

WHAT TO DO WHEN THE GOVERNMENT COMES KNOCKING:

**Strategies for In-House Counsel Responding to and
Preparing for Government Investigations**

Lauren DeSantis-Then
(314) 622-6616
ldesantis@polsinelli.com

INTRODUCTION

Unexpected visits or phone calls to your place of business by government officials, regulators, investigators, auditors, or law enforcement officials offer little if any “breathing room” and therefore create a situation that is difficult for the company to control and maintain.

Make sure you have a plan.

OBJECTIVES

Provide In-House Counsel with:

1. An understanding of the methods the government uses to obtain information.
2. A basic framework for responding to requests for information in a manner that:
 - Ensures complete and timely cooperation
 - Protects the interests, rights and reputation of the company
3. Help you prepare for those unexpected telephonic and in-person visits from government agents.

GENERAL CONSIDERATIONS WHEN DEALING WITH THE GOVERNMENT

- Always make sure counsel (in-house/outside) is advised of **any** contact with the government before information in any form is provided;
- Always deal with the government in good faith
- Always maintain the highest personal and professional standards
- Take steps to ensure that employees understand the serious nature of a government investigation and that they afford it the highest priority

HOW DO GOVERNMENT INVESTIGATIONS BEGIN?

- Investigation by criminal investigators
- Referrals from civil investigative agencies (SEC, OFAC, HHS, FTC, EPA, etc.)
- Audits
- Complaints/tips from competitors, whistleblowers, including current or former disgruntled employees
- Press coverage
- Referrals from other investigations based on cooperating individuals or corporate defendants
- Initiatives focusing on a particular issue or industry (Ex.: New CARES Act funds priority)

INVESTIGATIONS

- Can be civil, criminal, or concurrent
- May involve multiple government agencies in multiple jurisdictions working together or independently
- Are increasingly common in highly regulated industries (auto, finance, banking, health care, pharmaceuticals, technology, any type of government contracting)

A civil investigation may lead to a criminal investigation and vice-versa, so all investigations require thoughtful treatment at the time of initial contact.

INVESTIGATIONS

Investigations can be difficult to deal with because:

- Don't know how investigation was triggered
- Not sure what the status of your company and/or employees are – are they “targets”, “subjects” or just “witnesses”

Regardless, in-house counsel can implement practical strategies to ready a company and its employees in the event of an investigation to make sure that any government contact is handled appropriately.

PURPOSES OF THE VISIT AND GENERAL INVESTIGATORY TECHNIQUES

- Subpoenas
 - Grand Jury Subpoenas
 - Documents
 - Witness testimony
 - Administrative subpoenas
 - Civil Investigative Demands
- Search Warrants
- Request for Interviews
- Informal request for documents

THE INITIAL RESPONSE TO THE GOVERNMENT

- In-house Counsel should discuss hiring outside counsel and immediately contact the government representative
- Communicate that it is the company's policy that as a general matter it will cooperate with official government inquiries in a complete and timely manner
- Ascertain the nature and scope of the investigation and the company's potential legal and regulatory exposure: Status – Witness, Subject, Target
- Discuss a timetable for the company's response and promise continued interaction in order to manage expectations – **key is to effectively manage the government's expectations.**

SUBPOENAS- GRAND JURY SUBPOENAS

- Federal agent shows up with a grand jury subpoena, ***it means there is a criminal investigation underway that might have very serious consequences***
- Agent(s) might show up at an employee's home instead of the workplace
- A grand jury subpoena may seem like a civil subpoena, but it is not. Law enforcement has more power than a civil litigant
- The agent serving the subpoena has consulted with an Assistant United States Attorney, and the government has a plan

In civil litigation – a dispute of document production might lead to motion to compel. In grand jury proceeding, it might lead to an indictment for obstruction of justice

SUBPOENAS- GRAND JURY SUBPOENAS

- In most cases, agents hope to catch you off guard and without benefit of any discovery or a legal strategy
- When you first meet the agent, they might start by asking you friendly questions relating to the investigation and never mention that they have the subpoena in their possession
- Talking to the agent without adequate preparation can complicate your “problem”
- Lack of recall or precision could be interpreted as obstruction or a cover up
- Agents often have preconceived ideas of what the “truth” is.
- It is important to engage outside counsel immediately.

GRAND JURY TESTIMONY

- Counsel is not entitled to be present in the grand jury with the witness.
- Counsel can be present outside of the grand jury room and the witness can request to speak with them at any time.
- The landscape of U.S. criminal cases is littered with individuals who have complicated their problems by testifying in the grand jury.

Responding to a subpoena for grand jury testimony requires complex analysis that should be handled by experienced criminal counsel.

