



# What to Do When the Government Comes Knocking: Effectively Managing Subpoenas and Related Inquiries

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Corporate Counsel  
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# Panel



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# Agenda

- Introduction
- Government Investigations: Preparation
- Government Investigations: Response
- Special Case: Search Warrants
- Internal Investigations
- Government Investigations: Resolution

# Introduction

# Introduction to Government Subpoenas and Related Inquiries

- **Numerous Investigative Agencies**
- **Primary types of government inquiries:**
  - Search Warrants
  - Grand Jury Subpoenas
  - Civil Subpoenas and Civil Investigative Demands (CIDs)
  - Informal Requests for Information
  - Interview Requests
- **Numerous Potential Origins (e.g., whistleblower complaint, referral from another agency, “industry sweep”)**
- **What you are seeing may only be the tip of the iceberg**

# Preparation

# Preparation for Government Investigations

- **Every company should have a robust corporate compliance program and a written policy governing appropriate responses to government investigations**
- **Written policy has three goals:**
  - Set the Tone
  - Establish Process
  - Advise Employees of their Rights

# Preparation for Government Investigations

- **Set the Tone:**

- Company will cooperate with authorized government investigations
- Employees may not alter, conceal, or destroy documents related to a government investigation
- Employees may not intentionally mislead government investigators

- **Establish Process:**

- Designate a point person (e.g., general counsel / compliance officer) to be notified in the event of a government investigation and to lead/manage the company's response



# Preparation for Government Investigations

- **Advise Employees of their Rights:**

- Employees may decide to speak – or not to speak – with government investigators
- Employees may have counsel present when speaking with government investigators
- Employees may condition speaking with government investigators on doing so at a convenient time and place

- **Tailoring Company's Response:**

- These processes generally apply to subpoenas, civil investigative demands, and requests for interviews (processes related to search warrants are addressed herein)
- Participation in a regulated industry may require certain audits/inspections or permit other government investigative activity

# Response

# Response: Document Preservation

- **Every company should have a written policy governing retention and destruction of documents and data**
- **Effective and timely preservation is critical**
  - Demonstrating that lost information is not relevant is challenging and expensive
  - Failing to preserve information could result in an expanded government investigation addressing the reasons the information was lost
    - Targets of expanded investigation could include in-house counsel or company executives – potential exposure for obstruction of justice
- **Send timely and thorough preservation notice**
  - Identify which employees (custodians) may have relevant information
  - Identify custodial and non-custodial data sources where relevant information may be located
    - In addition to hard copy documents, include non-traditional sources such as voicemail and “personal” devices (mobile phones, text messages)

# Response: Document Preservation

- **Coordinate with IT personnel to ensure preservation of live and archived data**
  - Suspend or modify automatic deletion protocols
  - Suspend regular deletion of archived data and backup tapes
  - Suspend custodian ability to delete email prior to backup
  - If appropriate, begin the process of capturing/imaging email folders or hard drives (and conducting commensurate “custodian” interviews)
- **Inform third parties (e.g., vendors, contractors) of their obligation to preserve documents and data**
- **Be mindful of laws impacting collection and transfer of personnel data (particularly non-U.S. laws, if applicable)**

# Response: Document Collection, Review, and Production

- Engage a qualified e-discovery firm for any substantial collection
- Track documents and data collection – custodial and non-custodial sources, date ranges and search terms
- Ensure effective procedures for review
  - Code for and protect confidential and privileged documents
  - Train and supervise review team
  - Impose ongoing quality control
- Bottom Line #1: Be able to defend your process(es)
- Bottom Line #2: Know what is in the production before it goes out the door

# Response: Communication with Government Investigators

- **Credibility is key – choose outside counsel wisely and avoid any overstatement or prejudgment**
- **In many instances, early engagement is the best way to reduce the burden of compliance**
  - It is appropriate to defer substantive discussion until outside counsel is retained
  - First impressions matter – can have a significant impact on the long-term relationship
    - Assume there will be a long-term relationship
  - If strategically appropriate, establish company intent to cooperate – you can learn a lot at the outset by being nice
  - Communicate clearly and in a timely way about burden, scope, or timing issues impacting document productions
    - Likelihood of success is greater if you are specific and show your work
    - Slow document production at the outset can get the relationship off to a rocky start
    - Often government investigators will accept a small initial production (e.g., organizational charts) and view this as a sign of good faith
    - Be aware of agency-specific processes (e.g., FTC on CID response timing)



# Response: Communication with Government Investigators

- **General cooperation – particularly at the outset – can be independent of the decision whether to engage to resolution or contest**
  - Pushback may be appropriate but should be reasonable and communicated effectively
- **Be prepared for ongoing requests – more documents, employee interviews**
- **Pressing for information is appropriate – even advisable**
  - Differentiate between the following: witness / subject / target
  - Ongoing information exchange – often need to give to get

