



What to Do When Your Company Is the Subject of a Government Investigation

By Sterling Miller



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There is little more disconcerting than being contacted by the government when it starts investigating your company. What happens, in large part, depends on what's being investigated and how you respond. You'll know the seriousness of the circumstances fairly quickly, depending on what tools the government uses for its initial contact with your company. Regardless of how it starts, there are many things common to any company's response to a government investigation.

There are several initial questions to ask when a government investigation into your company is launched:

Which agency is looking at your company?

The first thing to determine is which agency is asking for information. Once you know which agency is investigating, start to determine whether the issues are civil or criminal (or potentially both). For example, the Department of Transportation does not have criminal enforcement powers, but the Department of Justice does. Regardless, any civil investigation can morph into a [criminal investigation](#) under the right circumstances.

How were you contacted?

How you are contacted by the government means a lot. Here are three key ways the government will contact a company under (or part of an) investigation:

- **Civil Investigative Demand (CID)** – A civil subpoena from the government directed to the company. Nothing criminal is present. A CID can command documents, interrogatories, witness testimony, or any combination thereof. Failure to comply can subject the company to court sanctions. The government may serve a CID on any person or business in any jurisdiction in the United States and in any foreign country, provided such service complies with due process requirements.
- **Grand Jury Subpoena** – A criminal investigation is underway and, if your company is a target or subject, bad things are possible. Unlike a civil subpoena, failure to comply or adequately comply with a grand jury subpoena can mean a criminal charge of obstruction of justice. It also means the government is well underway with whatever case it is looking to bring.
- **Search Warrant** – The company is the target, law enforcement has convinced a judge of probable cause of a crime, and evidence of that crime resides on your company's premises. While in-house counsel should meet with the lead agent and ensure the search is limited to the areas listed in the search

warrant (get a copy), they must not interfere in any way with the execution of the warrant. You should get outside counsel on the phone immediately.

The type of government investigation in-house counsel will most likely deal with is a CID. This article will focus on what to do when responding to this type of request.

Engage outside counsel.

Unless you're experienced in dealing with a CID, you should consider calling outside counsel to help you with the response. Yes, this will add cost to your response, but here's the bottom line: Government investigations (civil or otherwise) are expensive. You'll find yourself frustrated and exasperated at times. Having experienced outside counsel to help you understand the process and serve as a buffer between you and the government is worth the cost. Additionally, the involvement of outside counsel can help cement claims of attorney-client privilege and can help reduce your personal exposure.

Call the government lawyer.

Do this within 24 hours of receiving the CID if possible. Typically, a CID has a very short response time, and you'll likely need to extend the deadline. It won't happen automatically, and only with the consent of the attorney in charge of the CID. Unless you're experienced in dealing with government investigations and with the type of CID received by the company, this is a task for outside counsel. One thing to do on the call is find out as much as you can about the investigation: What is it about? What triggered it? Why is your company involved? Are you a target? Regulators can be tight-lipped, but they typically will give you some helpful information.

Another goal of the call is to establish a good rapport with the government attorney, including your assurance the company will cooperate and comply in good faith and in a timely manner. It's in your company's interest (and yours personally) to deal with the government in good faith and maintain the highest personal and professional standards.

Can you narrow the scope of the request?

The next task is trying to narrow the scope of the request. A CID is typically broad in terms of the information sought and the time frame covered. Unless you have an agreement with the government attorney to narrow the scope or a court order, you're duty bound to comply with the CID as written. The government attorney usually welcomes a request to narrow the scope, as they only want documents useful to their inquiry. Consequently, truthfully informing them about how what they're asking for in the CID may or may not be relevant can be helpful to both sides. This requires you to be on top of what information you do or do not have. Promise to begin a rolling production of responsive documents you can easily gather and produce quickly.

Put a document hold in place and suspend record destruction.

Another thing to do quickly once you receive a CID is to put a document hold in place with the people who may have responsive documents. There's an art to this because you're guessing somewhat about the scope of the investigation and which employees it might involve. Still, you must make a good faith effort immediately to get a document hold in place with the most likely affected employees. After a call or two with the government attorney, you should be able to narrow the scope of the CID and agree on the custodians of interest. Then you can limit the document hold to just those people.

Additionally, you need to ensure any document destruction policy is suspended as to those identified individuals, as well as any automatic deletion of documents or email. Don't rely on sending an email and assuming everyone is complying. Require signed acknowledgements from each individual affirming:

- They have received the hold notice.
- They will not delete or destroy any relevant records (and they err on the side of over-inclusion).
- They understand bad things can happen to them and the company if they fail to comply.

