

A Primer on Government and Internal Investigations

by

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Table of Contents

Introduction	2
Government Investigations	3
Internal Investigations	6
Conclusion	10
Appendix: Checklist for Government Contact	11
About the Authors	15



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Introduction

“White-collar” criminal investigations and indictments are on the rise. White-collar crime often involves allegations reaching across numerous disciplines, including, among other things, securities violations, such as Foreign Corrupt Practice Act (FCPA), insider trading and financial fraud; mail or wire fraud; and other violations of regulatory statutes. Allegations of a false statement made to a government agent or entity or illegal exportation of tanks and anti-tank weapons are examples of recently prosecuted white-collar cases, as are other crimes like campaign finance fraud and bribing foreign officials. Additionally, severe fines and incarceration are now common in sentences for white-collar offenses.

Although all criminal activity has a certain complexity to it, white-collar crimes tend to be more document intensive and involve difficult proof patterns. The factual complexity of white-collar matters tests counsels’ ability to clearly present the case to the judge, jury or government agency that would determine if a violation occurred. Retaining competent counsel is a critical first step to avoiding crushing publicity, insolvency and/or incarceration for white-collar offenses.



Government Investigations

What Has Happened?

When faced with the prospect of a government investigation or prosecution, the first inquiry is to determine the underlying facts and the status of the individual or entity within the investigation or prosecution. The defense lawyer must initially inquire if the individual or entity is the subject or target of the investigation, or rather, is a mere witness. Such an initial inquiry will dictate the timing and method of an appropriate response.

Similarly, if the government has served a subpoena upon a company – often the first indication that there is a problem – the government may be in an early stage of an investigation to determine if a crime or a civil violation has, in fact, been committed. For example, the SEC may serve a subpoena on a company seeking documents relating to an insider trading investigation. Such information will undoubtedly be shared with the criminal authorities as well if provided to the SEC. The government may also serve a grand jury subpoena to obtain the information. In either case, the person or company should determine if the scope of the subpoena is overbroad, and at the very least, seek additional information about the basis of the investigation from the prosecutor. One should consider a motion to quash the subpoena, but it is maybe more productive to negotiate with the government attorneys to narrow the scope and types of documents sought. In any event, any subpoena received should immediately be turned over to the company's inside and/or outside counsel, to assess a potential response and ensure the subpoena is properly addressed.

Another relevant initial assessment is if the person or entity is responding to a federal or state inquiry. Often white-collar crimes are prosecuted by the United States Attorney's Office or the United States Department of Justice. However, many state and local district or state attorney's offices will pursue economic crimes or other white-collar crimes such as political corruption. There are different considerations if it is a state or federal investigation or prosecution, with factors including, among others, publicity and the resources the government may commit to pursuing its investigation or prosecution.

Additionally, some white-collar investigations or prosecutions begin with civil claims brought by the SEC and other federal civil regulatory agencies. These agencies, generally, work in conjunction with the United States Attorney's Offices to prosecute a parallel crime if the government believes that a crime has been committed. Knowing if a parallel government investigation exists will provide context and inform strategy.



Subject, Target or Witness?

Targets of investigation are often indicted. An indictment charges the entity or individual with specific criminal activity. However, status as a subject of an investigation usually indicates that the government is interested in discovering additional information about the company or individual, but has not yet determined if it will seek an indictment. Witness status, generally, indicates that the company or individual is not going to be prosecuted, but the government intends to obtain information from the company or individual.

An initial classification of the company or individual as a target, subject or witness will likely shape the response to the government. However, an initial characterization may change. For example, if the government seeks evidence to present to the grand jury to obtain an indictment and testifying or producing information may cause potential liability, the client may have to consider such ramifications of their position before responding.

Arrests and Search Warrants

Arrests are made by both federal and state authorities. Each jurisdiction follows certain procedures. Arrests usually occur after an indictment or criminal complaint. There are numerous issues associated with evidence seized during the arrest or confessions made after the arrest. Similarly, arrests made pursuant to a warrant that is later ruled defective may also raise concerns, as do warrantless arrests.

