

## Managing Government Investigations for the In-house Lawyer

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The news of a federal agent delivering a grand jury subpoena or other investigative process can be stomach churning. At that moment, in-house counsel typically does not know whether the company or its executives are under investigation, whether employees may have engaged in suspicious or unlawful activity, or whether the government is simply seeking to collect documents or other information in the company's possession. The agent's visit could be benign or it could mark the beginning of a long, expensive, and difficult process. In either scenario, in-house counsel can take several steps, detailed below, to put the company in the best possible position vis-à-vis the government's investigation.

### *Contact experienced counsel*

Effectively engaging the government in the course of a investigation requires experience and specialized knowledge. The government wields tremendous power in the investigatory stage of both criminal and civil investigations, and failure to adequately respond to a subpoena or civil investigative demand (CID) could put the company and its representatives at greater risk. Ideally, the company should retain counsel familiar with the type of process at issue (e.g., criminal subpoenas, CIDs, agency administrative subpoenas), the agency issuing that process (e.g., Department of Justice, Federal Trade Commission, Consumer Financial Protection Bureau), and, if knowable, the subject matter of the investigation.

Choosing the right attorney is especially important if there is reason to believe the government is examining the company's conduct. In that case, the company may need to conduct an internal investigation. Experienced counsel can ensure such an internal investigation is conducted with integrity and in a way that minimizes business disruptions and safeguards privileged and confidential information. By utilizing independent outside counsel, the company will also signal to the government that it is taking the investigation seriously.

Experienced counsel will also know how to assemble a "clean" investigation team and a reporting chain that steers clear of potential targets or subjects of the investigation. (Individuals whose conduct may be under investigation by the government, or relate to it, should not play a role in an internal investigation.)

### ***Secure documents/data***

The company should move immediately to secure documents potentially responsive to the government's request. This means not only physically securing documents and workspaces, but also electronic systems and databases, emails, chats, audio or video recordings, text messages, and other potential sources of information. In-house counsel should work with outside counsel to determine the universe of potentially responsive documents and identify document "custodians," i.e., individuals whose documents may be responsive to the government's requests. Those custodians should then be instructed to preserve certain categories of information (as determined by counsel after close review of the subpoena/CID) and to not destroy, discard, or remove such documents. After the "legal hold" has issued, the company and counsel should remind employees of the hold and ensure ongoing compliance.

In-house counsel should also partner with its information technology team to ensure that it can "lock" or "freeze" any potentially relevant data. The company may also need to suspend auto-delete functions in email and modify document retention and shred policies.

### ***Realistically assess the time needed to respond the government's request***

It is not unusual to get broad requests from prosecutors or government agencies calling for "all records" pertaining to the relevant issues over a period of many years. Often the requests contain short turn-around times. In certain investigations, these requests can be extremely burdensome, requiring the company to collect data and documents from numerous custodians, work sites, and locations. Meeting the government's demands may require fact-finding by the investigative team to determine where certain documents are housed and may also require the company to access its archives or old or retired computer systems. It may be impossible to determine the universe of responsive documents without first conducting forensic reviews on computer networks and e-mail systems. All of this takes significant time, effort, and resources.

Additionally, before any document production is made, counsel will need to review the relevant documents to ensure the company preserves the attorney-client privilege and protects attorney work product. Counsel may also want to request confidential treatment for productions made to certain agencies, like the Securities and Exchange Commission (SEC). This is key, as the company loses control of the documents once they have been turned over. Those same documents may be shared with other investigating agencies (for instance, DOJ's Criminal Division may share

them with the Civil Division or with the SEC), or they may be demanded by civil litigants at a later time. It is thus imperative for counsel to review carefully any material prior to production.

To the best of its ability, the company should make a determination as to whether it can timely respond to the government's document requests. If it cannot, it should estimate how long it would take to respond fully to the government's requests. It should also document the steps *and costs* involved in doing so. Prosecutors and other federal investigators may not always appreciate the burdens their requests put on companies and, as discussed below, they may be willing to streamline their requests and/or grant extensions of time in which to respond. Companies will also want to have this information ready in the event they need to litigate a motion to quash a subpoena or similar motion.

### ***Engage the government***

Companies can and often should engage the government through counsel in the course of an investigation. In some civil investigations, meeting with the government (a "meet and confer") is required. In a criminal investigation, counsel should immediately ask the government whether the company or any of its executives are targets or subjects of the investigation. The prosecutor may not answer the question, but she may provide other helpful information, including, for example, the scope and nature of the investigation, the timing of the investigation, or whether other agencies are involved. The tone and tenor of the conversation may also indicate where the company sits within the investigation, and can be invaluable in determining the appropriate steps to take going forward.

