

When the Government Asks Questions: A Guide to Responding to Government Inquiries

White Collar Toolkit

In today's highly regulated environment, businesses in any industry sector should be prepared to respond to a government inquiry. While each situation is unique, an organization's response to the initial government contact often sets the tone for how an investigation unfolds. It may also materially impact the ability to favorably resolve regulatory or related public relations threats.

These best practices should be followed by companies involved with government inquiries:

EDUCATE YOURSELF AND YOUR EMPLOYEES ABOUT INVESTIGATIVE TACTICS.

- Questions from law enforcement may be presented via telephone, e-mail, letter, or virtually anywhere in person.
- Subpoenas and Civil Investigative Demands (CIDs) are also commonly used to elicit information and statements from unprepared recipients.
- Establish clear points of contact and lines of communication to ensure that surprise and routine initial contacts with law enforcement are addressed promptly and properly.

TRIAGE WRITTEN REQUESTS FOR INFORMATION.

MEMORIALIZE SERVICE

- Carefully record the date and time of service of a subpoena or CID for future reference. A prompt acknowledgment to the agent or prosecutor and early assurance of your intent to keep the lines of communication open can change the course of an investigation.

UNDERSTAND THE SCOPE

- A subpoena or CID does not entitle an agent to search your files or devices.

KNOW YOUR REGULATORS

- Determine the identity of the issuer and whether the issues are administrative, civil, criminal, or all the above. The mechanism is equally essential to this analysis — CIDs are a powerful pre-litigation tool, while a grand jury subpoena means that a criminal investigation is underway.

CONSULT COUNSEL AND CREATE YOUR RESPONSE PLAN

- Subpoenas and CIDs rarely compel the immediate production of documents, and subpoenas for testimony may be negotiated into an informal interview, attorney proffer, or witness proffer instead of a stressful appearance. Respond only after carefully reviewing the requests with an attorney.

PRESERVE RECORDS AND DEVELOP AN ACTION PLAN.

- Send a document preservation notice to people who may have relevant information to avoid all appearances of obstruction of justice. Be thoughtful in the messaging; such notices can often generate office speculation or gossip.
- Work quickly and closely with your IT, HR and Records departments to suspend any regular data disposition procedures, ensure the separation of custodians' information is maintained, and collect potentially relevant documents and communications. Engage an electronic discovery provider to perform the collections if you do not have the necessary in-house expertise.
- Assess whether an internal investigation is necessary or desirable with the assistance of an attorney. Depending upon the subject matter, a parallel internal investigation may help to ensure that the illegal conduct or other wrongdoing has stopped. An internal investigation may also counter any incomplete or inaccurate assertions made by the government, and allow you to implement measures to promptly mitigate liability.
- Where a subpoena or CID requests substantial document discovery, begin a dialogue with the agent or prosecutor about production timing, scope, and format, as well as privilege logging, with the goal of negotiating reasonable search criteria, sufficient time to perform a comprehensive attorney review, and acceptance of a less burdensome categorical or objective metadata privilege log.

BE PREPARED FOR INTERVIEWS.

TELL THE TRUTH

- It is a felony offense to make a materially false statement in response to questioning by the government, regardless of the context. The government does not have an "off-the-record" interview or conversation. Agents are not required in many jurisdictions to ask permission nor to inform you about recording a conversation with you.

VERIFY CREDENTIALS

- Request — and verify — the interviewer's agency, badge or ID number, and phone number before speaking with them.

UNDERSTAND YOUR RIGHT TO REMAIN SILENT

- There is no legal mechanism for an agent to compel an interview. Without a subpoena, and regardless of what the agent may say, the choice to respond belongs to the interviewee.

COLLECT INTELLIGENCE

- Request information about the nature and subject matter of the investigation and for records or other information that can or should be reviewed in advance. Ask whether you are a witness, subject, or target of the investigation.

CONSULT COUNSEL

- Ensure that employees understand their right to consult with an attorney and for the attorney to be present for any future interactions with the government. At the very least, have a third-party witness participate. Company counsel should be notified in advance and permitted to attend if the interview will be about the interviewee's work for your company.

BE ALERT TO COERCION

- It is improper for an agent to use the threat of a subpoena or search warrant to coerce statements from employees. Advise the interviewee that they have the right to terminate any conversation and/or schedule an interview with an attorney in attendance.

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