In fact, when a government agent seeks an arrest warrant, the officer must present evidence to a neutral judge or magistrate sufficient to establish probable cause that a crime has been committed. This determination will be made if facts exist within an officer's knowledge providing a reasonably trustworthy basis for a person of reasonable caution to believe that an offense has been committed or is about to be committed. Courts should deny requests when the warrant fails to describe in particularized detail the person to be arrested, but evidence used in a warrant need not be, ultimately, admissible at trial. Evidence supporting a warrant may not be knowingly or intentionally false or made in reckless disregard of the truth.

A search warrant is a court order issued by a magistrate, judge or other official authorized to do so. Typically, a search warrant authorizes law enforcement officers to conduct a search of a person or location for evidence of a crime and to confiscate evidence if it is found. Most searches by the police require a search warrant based on probable cause, although there are exceptions: most notably, an emergency or the free and voluntary consent of a person who has apparent use of or control over the property, among others. Searches and warrants must be reasonable and specific, including as to the specified object to be searched for and the place to be searched. However, other items, such as



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rooms, outbuildings, persons and vehicles, among other places, may require additional search warrants.

To obtain a search warrant, a government agent must first prove before a magistrate or judge that probable cause exists, based upon direct information (that is, information obtained by the officer's personal observation) or hearsay information. Hearsay information may be obtained by oral testimony given over a telephone or through an anonymous or confidential informant so long as probable cause exists based on the totality of the circumstances.

Both property and persons may be seized pursuant to a search warrant. The standard for a search warrant is, however, lower than the proof required for a later conviction because the evidence collected without a search warrant may not be sufficient to convict, but may be sufficient to suggest that enough evidence to convict may be found using the warrant.

When a government agent arrives with a search warrant, there is a problem. Call counsel immediately to minimize disruption or intrusion to you and your business. Counsel may not stop the search, but may work to minimize disruption and ensure that law enforcement agents respect a client's rights.



Internal Investigations

A corporate internal investigation is a systematic attempt by the business to determine if the business has violated internal policies or legal requirements.

With prosecutions and enforcement actions against business entities at all-time highs and expanding whistle-blower incentives feeding more actions against companies, the need for effective internal investigations has never been greater. Conducting an internal investigation demonstrates a company's appreciation for compliance issues and mitigates exposure to regulatory and law enforcement action. In some circumstances, legal or fiduciary duties require companies to undertake internal investigations.

An effective internal investigation identifies the conduct at issue and the involved participants, quickly stops any offending activity, memorializes the company's response to the issue, and provides sufficient information for the company to determine the scope of any problems and if disclosure to law enforcement or regulatory officials may be beneficial.

Following is an outline of common issues encountered once the need for an internal investigation arises and best practices for addressing such issues.

Who Conducts the Investigation?

Internal investigations are not always undertaken by outside counsel. Corporate audit groups, the board of directors, the general counsel or his or her designee, or non-attorney outside vendors may all undertake internal investigations. In-house counsel are, generally, more familiar with the operation of the business, but outside counsel may be more objective and have greater experience with investigations. Outside counsel may provide a more independent view while in-house counsel may be more deeply involved in the business side, assuming outside counsel had not been previously asked to review the issues giving rise to the investigation.

Investigations and investigation reports conducted by non-attorneys are less likely to enjoy attorney-client privilege or work product protection, unless undertaken at the behest of counsel for prospective or current legal actions. Since in-house counsel, generally, have business obligations in addition to legal duties, investigations undertaken by in-house are more vulnerable to a privilege challenge.



Who Is the Client?

When outside counsel conducts an internal investigation, the business should consider the corporate group that engages counsel. To preserve the integrity of the investigation, an audit committee or some other board sub-committee should engage counsel if the investigation's scope will include senior management.

The engagement letter should identify the purpose of the engagement as not merely to investigate facts, but also to render legal advice. To maintain work-product protection of the ultimate work product, the engagement letter should also indicate if the investigation is undertaken in contemplation of litigation or government action.