Experienced counsel will also be able to work with prosecutors to narrow the scope of the subpoena, where possible. No prosecutor wants to slow her investigation litigating the breadth or burden of her subpoena (if she can help it). Nor does a prosecutor want large volumes of unnecessary information. Accordingly, the government will likely will work with the company to narrow the request where such issues are identified, saving the company significant time, money, and resources in the process. If the request is necessarily broad, the company may need or want to with the government to develop appropriate search terms for searching electronic data.

Except where time is of the essence, the prosecutor is likely to grant requests for extension of time or permit "rolling productions." This will ensure the company can conduct their document collection correctly, efficiently, and with as few business disruptions as possible.

### ***Make and execute a document collection plan***

Making and executing a good document collection plan is not easy. It is important that counsel work with knowledgeable individuals within the company (whose conduct is not in question) to ensure that all potential sources of information have been considered, including individuals and systems. This means working with business components within the company, but also with I.T., who will usually be best positioned to advise the company on how to locate and extract relevant data, and can help set expectations about how long that process will take.

Although there may be many document "custodians," there should be a single "Custodian of Records." This person is an integral part of the company's investigation team, as he or she may be called upon to authenticate the company's business records and explain where certain records came from. The Custodian of Records will not be doing this alone; counsel will be working with the Custodian to record how and where searches were done.

The document collection process itself must be undertaken with care, as it has both legal and business implications. In many cases, the government will ask for original documents, rather than copies, and it may ask for documents to be produced as they were kept originally. Meeting these demands will require a member of the investigation team to visit employee offices and workspaces to review and collect documents. This can be disruptive. Companies should consider the timing of their document collection and the impact on the business. If taking original documents has a substantial effect on business operations, the company, through counsel, should work with the government to determine if a modification can be made. If there is reason to believe an employee will resist or obstruct a search, the company should consider limiting the employee's access to the worksite while a document review and collection is completed.

The document collection must be thorough. The government has many tools at its disposal and may already know that certain documents exist or should exist. Failure to collect and produce those documents to the government will raise questions about the integrity of the company's document collection efforts, or worse. The company may face fines, criminal contempt, or even charges of obstruction of justice.

More often than not, the company will want to cooperate with a government investigation, particularly where it appears some wrongdoing has occurred. Such cooperation will only be valuable if the company can offer complete and reliable information. Ideally, the company will be able to show that it preserved evidence

early, searched all areas reasonably likely to contain responsive documents, and minimized opportunities for document destruction. If, instead, the company takes a narrow, overly technical, or sloppy approach to its document search and collection, the government will have little interest in the company's "help."

### ***Decide whether to pursue an internal investigation***

Where serious ethical, legal, or regulatory questions are raised by the government's inquiry, or where such issues surface in the course of complying with a subpoena, the company may choose to conduct its own internal investigation. Doing so carries potentially great risks and benefits, and must be done extremely carefully. On the one hand, the investigation may identify new and additional wrongdoing, which the company could be obligated to report. On the other, it may provide the company with a better grasp of the facts, allow the company to remediate problems quickly, and, where appropriate, assist the government in identifying other bad actors.

If the company chooses to investigate with an eye towards cooperation, it should do so promptly and thoroughly. In almost all cases, the government will assess cooperation credit based on the timeliness of the company's disclosure and its completeness.

Because internal investigations are rife with potential landmines, however, including privilege and ethical issues, they should only be undertaken by experienced counsel after carefully weighing the pros and cons.

### ***Document the Company's efforts***

This cannot be underemphasized. A company responding to a grand jury subpoena or other demand for documents should keep clear records noting the scope and timing of the collection, the individuals involved, the places searched, the places *not* searched (and reasons why), the documents collected/produced/withheld, any reasons for delay, and, of course, any agreements or discussions with the government. This is essential to protect the company should questions arise about the completeness or integrity of its response to the subpoena. There are also practical reasons for good record-keeping. Some investigations last years and lie dormant for long periods of time. Others are fast moving and involve numerous players throughout the company. Having clear records memorializing in-house counsel's efforts and decision-making will allow the company to understand the full scope of its actions and assess whether more needs to be done.

Likewise, having clear notes of any employee or witness interviews could help in any effort to cooperate and protect against due process claims or other claims raised by employees.

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All government investigations, whether civil or criminal, should be treated seriously. Retaining experienced counsel will help companies navigate the different and varying government processes involved, depending on the request, and position the company well in connection with the government's investigation. Counsel will also help the company determine whether an internal investigation is prudent or necessary and guide the company through that important and sensitive process.