

# Responding to Government Demands for Information

Presented by

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# In-House Panelists

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- Paul Reeve, *UPS*
- John Wear, *Coca-Cola*

# Responding to Government Demands for Information

The following is a handy punch list of steps to take before, during, and after your company receives a demand for information from the government.

The desire to respond promptly must always be balanced by the potential consequences of providing incomplete or inaccurate information, disruption of business operations, and the need to be prepared for potential adverse actions the government may take once it receives the information

# I. Advance Preparation

- Designate in-house lawyer responsible for managing significant government inquiries
- Identify categories of inquiries that are elevated to that in-house lawyer
- Inform employees about protocol for elevating serious inquiries

# I. Advance Preparation

- Address investigations issues in company code of conduct/employee handbook
  - Cooperation
  - Document preservation

# I. Advance Preparation

How to Establish Best Practices to  
Collect/Preserve Information—The Need To  
Ensure Compliance with Federal, State & Local  
Laws Regarding *What to Keep* and *For How  
Long*

# I. Advance Preparation

- Distribute preservation memo
- Identify potential legal and logistical issues
  - Scope lawyer
  - Timing
  - Document/data retention
  - Privilege
  - NDAs

# I. Advance Preparation

- Develop protocols for document collection
- Develop and distribute protocol for law enforcement visits and search warrants
- Identify potential outside counsel

## II. Search Warrants

- Instruct employee in charge at the scene not to interfere or obstruct
- Get business cards of agents and identify agent in charge at the scene
- Get copy of warrant

## II. Search Warrants

- Talk briefly to agent and indicate that all questions should be directed to you
- Contact outside counsel and deploy to location
- Report up the chain (general counsel, CEO, board)

## II. Search Warrants

- Consider enlisting internal/external communications professionals
- Ask employee on scene to monitor (but do not interfere with) agents. Keep log of what is taken
- Identify any potentially privileged information

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## II. Search Warrants

How to address new challenges like employees tweeting about the search or recording it on their phones?

## II. Search Warrants

- Be prepared for employee questions about interviews
  - Administer Upjohn warning and memorialize having done so
  - It is their choice whether to be interviewed, but if they choose to be interviewed they can be accompanied by counsel and designate the time and place
  - Do not destroy documents or delete information

# III. Subpoenas for Documents

- First Steps

- Identify date for compliance, but recognize this can usually be negotiated
- Designate responsible lawyer
- Report to key stakeholders (general counsel, CEO, potentially Board)

### III. Subpoenas for Documents

- Consider whether to engage outside counsel, and if so who
  - Designate responsible lawyer

#### Factors:

- Expense
- Employee/systems disruption
- Experience
- Relationships/reputation in jurisdiction

### III. Subpoenas for Documents

- Divide responsibilities between in-house and outside counsel
- Outreach by in-house or outside counsel to government
- Designate a document custodian

### III. Subpoenas for Documents

- Evaluate use of third-party data management company and specific issues of big data
- Negotiate issues with government lawyers, including potential use of search terms, and address production logistics, taking into account their level of sophistication and objectives
- Document process of gathering information

## III. Subpoenas For Documents

How to Deal with Big Data and Manage Investigation Costs?

### III. Subpoenas For Documents

Managing the Government's Expectations  
Regarding Technical Capacities of Email Reviews

## IV. Subpoenas for Testimony/Employee Interviews

- Consider whether employee can or should be represented by counsel for the company, including conflicts (employee a whistleblower)

## IV. Subpoenas for Testimony/Employee Interviews

### - Upjohn/conflicts of interest

Rule 1.6 Confidentiality of Information

Rule 1.7 Conflict of Interest: Current Clients

Rule 1.8 Conflict of Interest: Current Clients: Specific Rules

Rule 1.13 Organization as Client

Rule 4.1 Truthfulness in Statements to Others

Rule 4.2 Communication with Person Represented by Counsel

Rule 4.3 Dealing with Unrepresented Person

## IV. Subpoenas for Testimony/Employee Interviews

- Ensure employee understands attorney-client privilege
- Consider whether to recommend counsel for employee
- Consider whether to advance fees and whether to execute undertaking/indemnity agreement, considering state laws and corporate by laws

## IV. Subpoenas for Testimony/Employee Interviews

- Evaluate potential common interest agreement with other counsel and whether oral or written
- Evaluate potential Fifth Amendment issues, including impact on employment
- Warn employees about obstruction/witness tampering/false statements exposure

## V. Reporting and Disclosure

- senior management
- the board
- 10k/10Q
- auditors
- the press

# Responding to Government Demands for Information—Key Concern

## The Attorney Client Privilege

- What is it?
- Why do you want to protect it?
- How do you protect it?
- Should it ever be waived?
- How is it accidentally waived?

# Responding to Government Demands for Information—Key Concern

## Attorney Work Product Protection

- What is it?
- Why do you want to protect it?
- How do you protect it?
- Should it ever be waived?
- How is it accidentally waived?