

Responding to a US Government Investigative Subpoena

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Editor's Note: Hedge fund firms have recently found themselves in the spotlight of unwanted government attention, particularly in the ongoing insider trading investigations that have been spawned by the Galleon Group cases. In this guest article, attorneys John Bartko and Charles Miller discuss how to approach a government investigative subpoena.

Governmental agencies charged with regulating the financial and securities industry, like the Securities and Exchange Commission, the Commodity Futures Trading Commission and the Department of Justice are granted wide powers to conduct investigations and issue subpoenas.

Government representatives are likely to arrive unannounced and interested in interviewing employees when serving a subpoena. It is, therefore, critical for firms to have a policy in place as to how to respond to such situations, and to make sure employees are actually aware of that policy.

Especially as more information is produced and stored electronically, the issue of how to control a company's response to investigations has taken on some new twists.

While the company and employees may have to make materials described in the subpoena available, nothing should be done until counsel who is identified in the firm's policy is consulted. He or she will control the timing and nature of the response.

The government subpoena is often used as an investigative device by regulatory agencies. It is also a potential discovery tool of the DOJ should the investigation result in a criminal referral. Because of the possible far-reaching nature of these types of inquiries, a firm that receives an investigatory subpoena from a federal regulatory agency should consider it an opportunity to respond to the request in a full and complete manner with the result that the agency bring its investigation to a close, rather than referring it to the DOJ with a recommendation for further investigation.

The most draconian demand for information is a search warrant issued after a judge has determined there is probable cause to believe a crime has occurred. When that happens, the DOJ can even mirror your computer hard drives to collect information described in the warrant. It is imperative to immediately contact experienced counsel who can then negotiate with the agents serving the warrant. Preserving a careful record of how the search is conducted may prove critical at a later juncture in explaining the company's position.

Investigatory subpoenas are often open to negotiation that can focus and limit what will be produced and the circumstances of production. Investigatory subpoenas from government entities such as the Federal Trade Commission and the SEC are often broad and all encompassing and active negotiation on how to respond can help in creating a transparent process.

Electronic discovery is as large an investigatory burden for government agencies as it is for those who are being asked to produce the material. The government doesn't actually want the kitchen sink, but sometimes subpoenas resemble requests for it, since they are investigatory. This represents a real opportunity for informed counsel fluent in the intricacies of your records information management policy to engage the government on your behalf

and negotiate a production in response to the subpoena -- preferably a "rolling" production if the scope of the subpoena must remain broad -- which will assure the government that the recipient is making a full and complete effort to produce the information requested. A subpoena must be "reasonable" and this includes the scope of the request, and the burden it places on the responding party. The goal is to quickly ascertain what and where the most relevant non-privileged documents that are not work product are, and where they can be located, and then produce these in response to the subpoena.

Handling electronic discovery requests has become a sub-specialty of many litigators. These are important negotiations that require informed, skilled counsel who are adequately supported by electronically stored information (ESI) project managers and data analysts who can advise them professionally about the technological hoops and associated costs each bears to respond to the subpoena.

Regulatory agencies are no more interested in a "data dump" than defense counsel in a criminal matter: they are interested in relevant documents. Having counsel who can make accurate, verifiable statements about ESI that would be part of any production will foster the professional respect and cooperation that can effect an appropriate narrowing of the subpoena. This can effectively limit the costs of production to the recipient, while at the same time assuring the government that it has the opportunity to look at all of the relevant documents requested, while not being overwhelmed with extraneous information, and, therefore, no further investigation is required.

Counsel who understand negotiation but have not yet made themselves familiar enough with the intricacies of the IT platforms on which hedge fund firms exist will be better able to represent you if they are assisted by professionals with the necessary ESI experience. Electronic discovery is a reality, as are its costs, including effective ways to limit those costs through a process which creates trust. In order to be effective, counsel must be adequately supported by informed ESI project managers and data analysts.

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