manage the budget is to request discounts on hourly rates. Though this does not cap your ultimate hourly exposure, it does reduce costs. Firms are usually receptive to greater discounting if it is rewarded with a greater volume of work.
- Blended rates: Rates obviously vary based upon experience. Initial document productions consume large numbers of associate and staff attorney hours. Later interviews and government contacts require more midlevel and senior involvement. If you negotiate a blended rate, it is best to reach an understanding with the firm as to staffing and seniority levels, so that the firm does not push too much work to less senior people. Certain tasks should always be performed by highly experienced counsel. Some clients want the most senior people running the case but want to eliminate the appearance of very high hourly rates on bills, i.e. no one is billing over \$695 an hour.

A budget is a powerful management tool. It can identify the type and sequence of tasks, the scope of the tasks, the resources needed, and an estimate of costs.

Often, budgets mushroom over time. What starts as a single subpoena from DOJ may turn into a party with invitations issued by the SEC, state attorney generals, foreign regulators, and plaintiff lawyers representing whistleblowers, shareholders and self-styled victims. Thus, it is best to treat a budget as a prediction with a limited half-life, but still a tool to identify and manage the investigation's various components.

Divide and Conquer

With a plan and budget in place, it will become much easier to identify the cost centers in the investigation and manage them appropriately by dividing tasks between your in-house team and your retained outside counsel.

Overworked legal departments may initially want to outsource all aspects of a new investigation. There are many tasks, however, that in-house staff can do more efficiently. For instance:

- In-house counsel should conduct much of the liaison work with present and former company employees. Does it make sense to pay a lawyer \$350 an hour to schedule interviews?

- If the case spans multiple jurisdictions, in-house counsel can take on the task of locating relevant documents, identifying document custodians, and even gathering documents.
- Finally, in-house counsel can add great value by identifying a pool of potential experts, though outside counsel has to be firmly involved in the process of interviewing and retaining experts.

On the other hand, it's just plain foolish to take certain tasks in-house. Outside counsel should be in charge of the document production — even if in-house lawyers do some initial work — to insulate the client from prosecutors' inherent suspicions when the inevitable problems occur.

Follow the Documents

Perhaps no legal task has grown more over the past 20 years than document productions. Government investigators sometimes have unsophisticated or uncaring attitudes about the complexity, cost, and timing of document productions. Without proper management, document identification, retention, review, and production can take up well over 50 percent of your budget. In this area, there are several ways to keep costs in line:

- Firms are investing substantial resources to reduce the costs of document production, and minimize errors — inadvertent production of privileged materials, and delayed production of relevant ones. For example, McDermott Will & Emery has a discovery and disputes services center, which helps clients manage the costs and risks of document gathering, retention, and review — and has also hired in-house staff attorneys who conduct routine document production and review at a lower cost than if performed by associates. This allows clients to get all of their document services from one vendor, but at a reduced cost.
- Contract attorneys: If your outside counsel does not have a low-cost document production system in place, you should consider using contract attorneys. These attorneys can perform document review at a lower price than associates. Your outside counsel should retain control of the review and train and supervise the contract attorneys to minimize errors and maintain consistency.

Keeping Down Costs of Indemnified Individuals

During the course of the investigation, in-house lawyers may have to retain counsel for individual executives and employees of the company. These separate counsel can quickly

take a manageable budget and make it difficult to control. There are a few things that can be done, however, to keep costs in line:

- Shared Counsel: You can minimize the number of law firms by referring employees with aligned interests to the same counsel. Obviously, there may come a time when separate counsel is needed. But reducing the number of law firms will cut down on the costs of representation. It is always the employee who has the final decision on who will represent him.
- Shared Work Product: To the extent that there are common interests between the company and the indemnified individuals, you should enter a common interest/joint defense agreement with those individuals and share work product with them
- Budgets: Once again, the same budgeting rigor, discounts, and caps that apply to the company's outside counsel should apply to counsel for indemnified individuals. Companies typically have discretion on whether to indemnify and advance fees to nonofficer employees. This gives the company leverage to impose reasonable controls, such as requiring prior approvals if a monthly bill exceeds a certain amount. Companies may seek to have the employees agree to submit all fee disputes to a stripped-down arbitration process.

Reporting and Control System

Finally, any complex case will spiral out of control unless it has a defined, centralized reporting and control system. There should be one or a small group of outside counsel who manage the investigation and direct traffic. And, there should be one or a small group of in-house lawyers who get reports from outside counsel. If there are multiple channels of direction and reporting efficiency suffers.

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