Dealing with the Complex Issues that Arise When Responding to SEC Subpoenas for Documents

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AGENDA

- SEC’s new approaches to enforcement
- SEC subpoenas and voluntary requests
- Critical first steps
- Preservation and collection of documents
- Reaching out to the SEC
- Ways to reduce costly volume of production
- Addressing privilege issues
- SEC Data Delivery Standards
- Freedom of Information Act (FOIA) protections
- Cover letter and production
- Other issues that arise
SEC’S NEW APPROACHES TO ENFORCEMENT

- New leadership including numerous former prosecutors
- SEC professing and demonstrating aggressive enforcement agenda
- Will now pursue “even the smallest infraction”
- Staff can now issue subpoenas more quickly and easily
  - Because Enforcement has delegated authority, SEC approval is no longer necessary
- Particular focus on investment advisers (hedge funds, private equity funds, mutual funds), financial statement and accounting fraud, insider trading, microcap fraud, and market structure violations
- Suggests increased number of subpoenas
SUBPOENAS AND OTHER REQUESTS

- **Subpoenas**
  - Impose legal obligation to comply
  - SEC may go to federal court to secure compliance
  - SEC need only show the subpoena is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant
  - Technically, sanctions for failure to respond may include a fine of up to $1,000 and/or imprisonment for up to a year
  - Party may go to federal court to challenge the subpoena
    - Challenges are rarely successful but extreme circumstances may provide a basis
    - Would require party to disclose publicly the investigation
SUBPOENAS AND OTHER REQUESTS

- Requests to regulated entities
  - Regulated entities such as registered investment advisers and broker dealers must provide certain information, if requested, even without a subpoena
  - Failure to provide mandated documents can result in fines, imprisonment, suspensions, bars, and other sanctions

- Voluntary requests for information
  - Consider treating them like subpoenas
  - SEC staff can quickly get authorization for a subpoena

- SEC forms 1662 and 1661 provide cautionary disclosures, including possibility of sharing documents with other authorities
FIRST STEPS

- Read the subpoena or request
  - To varying degrees, it will indicate what the SEC is investigating
    - Also, in case of a subpoena, consider requesting a copy of the SEC’s formal order of investigation under Rule 7(a) of the SEC’s Rules of Practice
  - Check date it was sent and deadline for response
  - Staff involved may indicate if it is a specialized unit case
  - Look at scope of the subpoena and start considering issues and challenges raised

- Deal with it quickly – Do not sit on it
- Designate a point person to oversee collection effort
- Handle it internally or engage outside counsel as appropriate to your resources and nature of inquiry
PRESERVATION AND COLLECTION OF DOCUMENTS

- Keep a record of all steps taken in the document preservation and collection process
- Talk to your IT staff or service provider about preserving documents on system/server
- Turn off automatic document deletion processes
- Depending of nature of the subpoena/inquiry, make copies of specific hard drives, etc.
- Send litigation hold to all persons that may have responsive documents
- Have persons with responsive documents provide them to point person
- Segregate documents by custodian and/or as kept in the ordinary course of business
PRESERVATION AND COLLECTION OF DOCUMENTS

- As appropriate, formulate and use a list of key word searches to locate responsive emails and other searchable documents
  - Make sure to save a list of key word searches used

- You will typically need to ask people multiple times for documents and then also need to check to make sure you have everything
  - If documents are missed, the Staff will not believe your production efforts were adequate, and it will change the tone of the investigation

- Consider whether documents beyond scope of the subpoena should be produced to ensure proper context is provided
REACHING OUT TO THE SEC

- Preferable to wait until you have started the collection process and have a sense of the volume of documents and other production issues and challenges
- Comforting to SEC Staff to know that firm/individual is complying and that there is a contact person
- Initial discussion gives important first impression
  - Preview helpful facts/documents if appropriate
- Negotiate narrowing of the scope of the subpoena as appropriate in light of challenges
  - Choose your battles carefully
REACHING OUT TO THE SEC

- If necessary, seek an extension that is reasonable under the circumstances and/or a rolling production
  - As a practical matter, SEC Staff has no recourse if one misses a deadline, but delay can affect view of cooperation
- Confirm any agreements or understandings with staff in writing before acting
- Inform staff of problems or delays as they arise
  - Serves to keep expectations realistic, and demonstrates good faith as you work through problems
WAYS TO REDUCE VOLUME OF PRODUCTION