Work Plan and Initial Assessments

With counsel engaged, the initial tasks are to gain a preliminary understanding of the scope of the issue, plan the scope of the investigation, and confirm that any ongoing illegal activity is ceased. The work plan should be sufficiently comprehensive to fully capture the pertinent facts and evidence but flexible enough to change as facts are discovered.

Counsel should also, initially, assess potential "whistle-blower" issues and plan accordingly for the interview phase of the investigation.

Interviewing Witnesses, Gathering Documents and Preserving Information

Identifying the witnesses with knowledge of the events at issue and preserving the subject documents are critically important aspects of the internal investigation.

At the outset of the investigation, counsel should consult with the company's information technology department to understand the company's document retention policies and suspend any programs that allow for the deletion of e-mail and other potential evidence from company servers or paper records. Counsel should also issue an evidence preservation memorandum to appropriate persons in the company, directing them to retain and not delete or destroy documents and electronically stored information pertaining to the investigation subjects. This is particularly important if the internal investigation was prompted by a government inquiry or other anticipated litigation because the failure to preserve such evidence may adversely effect the company's ability to defend itself and subject it to penalties if violated.

Gathering documents will also identify further witnesses. Organization charts and explanations of the roles of particular employees will assist counsel in identifying witnesses to interview as well. In cases involving large numbers of potential witnesses, engaging a vendor to perform a server-based e-mail review to help identify the more significant witnesses may be worthwhile.



Additionally, when meeting with witnesses, counsel must provide the “Upjohn” warnings, making clear that counsel represents the company and not the individual witness. Consistent with this fact, witnesses should be informed that any privilege that covers the interview belongs to the company and that the company may choose to waive that privilege in the future. Witnesses should also be informed of their opportunity to consult with personal counsel if they wish, and of their duty to cooperate with the investigation and provide documents as part of their employment responsibilities. Counsel may wish to have witnesses sign written acknowledgments of these points.

To effectively interview a witness, counsel should have reviewed at least some of the pertinent documents. Counsel should also have another person present during interviews to take notes and potentially serve as a witness to the interview should the company employee later recant his or her statement. When conducting the interview, counsel must decide if he or she intends to memorialize the interview in a written statement, memorandum, or recording of the conversation. The benefits of locking in a witness statement must be measured against the risk of future discovery of statements by the government, plaintiffs’ lawyers, or others.

Reporting Results

Once an investigation is completed, the parties must decide if they will report results in writing or orally, and to whom the results would be disclosed. Although it is difficult to convey the results of a complex investigation without a written report, there is always a risk that a written report may fall into the hands of plaintiffs’ attorneys, the government, or other unintended recipients.

Further, there may be friction between the company’s desire to maintain the secrecy of its internal investigation and the company auditor’s need for information to provide an unqualified audit report. Sharing the results of an internal investigation to the company’s outside auditor risks waiver of an otherwise applicable privilege.

To Disclose or Not to Disclose?

Once an internal investigation is completed, the company must decide if it should disclose its results to regulators or law enforcement. Absent a mandatory disclosure obligation, the decision to disclose is informed by many factors, including the severity of the findings, the company’s success in redressing the subject conduct, the availability of a voluntary disclosure program through an appropriate government agency, the likelihood that the issues will come to light through other channels (such as whistle-blowers), the likelihood of shareholder lawsuits, and the extent that disclosure is necessary to avoid an adverse government action.

Federal prosecutors consider a company’s cooperation as among the factors weighing against the prosecution of the entity. Federal prosecutors may not demand waiver of the attorney-client or work privileges, disclosure of the company’s internal investigation or withhold “cooperation” status merely



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because the company elects not to waive a privilege by disclosing such a report. Nonetheless, enforcement agencies, such as the SEC, as well as state prosecutors, may not be subject to the same restrictions as the Department of Justice. However, in dealing with any prosecutor or other enforcement entity, the company must consider if it can meaningfully cooperate without sharing the internal investigation report.



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Conclusion

Potential white-collar and other criminal and regulatory violations risk economic disaster for companies and criminal liability for their key personnel. Early identification and rectification of such matters may minimize their risks.

