

# Preparing For and Responding to Government Investigations

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## Substantive Areas of Government Inquiry

- Areas Where the Gov't Routinely Conducts Investigations:
  - Securities Fraud
  - Mail/Wire Frauds
  - Health Care Fraud
  - Food, Drug & Cosmetics Act
  - Money Laundering
  - Tax
  - Foreign Corrupt Practices Act ("FCPA")
  - Antitrust & Unfair Trade Practices
  - Environmental



## How Government Investigations Are Commenced

- Grand Jury Subpoena
- Administrative Subpoena from Government Agency or DOJ
- Whistleblower Complaint (usually leads to Grand Jury Subpoena or Administrative Subpoena)
- Search Warrant (the Government's Nuclear Option)



- Possible Responses to Gov't Investigations. . .



# Possible Responses to Investigations





## Possible Responses to Investigations





## The Interplay between Government Civil and Criminal Investigations

- DOJ Often Injects Itself As a Direct Result of Government Civil Subpoena (e.g., Office of Inspector General) and Civil Investigation





## Government Agencies Involved in Criminal Investigations

- In a Federal Investigation, the DOJ may be at the Dance
  - DOJ may partner with civil enforcement agencies, such as SEC, IRS, FDA, EPA, OFAC, & HHS
- State Attorney General's Office or County Prosecutor's Office Working with State Regulators





# The Grand Jury Subpoena

AO 110 (Rev. 06/06) Subpoena to Testify Before a Grand Jury

## UNITED STATES DISTRICT COURT

for the

Western District of Washington

### SUBPOENA TO TESTIFY BEFORE A GRAND JURY

To:

**YOU ARE COMMANDED** to appear in this United States district court at the time, date, and place shown below to testify before the court's grand jury. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place: United States Courthouse 700 Stewart Street Third Floor, Room 3210 Seattle, Washington 98101	Date and Time:
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You must also bring with you the following documents, electronically stored information, or objects (blank if not applicable):

REVIEW ATTACHMENT FOR DETAILED REQUEST.

PLEASE REFERENCE SUBPOENA NUMBER (SN) AND USAO NUMBER  
IN ALL FUTURE CORRESPONDENCE

Date: \_\_\_\_\_

CLERK OF COURT

Issued in blank

William M. McCool

Signature of Clerk or Deputy Clerk

The name, address, e-mail, and telephone number of the United States attorney, or assistant United States attorney, who requests this subpoena, are:

U.S. Attorney's Office  
700 Stewart Street, Suite 5220  
Seattle, WA 98101-1271  
Phone: 206-553-7970  
Fax: 206-553-2502

GJ  
USAO #  
SN



## Grand Jury Subpoena 101

- Who Issues: AUSA in Name of Grand Jury
- Types: Subpoenas Duces Tecum & Testimonial
- Evidence Needed to Issue: Not Much
- At Minimum: (1) You ***Must*** Preserve all Records → The Company Should Immediately Issue a Broad Document Preservation Order, and (2) Do Not ***Alter, Modify, or Delete*** Documents/Data → Will Lead to Obstruction Charge
- All non-privileged responsive documents must be produced. This includes responsive documents kept in employees' "personal files" at home or in employee's office space.



## Grand Jury Subpoena 101

- Establish a Protocol
- Grand Jury subpoenas are relatively common, and are often served on companies that have no liability but have information deemed relevant by the government for an investigation.
- Companies should establish a protocol specifying a coordinating person to whom all subpoenas should be sent immediately upon receipt. This should avoid a situation where the subpoena does not make its way to responsible in-house or outside counsel until the eve of the return date.



## Grand Jury Subpoena 201: Responses

- Call AUSA – Establish Dialogue and Trust
  - Negotiate Scope of Subpoena
  - Negotiate and Extension if Needed
  - Don't Ignore Subpoena—File Motion to Quash if Necessary
- Consider Notifying Board of Directors
  - May Have Reporting Obligations
  - Examples: Possible SEC Reporting; Government contractor must report if it becomes aware of kickbacks to upper and lower tier subcontractors.
- Consider Whistleblower Possibility (False Claims Act, Sarbanes-Oxley, Dodd-Frank)
  - Employees who know about subpoena should be strongly admonished that they should avoid discussions about the investigation or the subpoena. (No “group discussions” regarding the possible problem)
  - Discussions regarding the facts should occur with attorney present to protect the attorney-client privilege.



## Grand Jury Subpoena 401 – Internal Investigation

- Upon receipt of grand jury subpoena or civil investigative demand, Company should strongly consider initiating an internal investigation.
  - This enables Company and counsel to “get ahead” of the Government.
  - Such investigation will inform decision as to how to deal with Government.
  - Risk that if Government goes forward with criminal case, it might at some point demand the Internal Investigation Report. Law and policy on this is unsettled.



## Grand Jury Subpoena 501

- What if Government Attempts to Interview Current or Former Employees?
  - Company may not direct current or former employees either to assert the Fifth Amendment or to refuse to speak to Government investigators; witness tampering and obstruction problem.
  - Company may advise current or former employees:
    - They can speak to investigators if they wish, but they are under no obligation to do so.
    - Company requests that company counsel be present at any law enforcement interview.
    - Employee has right to confer with counsel before deciding whether or not to be interviewed.
    - Consider whether Company should offer to refer employees to qualified counsel and offer to indemnify/advance fees to employees.
    - No matter what, employees should be told to always be truthful if they speak to Government investigators.