# Response: Notifications and Disclosures

- **Numerous interested stakeholders – both aligned with company's interest and not**
  - Internal – Board, senior management, employees
  - External – other government agencies, insurers, auditors, lenders and business partners
  - Public – SEC filing if the company has registered securities
- **There is no set formula for disclosure – depends on many factors:**
  - Materiality
  - Who or what is at issue
  - Applicable contracts or policies
- **Related Issue: Are conduct restrictions required (e.g., trading limitations)?**

# Search Warrants

# Special Case: Search Warrants

- Discussion has focused on subpoenas and other more typical process(es)
- Search warrants are unique because of the exigency and lack of notice
- No company expects to have government investigators show up with a search warrant – but it happens every day

# Special Case: Search Warrants

- **Lawful and effective response is predicated on the following steps:**

1. Remain calm; be polite to authorities but be prepared to assert company's rights
2. Do not interfere with or impede the authorities executing a search warrant
3. Contact the general counsel or other in-house point person immediately; that person should take the lead in communicating with the authorities and coordinating the company's response; call outside counsel if engaged
4. Request a copy of the search warrant; review it to understand the scope of the search; ask what crime or conduct is being investigated
5. Direct all employees not to discard, alter, or destroy any documents or data that may be called for by the warrant; confirm this instruction in writing

# Special Case: Search Warrants

- **Lawful and effective response is predicated on the following steps:**
- 6. Consider sending non-essential employees home; remind employees of their rights and responsibilities related to government interview requests
- 7. Designate point person in each area to keep a record of locations searched, documents or devices seized, and comments made by authorities during search
- 8. Request on-site copying of business essential documents and data being seized by the authorities
- 9. Politely notify the authorities if they search in areas not covered by the warrant or if they review or seize privileged material; do not consent to a search of areas not covered by the warrant without first consulting legal counsel
- 10. Do not engage with the media or other third parties without first consulting legal counsel



# Internal Investigations

# Internal Investigations

- **Numerous benefits to the company**
  - Information gathering
  - Identification of relevant personnel
  - Potential remediation of policies and procedures
  - Potential self-reporting
- **Who should conduct the internal investigation?**
  - General Counsel / Chief Compliance Officer
    - Who/what is being investigated?
    - Type of wrongdoing alleged?
- **Controlling the flow of information**

# Internal Investigations

- **Document Collections / Preservation**
- **Privilege and work product considerations**
  - Attorneys should oversee the investigation or those at the direction of counsel
  - Instruct recipients not to forward or disclose privileged or confidential communications
- **Representation issues (e.g., joint representation versus separate employee counsel; joint defense agreements)**
- **Employee/witness interviews**
  - Upjohn warnings
- **Use of experts**
- **Investigation reports – oral, written, or both**
- **Potential Self-Reporting to Regulators**

# Internal Investigations: Guidelines

- **While the techniques utilized to conduct an internal investigation will vary depending on the unique circumstances, these practices should be generally followed:**
  1. Remain Objective: Facts and evidence should be followed and examined impartially
  2. Recognize Conflicts of Interest: Avoid the appearance of bias or partiality
  3. Record and Document Critical Evidence: Create investigation plan which potentially includes witness interviews; avoid spoliation of documents
  4. Protect Confidentiality and Privilege: Conduct in a manner which preserves privilege and confidentiality as to investigation materials
  5. Understand Broader Context of Investigation: How will the investigation impact the Company? Officers? Business consequences?

# Resolution

# Government Investigations: Resolution

- **Identifying acceptable outcomes for the Company**
- **Challenge versus cooperate to resolution (Yates Memo)**
  - Increased emphasis on DOJ's pursuit of individual prosecutions for those involved in corporate wrongdoing
  - Cooperation credit policy
    - Since 2017, the DOJ has issued and clarified policies that have increased incentives for corporations to voluntarily self-report, fully cooperate and timely remediate
    - Civil v. criminal matters
- **Biden Administration's renewed focus on collaboration between civil and criminal division**



# Government Investigations: Resolution

- **Various Resolution Mechanisms:**
  - Deferred Prosecution Agreements: filed with a charging document and subject to judicial review
  - Non-Prosecution Agreement: letter agreements between regulator and the entity subject to the agreement
  - Corporate Integrity Agreements: agreement outlining the obligations that a company makes with a governmental agency as part of a civil settlement
- **Resolution mechanisms may include the use of Compliance Monitors which evaluate the company's existing compliance program and establish recommendations and implementation goals**

# Questions?

# Thank you!

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