ADMINISTRATIVE SUBPOENAS AND CIVIL INVESTIGATIVE DEMANDS

- A subpoena is a court or administrative order directing a witness to appear and testify and/or to produce documents
- A “Civil Investigative Demand”, or CID is similar to a subpoena, but can demand production of documents, answers to interrogatories, testimony, or all three
- Failure to comply with a subpoena may result in sanctions

SUBPOENAS- IMMEDIATE “TO DO” LIST

- Engage with outside counsel and develop a plan
- Prepare Internally
- Document Everything
- Engage with the Government

The Planning:

- Contact lead government investigator to determine whether the company can negotiate:
 - Scope of Subpoena
 - Time for Compliance
 - Production protocol and format including Electronically Stored Information (ESI) and metadata
- Determine whether the company/employees will self-collect documents or whether document collection will be coordinated by counsel and IT professionals (The latter is recommended especially where ESI is requested)
- Coordinate document review for relevance and privileges
- Where testimony is requested, determine who will testify on the company's behalf
- Implement appropriate document retention and hold notice

Preparing internally

Work with outside counsel immediately to determine what is and is not available:

- Circulate a Document Hold memorandum
- Hard copy documents
- Email
- Electronic documents
- Be armed with specific details as to the type, form and volume of the information
- Get knowledge of what does and does not exist
- Put together a team to help retrieve the documents

THE INITIAL STEPS- DOCUMENT PRESERVATION AND PRODUCTION

- Advise potential affected employees *in writing* to request that all potentially responsive documents be immediately segregated and preserved
- Employees should be instructed to search all of their documents, regardless of their form and location
- Contact the IT department and any other department *in writing* that is responsible for document retention and halt document destruction
- Request *in writing* that IT department conduct search for electronic documents

Remember – A routine government inquiry can quickly accelerate to a full-blown criminal investigation or search warrant and seizure if documents are destroyed after an investigation has commenced or government believes they are not receiving complete and timely cooperation.

THE MECHANICS OF RESPONDING TO A SUBPOENA FOR THE PRODUCTION OF DOCUMENTS

- Designate a non-lawyer custodian within the company who will not be a fact witness in the investigation
- Ensure that supervisors of employees who may have responsive records understand their roles and responsibilities
- Screen all documents and segregate “hot documents”
- After documents have been gathered, but prior to production, resurvey employees
- Number and copy all records that are to be produced
- Maintain copies of all records produced in a secure, central location
- Transmittal letter to the government

OTHER INTERNAL STEPS

- If outside consultants are needed be sure to engage them via outside counsel in order to establish privilege
- Establish attorney-client privilege over all internal communications regarding the matter
- Advise management and board
- Control the flow of information within the company
- When providing information to the government never attempt to use political contacts or special access to the investigating agency to forestall the inquiry or curry favorable treatment

-
- **Investigate, investigate, investigate**
 - **Understand what you are providing**
 - **Review documents**
 - **Analyze data**
 - **Beware of email**
 - **Do your own defensive search to see what might exist**
 - **Prepare to spend resources: time and money; money and time**
 - **May need to temporarily assign one or more employees to responding to the investigation, etc.**
 - **Spending smaller sums early may save big sums later**

▪ **DOCUMENT, DOCUMENT, DOCUMENT**

- **Document your cooperation efforts**
- **Document collection efforts**
- **Document efforts to narrow requests based on burden and availability of materials**
- **Document provision of information, documents, and data**

ENGAGING THE GOVERNMENT:

COMMUNICATION IS KEY

Begin a dialogue with the government early in the process

- **Outside counsel should introduce themselves early and let the government know that you, the client, are taking prompt action to respond**
- **Gather as much information as you can to determine if you are a**
 - **Target**
 - **Subject or**
 - **A witness**
- **Express willingness to cooperate**

- **Establish credibility**

- A. **be prepared with specific facts and details**
 - I. **volume of documents**
 - II. **what searches you have already conducted**
 - III. **what steps IT has taken to preserve and search for documents**
- B. **give realistic expectations for timing of productions**
- C. **Always tell the truth**

****Failure to do so could expose the company and its employees to separate criminal liability***

***** Deleting, concealing or altering relevant documents = JAIL TIME***

- **Do not over-promise and under-deliver**
 - A. **Do not make misrepresentations**
 - B. **Do not obfuscate**
 - C. **Do not make mistakes (i.e., represent that all documents have been produced only to have to recant at a later date)**