- Steps to consider:
  - Remove exact duplicates of emails among custodians
  - Produce longest email in chain, but remove lesser included emails
  - Exclude spam or blast emails
  - Other reasonable steps may become apparent
    - For example, an overbroad subpoena for five months of email from a custodian may yield hundreds of thousands of emails when the SEC may be interested only in those few related to a specific topic

- Any narrowing of a subpoena should be cleared with the SEC Staff in advance and reflected in the cover letter and/or other correspondence
- All excluded documents should be preserved
PRIVILEGED DOCUMENTS

- Prepare a list of all inside and outside counsel with their email addresses
- Use the list, as well as key words as appropriate, to search for and segregate potentially privileged emails and other searchable documents
- Review potentially privileged documents to ensure privilege actually attaches
- Consider entering into clawback arrangement with the SEC to provide for return and non-waiver of privileged documents inadvertently produced
ATTORNEY-CLIENT PRIVILEGE

- **Elements:**
  - A communication
  - Made between privileged persons
  - In confidence
  - For the purpose of obtaining or providing legal assistance for the client
    - Restatement (Third) of the Law Governing Lawyers § 68

- **Waiver**
- **Common interest**
SEC DATA DELIVERY STANDARDS

- SEC requests documents to be produced to Enforcement’s Centralized Production Unit (ENF-CPU) in accordance with SEC Data Delivery Standards (i.e., seven single-spaced pages of technical requirements)
- Requests all data be produced in structured format prepared for Concordance®
- All scanned paper, email, and native file collections should be converted/processed to TIFF files, Bates numbered, and include fully searchable text
SEC DATA DELIVERY STANDARDS

- Text and metadata of emails and attachments and native file collections should be extracted and provided in .DAT file using fields and format set by SEC.
- Standards provide directions for production of audio files, video files, and email native files.
- Electronic trade and bank records and phone records should be provided in Excel spreadsheets or delimited text files.
FOIA PROTECTION

- Cover letter and each page of the documents to be produced should contain, at a minimum, “FOIA Confidential Treatment Requested by ABC, Inc.”
- Also include in cover letter language making clear request that the documents be treated as confidential and non-public under FOIA (5 U.S.C. § 552) and applicable regulations adopted by the SEC (including 17 C.F.R. § 200.83)
- Request notification and an opportunity to contest disclosure if the documents are the subject of a FOIA request
- Cite grounds for confidential treatment under FOIA (e.g., business confidentiality, containing sensitive information, disclosure of which would be detrimental to the firm)
- Copy SEC FOIA Officer
COVER LETTER AND PRODUCTION

- Read carefully the instructions in the subpoena and cover letter that accompanied it
- Follow the instructions as appropriate under the circumstances, e.g.:
  - Provide narrative description describing what was done to identify and collect documents responsive to the subpoena
  - State whether individual/entity has met its obligations under subpoena
- Consider providing descriptions or other discussion as appropriate to provide context for documents provided
- Describe any steps taken to narrow scope of subpoena
- Include FOIA protection language
- Encrypt production and provide password by separate email or letter
- Be prepared for follow-up questions and requests
OTHER THINGS SEC MAY INSIST ON

- Privilege log
- Business record certification (under Rule 902 of Federal Rules of Evidence)
- Certification of Completeness of Production
  - Sought from settling parties
OTHER ISSUES

 “Forthwith” subpoenas
  • Demanding immediate production of documents and/or electronic storage devices
  • SEC policy requires good-faith belief that responding party
    ▪ is uncooperative or obstructive
    ▪ a flight risk
    ▪ may destroy, alter or otherwise falsify records
  • There are often good arguments in favor of less aggressive means of production

 Production of privileged documents (such as internal investigation materials) pursuant to confidential agreement
  • Some courts have held that such productions waive privilege
OTHER ISSUES

- Fifth Amendment privilege
  - Does not apply to corporations or corporate records
  - The fact that the contents of documents may be incriminating does not provide a basis for assertion of Fifth Amendment privilege to refuse production
  - However, the act of producing documents itself may constitute an incriminating communication sufficient to trigger the privilege where it provides information about the existence, custody, or authenticity of the documents produced
OTHER ISSUES

▪ Disclosure of subpoena
  • In general, no requirement to disclose fact of SEC investigation or subpoena
  • However, it may trigger contractual disclosure obligations to clients or other third parties
    ▪ Do not mislead investors as to fact of subpoena or investigation

▪ Insurance coverage
  • Check D&O policy terms

▪ SEC jurisdiction over foreign entities

▪ SEC Enforcement Manual
  • http://www.sec.gov/divisions/enforce/enforcementmanual.pdf
QUESTIONS?

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