

How to Respond to a Government Investigation & Minimize the Risk of Indictment, Suspension or Debarment

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Subpoenas and Search Warrants

Investigative Devices

- Grand Jury subpoenas are issued by a federal district court at the request of the prosecutor (assistant U.S. Attorney)
- Grand Jury subpoenas either: (1) compel witness testimony or (2) compel production of documents
- Search warrants are issued by a federal judge or a magistrate
- Search warrants are being used more frequently and enable confiscation of documents on the spot (preventing destruction of evidence)
- Administrative Subpoenas: Issued by agency IG. May only compel documents and not oral testimony.



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Subpoenas and Search Warrants

- Search warrants are public.
- Search warrants mean the company is the target of the investigation.
- Grand jury proceedings are closed to the public.
- Receipt of grand jury subpoena could mean you are a target, subject or witness.



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Responding to Search Warrants

- In advance of ever receiving a search warrant:
 - The company should designate a person to receive service of the company search warrant, and be present during the execution of a search warrant.
 - Designee should be trained in search warrant response procedures.



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Responding to Search Warrants (cont'd)

- Request the execution be stayed until counsel is present
- Review the warrant and provide access only to areas described in the warrant.
- Limit the seizure to property identified in the warrant and do not volunteer additional documents.
- You are entitled to a copy of the warrant.



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Responding to Search Warrants (cont'd)

- Counsel or the trained company designee should be present during the inventory of the property seized. Ideally, at the time of the search, ask to make copies of the documents seized (on the basis that they are working company files needed for operation).
- At a minimum, the designee should request a copy of the inventory prepared before the agent leaves with the seized documents/property



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Responding to Search Warrants (cont'd)

- The designee should obtain the business cards (or ask for names and affiliations) of the agent(s) involved in the search and ask the name of the Assistant U.S. Attorney in charge of the investigation



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Responding to Search Warrants (cont'd)

Advise Your Employees of Their Rights

- Employees should understand that they are under no obligation to answer substantive questions or consent to an interview. If they consent to be interviewed, they must tell the truth. Refer any questions or issues to your in-house or outside counsel.



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Responding to Search Warrants (cont'd)

- Attorney Client Privileged documents are not subject to seizure and should be segregated
- Classified documents are not exempt from search and seizure, but advise the agent that the documents are classified and immediately notify the relevant agency of any classified documents that were seized



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Responding to Search Warrants (cont'd)

- Advise employees not to destroy or alter any documents
- After the search, promptly issue a document retention memorandum to all employees at the site that no documents should be destroyed or altered
- Counsel should debrief all employees that were present at the search
- Immediately identify employees that may be knowledgeable about the subject of the investigation



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Documentation Preservation, Retention and Collection Strategies

- Designate a custodian of records (same person for all grand jury subpoenas so familiar with the process)
 - This person will be responsible for logging all collected documents, collecting certifications, and will be the liaison with counsel.
 - Ideally, custodian not involved in the subject of the investigation (sometimes it is an in-house paralegal)



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Documentation Preservation, Retention and Collection Strategies (cont'd)

- Issue a Document Preservation and Collection Memorandum. The memo should:
 - Be sent to all employees that may have relevant documents (be overinclusive in your universe of employees)
 - Describe the category of documents at issue (should use identical language to the subpoena so no argument of obstruction)



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Documentation Preservation, Retention and Collection Strategies (cont'd)

- Explain that described documents (including e-mails and electronic files) should not be deleted or destroyed.
- Remind employees to search their electronic files, off-site documents, documents at home, archive email (if subject to the subpoena date), shared drives.
- Include a certificate of compliance that requires the employee to certify that he read the notice, understood it and made diligent efforts to locate documents within his control
- No documents should be produced until reviewed by counsel



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Conducting Internal Investigations

- Treat the subpoena as if you are a target even if you don't believe you are or are told that you are not (i.e, conduct a thorough internal investigation).
- The company should retain outside counsel so that the investigation is privileged and confidential.
- Counsel will review the documents and interview employees. Employees must be informed that counsel represents the company and not the employee as an individual. Explain the privilege and let the employee know the conversation is confidential.
- Consider whether the Company should provide independent counsel for employees being interviewed.



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Voluntary Disclosure of Wrongdoing and Cooperation

- Voluntary disclosure of wrongdoing is the strongest indication of corporate integrity and often results in leniency from the government with respect to criminal proceedings as well as suspension and debarment (voluntary disclosure demonstrates present responsibility). Cooperation is the number one factor prosecutors consider when deciding whether or not to charge a company
- Risk: No free pass for voluntary disclosure (likely hefty fines, possible prosecution, may lead to action by states)



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Avoiding Indictment

- In addition to cooperation, a robust compliance program is critical to avoid indictment.
- A compliance program demonstrates a company's commitment to business ethics and integrity and is a factor listed in the McNulty memorandum, the DOJ guidance prosecutors must use when deciding whether or not to charge a company.



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Avoiding Suspension and Debarment

- Standard: Present Responsibility
 - The contractor has the burden of demonstrating its present responsibility and that suspension/debarment is not necessary
 - The FAR expressly provides that debarment is “not for purposes of punishment” and shall only be imposed if it is in the public interest



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Avoiding Suspension and Debarment (cont'd)

- The mitigating factors are listed in FAR 9.406-1(a)(1)-(10) and closely mirror the McNulty memorandum factors considered when deciding whether to criminally charge a corporation. The factors include:
 - Internal Controls
 - Whether the contractor had effective standards of conduct and internal control systems in place at the time of the activity which constitutes cause for debarment or had adopted such procedures prior to any government investigation



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Avoiding Suspension and Debarment (cont'd)

- Voluntary Disclosure
 - Whether the contractor brought the activity ... to the attention of the appropriate government agency in a timely manner
- Internal Investigation
 - Whether the contractor has fully investigated the circumstances surrounding the cause for debarment and ... made the result of the investigation available to the debarring official



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Avoiding Suspension and Debarment (cont'd)

- Cooperation
 - Whether the contractor cooperated fully with Government agencies during the investigation
- Payment of Penalties
 - Whether the contractor has paid or ...agreed to pay all criminal, civil and administrative liability for the improper activity
- Disciplinary Action
 - Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity
- Remediation
 - Whether the contractor has implemented or agreed to implement remedial measures



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Avoiding Suspension and Debarment (cont'd)

- Revised Controls
 - Whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs
- Time
 - Whether the contractor has had adequate time to eliminate the circumstances within the contractor's organization that led to the cause for the debarment
- Acknowledgement by Senior Management
 - Whether the contractor's management recognizes and understands the seriousness of the misconduct giving rise to the cause for debarment