ENGAGING THE GOVERNMENT: NEGOTIATING REASONABLE ACCOMMODATIONS

-
- **Your lawyer can help you limit the scope, extend the time to respond, or challenge its issuance (Subpoena/CID)**
 - **Negotiate with the government or move to strike or quash (Subpoena/CID)**
 - **Relevant factors:**
 - **Relevance and importance of the information to the investigation**
 - **Is the recipient a target of, or witness in, the investigation**
 - **Is the CID within the scope of the authorizing statute**
 - **Reasonableness of requested extension of time**
 - **Courts will generally enforce CIDs**
 - **Risks involved with challenging**
 - **Understand what the CID tells you**
 - **Insight into concerns and investigative focus**
 - **Use ongoing discussions about compliance to understand government's concerns and to educate government on issues**

ENGAGING THE GOVERNMENT: CONTROL THE NARRATIVE

Craft your substantive story and tell it early and often

- **Telling your story is not a substitute for, but a supplement to, the response**
- **Various ways to be effective, but likely will need to submit a comprehensive writing**
- **Engage on the merits**
- **Ask for an in-person meeting to explain your written submission**

SEARCH WARRANT

- A search warrant is a document issued by a judge or magistrate based on a determination of probable cause, permitting government agents to search and seize tangible property described in the warrant or located in an area specifically identified by the warrant. The warrant must describe with particularity the place or person to be searched and the items to be seized. The company's goal in responding to a search warrant are two-fold: (1) comply with the warrant; and (2) minimize the harm caused by the search.
- Government agents have a substantial advantage when executing a warrant. Agents are experienced in conducting searches, will prepare for and rehearse and surprise the company
- Execution – “shock and awe” investigative technique. Numerous agents, armed and wearing raid jackets
- Extremely disruptive – normal business operations will effectively be suspended
- Agents will attempt to question employees while searching for documents – considered perfect time to catch employees off-guard and obtain potentially damaging information

CHECKLIST FOR SEARCH WARRANTS

- Obtain a copy of the warrant
- Notify the General Counsel immediately
- Record the names of all agents and their agencies
- Note the time of arrival and departure of agents
- Limit the search to location described in the warrant
- Do not consent to a broader search without consulting counsel
- Videotape the search
- Audio or videotape any interviews
- Prepare a complete list of all documents/items seized
- Obtain copies of critical documents
- Request that agents download and copy computer data on site
- List all employees interviewed by agents

ADDITIONAL SEARCH WARRANT GUIDELINES

1. Request that, as a courtesy, the officers delay initiating their search in order for you to contact the General Counsel.
2. If you are asked to consent to the search, decline. The government could use any consent given as an alternative basis, in addition to the search warrant, for defending the legality of the search or to expand the search beyond the scope permitted by the search warrant.
3. Review the warrant carefully to identify the precise premises to be searched. The officers are not entitled to search any areas not specified in the warrant. If they do, inform the lead officer of your objection and take detailed notes (or photographs) of the officers' improper conduct.
4. You may send non-essential employees home or away. Otherwise, it is likely the authorities will seek to interview key employees during the search. Instruct designated employees to observe the search and take notes concerning what is searched and seized. Take duplicate samples in environmental seizures.
5. During the search, you will be asked where certain items can be found. Write down all such questions – they contain valuable information about the government's prior sources of information and possible investigation focus.
6. Request a detailed inventory. You are entitled to an inventory of all items seized.

SEARCH WARRANT- STRATEGY

- Determine the scope of the warrant – the Fourth Amendment prohibits the agents from conducting a search beyond its scope without consent
- Be polite and cooperative, but it rarely wise to consent to search outside the scope of the warrant
- Designate a senior administrative employee as the initial “front line” liaison with the agents and maintain communications with them
- Response must be professional, courteous and sensitive to public relations
- Advise employees that they are not to hide, destroy or alter documents in any way and that they do not have to submit to questioning

SEARCH WARRANT- EXECUTION PROTOCOL

- Request an initial sit-down with the lead agent to discuss location(s) of documents identified in the warrant
- Identify agent with IT responsibility and assign company IT specialist to partner with the agent
- Convene a meeting of administrative personnel who will be assigned to partner with agents conducting search regarding note-taking responsibility, up the chain communications responsibility, and inventory responsibility.
- Negotiate procedure for copying items seized
- Agents are required to leave behind an inventory of items taken during the search that should be sufficiently detailed, obtain detailed receipt for seized items not copied
- Prepare document hold memo for immediate circulation
- Suspend all routine document retention policy purges

REQUEST FOR EMPLOYEE INTERVIEWS

- Government agents often conduct “sweep” interviews in conjunction with the execution of a search warrant
- The first objective of an agent serving a subpoena or warrant is to interview whoever will talk to him or her. The interview may be designed to elicit information about an individual or the company, or about another company that does business with the company

REQUEST FOR EMPLOYEE INTERVIEWS (CONT.)