# The Search Warrant

§ 90.10 AO 93 (Rev. 12/03) Search Warrant

## UNITED STATES DISTRICT COURT

District of \_\_\_\_\_

In the Matter of the Search of

(Name, address or brief description of person or property to be searched)

### SEARCH WARRANT

Case Number: \_\_\_\_\_

TO: \_\_\_\_\_ and any Authorized Officer of the United States

Affidavit(s) having been made before me by \_\_\_\_\_ who has reason to believe

Affiant

that  on the person of, or  on the premises known as (name, description and/or location)

in the \_\_\_\_\_ District of \_\_\_\_\_ there is now  
concealed a certain person or property, namely (describe the person or property)

I am satisfied that the affidavit(s) and any record testimony establish probable cause to believe that the person or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

YOU ARE HEREBY COMMANDED to search on or before \_\_\_\_\_

Date

(not to exceed 10 days) the person or place named above for the person or property specified, serving this warrant and making the search  in the daytime — 6:00 AM to 10:00 P.M.  at anytime in the day or night as I find reasonable cause has been established and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to \_\_\_\_\_

as required by law.

\_\_\_\_\_  
U.S. Magistrate Judge (Rule 41(f)(4))

\_\_\_\_\_  
Date and Time Issued

at

\_\_\_\_\_  
City and State

\_\_\_\_\_  
Name and Title of Judge

\_\_\_\_\_  
Signature of Judge



## Search Warrant 101

- Who Issues: Federal Judge, Based on Government Agent's Affidavit of Probable Cause That a Crime Has Been Committed
- What to Expect → Overwhelming Force
  - No Notice
  - Multiple Armed Agents Wearing Clothes Identifying Themselves as Federal Agents
  - Demands for Immediate Entry and Access
  - Possible Request that All Employees Leave Premises; Alternatively, Requests to Interview Designated Employees
  - Possible Arrest of Employees Viewed as Targets
  - Possible Live Media Coverage





## Search Warrant 201

- What to Tell a Client Calling to Report a Warrant is Being Executed on Its Premises:
  1. Allow the Agents Access → Any Attempt to Deny Access May Result in Arrest
  2. Notify Outside Corporate Criminal Counsel
  3. Notify All Employees of the Presence of Federal Agents and Specifically Inform All Employees Not to Interfere with the Agents in Any Manner
  4. Ask for a Copy of Warrant
  5. Designate a Senior Level, Non-Operations Manager as the Point of Contact with the Agents. Ideal Candidates include In-House Counsel or Human Resources Manager
  6. Review warrant with outside counsel ASAP. Do not consent to agents taking materials outside the scope of the warrant.



## Search Warrant 201 – Continued

- What to Tell a Client Calling to Report a Warrant is Being Executed on Its Premises:
  7. If Warrant Seeks Electronic Data, Notify IT Dept. and Designate IT Employee to Work with Agents to Insure Imaging Accomplished Without Corrupting/Damaging Data
    - Identify Any Obviously Privileged Material and Notify Agent of Fact and Object to Seizure or Review; Notify Counsel
  8. If Agents Seek to Interview Employees, Attempt to Arrange for Outside Independent Counsel to Travel to Facility and Be Available to Assist Employees Desiring Representation During Interview
  9. Company may tell employees that decision to be interviewed is entirely up to them; consider issuing memo setting forth points outlined under Grand Jury Subpoena Response
  10. If Agents Intend to Take Samples, Request Agents to Take “Split Samples” or Allow Company Employees to Do So



## Search Warrant 201 - Continued

- What to Tell a Client Calling to Report a Warrant is Being Executed on Its Premises:
  11. Consider Shutting Down Operations for Remainder of the Day or at Least Retain Only Skeleton Crew
  12. Notify Company Public Relations Representative and Brief Them on Warrant



# Search Warrant 301

- What Should Counsel Do?
  1. Request Copy of Warrant Be Faxed or Emailed to Counsel for Consideration of A/C Privilege and Scope Issues
  2. Discuss with Client Issues Relating to Preserving Confidentiality of A/C Privilege and Related W/P Protection
  3. Request to Speak with Agent Re: Concerns Re: Preserving Confidential A/C Privilege and W/P Protection
    - Also Discuss Any Concerns Re: Scope of Execution vs. Warrant Language
  4. Contact AUSA and Notify of Concerns Re: Preserving Privilege or Scope Issues
  5. Discuss with AUSA Nature of Investigation and Status of Client → Witness, Target or Subject of Investigation?
  6. Post-Search: Immediately Send Letter to AUSA Requesting Return of A/C Privileged Material (If Refused, Escalate Issue to Court.) Also ask for access to documents if copies not made.



## Search Warrant 301

- What Should Counsel Do (cont'd)?
  7. Post-Search: Begin Preliminary Investigation to Begin Understanding Client's Possible Exposure
  8. Depending on Conclusions Reached as Result of Preliminary Investigation, Develop Protocol for and Execute Full Scale Internal Investigation Under Direction of Counsel



## Internal Investigation

- Strong incentive to conduct internal investigation
  - Possibly avoid disruption caused by regulatory investigation
  - Possible credit from regulatory agencies
- Risks: Information Discoverable by Class or Whistleblower Plaintiffs
  - Minimize privilege waiver by entering into confidentiality agreement with the Government
  - Are there other ways to minimize risk of privilege waiver?



# Internal Investigation Considerations

- Who Should Do Internal Investigation?
  - Regular Corporate Counsel? Independent Counsel?
- Who Should Direct the Investigation?
  - Management? Board? Board Committee? In-House Counsel?
- Employee Issues
  - Employees who refuse to cooperate or lie; retention of counsel for employees? Who should pay?