At Fox Rothschild, we address these issues with our clients to minimize disruption to their lives and businesses, and assist them through these most difficult times.



Checklist for Government Contact

When a party is contacted by the United States Securities and Exchange Commission, the Commodities and Futures Trading Commission, Medicare/Medicaid agencies such as the Center for Medicare and Medicaid Services (formerly known as the Health Care Financing Administration) and the Office of Inspector General of the United States Department of Health and Human Services, the Federal Bureau of Investigation, the Department of Justice, the United States Attorney's Office, the State Attorney General's Office, the Equal Employment Opportunity Commission, the Occupational Safety and Health Administration, or state agencies on securities, banking, health, senior services, public welfare, and insurance, it should immediately notify counsel. Employees of the company should not respond to any requests for information that are outside of the ordinary scope of routine reports regularly made to governmental authorities. If you are served with a subpoena, summons, complaint, search warrant or other legal document, call counsel immediately.

Subpoenas

If a law enforcement agent, investigator or other governmental authority appears in person — whether in the office, at home or elsewhere — and seeks information from you involving the company or requests information through a subpoena, you should be advised of the following rights:

- You have the right and the responsibility to request credentials of the agent or investigator for identification purposes;
- You have the right to speak or decline to speak, as all such conversation is voluntary;
- You have the right to consult with an attorney before deciding to be interviewed; and
- If you agree to be interviewed, you can insist that an attorney or other person (including a representative of the company) be present, you can choose the time and place of the interview, and you can terminate the interview at any time.

DO NOT turn over documents called for in a subpoena until instructed by the company's legal counsel.



Search Warrants

If a law enforcement agent, investigator or other governmental authority arrives to execute a search warrant on the company's property, the following steps should be taken:

- DO NOT interfere with the agents in their search;
- Demand a copy of the search warrant and the business card (or name) of the agent in charge, including the office or agency that he/she represents;
- Be sure the highest ranking employee of the company on the premises is informed of the situation; and
- Call the president and/or compliance officer.

Next, the president and/or compliance officer (or if neither is available, the highest ranking employee of the company on the premises) should take the following steps:

- Review the search warrant or other legal authority under which the agents assert the right to search the company's premises or seize company documents, equipment or records, noting the specific areas of the premises and items designated for the search and seizure;
- Ask for the name and telephone number of the supervising governmental attorney;
- Inquire into what the agents are seeking, and attempt to ascertain the nature of the inquiry and the alleged violations that are the basis for the investigation (treating the agents courteously throughout the entire visit);
- Ensure that only those items referred to in the search warrant are taken (voicing objection if the agents stray outside the physical space identified in the warrant or attempt to seize items that are not referred to in the warrant);
- Urge the other employees to remain calm, and to the extent possible, ensure that the presence of the agents does not unduly interfere with the ability of company staff to carry on their essential job functions, assessing the advisability of sending nonessential employees home;
- Advise the other employees not to make small talk with the agents, and ensure that company staff understand their obligation not to obstruct the investigation (although they are not required to explain the company's operations, bookkeeping, records or what any document means), as well as their right to refuse to be interviewed by the agents or to be interviewed only in the presence of legal counsel or other persons (including company representatives) or at another time and place, if they so choose;



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- Accompany the agents while they remain on company property, making notes of areas searched and the general description of items seized;
- As applicable, identify for the agents any documents sought that fall under the attorney-client, attorney work product or self-evaluation privileges;
- As applicable, attempt to convince the agents to take only computer files, not the entire computer hardware;
- At the close of the search, obtain an inventory and receipt of any items seized by the agents (and compare the list of seized documents and items on the government's receipt with the list created internally during the course of the search); and
- Request the opportunity to make copies of all documents to be taken off the premises by the agents, especially those essential to the company's ongoing operations.