Prepare employees in advance in the event of a government visit. Employees should be advised of the following:

- Investigators have the right to contact them and request an interview
- They can to speak with investigators and request that the interview take place at a place and time convenient to them
- They are not obligated to speak voluntarily and have the right to decline to be interviewed
- They have the right to have consult with legal counsel prior to deciding whether to submit to an interview
- The company will pay the costs of this consultation and recommend an attorney if you desire. You also have the right to retain your own attorney

REQUEST FOR EMPLOYEE INTERVIEWS (CONT.)

Should an employee consent to an interview, they should be advised that:

- They have the right to have an attorney present at the interview, to confer with an attorney in advance, and to terminate the interview at anytime
- That their statements to agents could constitute legal admissions that could be used as evidence against them, the company, or both
- TELL THE TRUTH, and should state only matters that that know to be fact. A false statement to an investigator may constitute a criminal offense
- They have the right to counsel before they sign any written statement

What Employees Should Know

If an employee is asked to meet with or be interviewed by law enforcement, regardless if it is in connection with a search warrant, the following guidelines should be observed.

1. First, do not obstruct the search. If the officers have a search warrant, they have the legal right to search the premises and to seize what is designated in the warrant as evidence.
2. The investigating officers may ask you to grant them an interview. You are under no legal obligation to grant an interview. A search warrant entitles them to search the premises. It does not entitle them to interview any person.
3. If you do grant an interview to the investigating officers, you should be aware that anything you say can be used against you in a criminal prosecution or in a civil enforcement proceeding. This is true regardless of whether the officers give you any so-called *Miranda* warnings.
4. If the investigating officers ask you to grant them an interview, and you would like to do so, it is the company's preference that its General Counsel be present at the interview.

REQUEST FOR EMPLOYEE INTERVIEWS (CONT.)

For employees that were interviewed, counsel should contact that employee and ask the following:

- What did the agent tell them about the investigation
- Did the agent tell them what their investigative status was – witness, subject, target
- Any statements by the agent concerning employees alleged wrongdoing
- What questions the agents asked the employee
- What agents the employee gave the agents

This is typically documented in a privileged memorandum from the attorney.

WHAT TO DO WHEN THE GOVERNMENT LEAVES

- Contact counsel who may conduct an internal investigation
 - Counsel may conduct an internal investigation to determine the scope of the government’s inquiry and the facts surrounding the issue and the debrief those employees interviewed by the government
 - Counsel should conduct the internal investigation in order to best protect confidential and privileged information
 - Counsel may prepare a memo to all employees regarding the investigation and employees rights when contacted by the government
- Protect the attorney-client and work product privilege
 - All documents generated at the request of counsel should be clearly marked “Privileged and Confidential – Attorney Work Product/Attorney Client Communication”
 - Maintain a separate file for the investigation. Access to files must be limited to attorneys and agents of attorneys to protect any privilege.

COSTS

- Resulting Costs

- Government action is expensive

- Production of Materials

- Employee time commitments

- Cost of Counsel

- Mitigation of Costs

- Insurance: Put insurance carrier on notice early to increase your chances of having insurance pay for some or all of the investigation and/or litigation costs

TOP TEN MISTAKES COMPANIES MAKE DURING INVESTIGATIONS

- Thinking it's going to be fast
- Thinking it's going to be fair
- Thinking it's going to be cheap
- Thinking one lawyer can represent everybody
- Thinking voluntary disclosure can be limited
- Thinking political influence can help
- Failing to anticipate that they will be investigated
- Failing to notify defense counsel before they fire key employee-witnesses
- Failing to coordinate public statements with defense counsel
- Failing to preserve records and electronic information

PREPARE YOUR COMPANY

- **Hope for the best, prepare for the worst**
- Preparation is smart and cost-effective
- Proactively train employees about what to do in the event of an investigation
- Designate a trained “crisis response team”, including in-house counsel, compliance officers, with access to public relations employees or firm. Maintain team contact list
- Designate a crisis response designee for each company site
- Maintain a list of qualified defense counsel whom you can call in the event of a civil or criminal investigation

TAKE-AWAYS

- Know your rights
- Plan ahead
- Coordinate interaction with government agents
- Preserve integrity of information
- Respond courteously and cooperatively without waiving rights
- Maintain a calm, thoughtful strategy
- Consult experienced counsel



Lauren DeSantis-Then

Shareholder

ldesantis@polsinelli.com

(314) 622-6616

100 S. Fourth Street, Suite 1000
St. Louis, MO 63102