Informal Contacts with Government Agents/Investigators

All contacts with anyone claiming to represent any local, state or federal agency shall be immediately reported to counsel. In complying with this policy, keep the following in mind:

- It is not uncommon for investigators to arrive unannounced at somebody's home and then try to make the person feel guilty if he or she does not consent to an interview. Occasionally, the investigator will try to suggest that you must speak with him or her "or else." Nobody is required to submit to questioning by a government agent or investigator. Beware of any agent who says that you have nothing to worry about or who suggests that by talking to him or her, things will be better for you. Agents and investigators do not have the authority to promise anything to a witness. Only a government attorney, working with your attorney, can make promises binding on the government.
- If someone claiming to represent the government contacts you at work or at your home, you should follow these steps:
 - > Ask for identification and a business card;
 - > Determine why the individual wants to speak with you; and
 - > If you prefer, tell the individual that you do not wish to speak with him or her, or that you want to make an appointment for a date and time in the future. Do not be intimidated by a claim that there should be no delay because "honest people have nothing to hide."

After the investigator or agent leaves, contact the president, the compliance officer or the company's legal counsel.



Contacts with Non-Company Employees

Unless it is part of a person's written job description to have contact with the following categories of individuals, all of the company's personnel are governed by the following rules:

- **Contact with the Media**

All contacts with the media **MUST** be referred to the president or counsel. You should politely, but firmly, decline to engage in any discussion with media representatives, no matter how seemingly harmless.

Reporters are skilled at extracting information, often pretending to know more than they really do or claiming to have already talked to someone inside the organization. Do not confirm, deny or otherwise discuss information related to the company with anyone from the media unless directed to do so by counsel.

- **Contact with Attorneys**

All contacts with anyone claiming to be an attorney should be immediately referred to counsel. Like all companies, the company may become involved in legal disputes and litigation. Attorneys representing those with interests contrary to the company may try to contact company personnel directly in an effort to obtain information. You should politely, but firmly, refuse to discuss anything with the attorney. Instead, refer the attorney to counsel.

The company also realizes that it may receive requests and subpoenas for certain customary documents from attorneys for use in connection with litigation, claims and disputes that do not involve the company as a party. The company's personnel should feel free to respond to such routine document requests, but to maintain control over contacts with attorneys, the request must be reported as required above.



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Ernest, a former SEC enforcement attorney, currently represents corporations, limited liability companies, partnerships and financial institutions, such as broker-dealers, investment advisers, private equity and hedge funds, banks and insurance companies, officers, directors, executives, and registered persons, among others, in white-collar internal investigations and criminal litigation.

Ernest's leadership roles within the firm include co-chair of the White Collar Compliance & Defense Practice and co-chair of the Securities Industry Practice.



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Patrick is has more than 20 years of experience representing businesses, executives, professionals and other individuals in federal white-collar criminal defense matters and parallel civil actions. His areas of concentration include health care, securities, tax and accounting oversight, public corruption, Foreign Corrupt Practice Act, Export Act and customs.

Patrick's experience includes defending a generic drug manufacturer in an SEC investigation; a principal of a major accounting firm in a PCAOB investigation; the CFO of a publicly traded company in an options back-dating and earnings management investigation; an Internet pharmacy in a federal Grand Jury investigation; a surgical instrument manufacturing executive in an FDA and Customs fraud indictment; a securities broker in a fraud indictment; a metals company director in a Customs fraud and Bank Secrecy Act indictment; a refrigerant company executive in an excise tax evasion indictment; a chemical manufacturing corporation in a Country of Origin Marking violation Grand Jury investigation; an exporter in an Office of Foreign Assets Control violation Grand Jury investigation; a securities broker in a re-insurance fraud indictment; and the Financial Secretary of the Philadelphia Fraternal Order of Police in a racketeering indictment



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Eric represents businesses and individuals in a wide range of business-related disputes as well as administrative and criminal compliance matters. In recent matters, Eric won a defense award for an investment adviser and broker-dealer in a securities arbitration, defended an individual investor in a Bernard Madoff “feeder fund” against clawback claims bought by the Madoff trustee, represented a former executive of a failed bank against mismanagement claims asserted by the Federal Deposit Insurance Corporation, represented a defendant in the appeal of her criminal sentence for public corruption offenses, and defended a national bank against alleged violations of the Fair Debt Collection Practices Act and Fair Credit Reporting Act.



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