Make sure you do not rely on employees to gather their documents for you. Also, contact the IT department and talk to the people in charge of suspending automatic deletions, ensuring they understand the importance of what is needed and the penalties the company can face. You also need them (and HR) to ensure if anyone under the document hold leaves

the company, they will secure their laptop and other company devices and turn them over to you. Finally, as you look for places where relevant information might be stored, don't forget home computers, phones, personal laptops, and – yes – paper, which many people still use.

Consider a parallel internal investigation.

Depending on the subject matter of the CID, and after discussing with outside counsel, you may wish to conduct your own internal investigation. There are several reasons to conduct such an investigation, including:

- Stopping any ongoing wrongdoing.
- Taking steps to prevent problems from reoccurring.
- Remediating potential fines by showing the government you're taking action yourself. (There's no guarantee, but it can't hurt.)
- Protecting executives and members of the board of directors from claims they have breached any fiduciary duties owed to the company.

Before you go down this path, decide whether in-house or outside counsel will conduct the investigation. If you already have outside counsel involved, it's better to let them handle the internal investigation. If not, consider engaging them for such an investigation. First, it will secure the appearance of a neutral third party conducting the investigation. Second, using outside counsel helps protect the attorney-client privilege, as courts often heavily scrutinize privilege claims by in-house counsel. Third, it takes in-house counsel out of the line of fire if serious problems are uncovered, where in-house counsel can – in some cases – be pressured internally to look the other way.

Employee interviews.

It's very possible investigators may wish to interview company employees. Likewise, any internal investigation will require employee interviews as well. Depending on the agency issuing the CID and the possibility of material exposure for the company, here are some things to keep in mind about interviewing employees:

- For internal investigations, give the [*Upjohn* warning](#) before starting each interview. The *Upjohn* warning makes it clear counsel represents the company and not the individual being interviewed, giving the individual the ability to obtain their own counsel before proceeding if circumstances warrant. Best

practice is to have the warning written out and read to the employee at the beginning of the interview. Underscore the importance of telling everything, including the bad stuff. It's better to know whether there are problems now rather than letting the government surprise you down the road.

- For employee interviews with government investigators where the company is not putting these individuals forward as company witnesses, emphasize with employees:
 - i. They can refuse to be interviewed or go forward with the interview – it's their choice.
 - ii. They have the right to have counsel present during any government interview.
 - iii. The importance of telling the truth. Lying will almost inevitably backfire on them and on the company.
 - iv. The company will pay for counsel to represent them, if this decision has been made by in-house and outside counsel. You may qualify the willingness to do so as long as interests are aligned. If interests are not aligned, they may need to obtain and pay for their own counsel.

Figure out your response plan.

As you begin the CID response process, take some time to sketch out your response plan. Your plan will include:

- Carefully reading the CID and understanding what the government is looking for.
- How will you staff the investigation? Do you need any outside experts?
- How you will keep and preserve the [attorney-client](#) and work product privileges, including how you ensure no privileged documents are accidentally turned over to the government.
- The process to identify hot documents and ensure those get to you and outside counsel promptly.
- Updating your document hold process and ensuring IT is not forgetting about any processes put in place to suspend document destruction.

- If witnesses are required, how will you identify them and prepare them?
- Steps to remediate any wrongdoing you uncover.
- How you will keep the C-Suite and board updated on the investigation's progress, especially if the investigation morphs into something more serious than a CID response.
- The cadence of meetings for the team in charge of the response to ensure things are moving forward as planned.
- How you will protect yourself, as in-house counsel, from any personal exposure with regulators, including relying on advice of outside counsel. This will include creating documentation about how you directed the company's response to the CID.

Dealing with disclosures.

The existence of the CID may become public, due to necessary disclosures if your company is publicly traded, or due to leaked information. This means once you receive a CID, you must be prepared to [deal with bad press](#). Unless there is a well-thought-out strategy behind saying more, the standard response to a press inquiry is to simply confirm the inquiry, the company's good faith cooperation, and faith in your company's compliance with the law. Your public relations team will be able to assist in crafting specific language to avoid adding to the concerns.

If you're a publicly traded company, you must be concerned about the potential need to disclose the CID in a public filing, e.g., [8K](#) or quarterly/annual filings. If the existence of the CID is already publicly known, there is little downside to disclosing. If it's not public, then you must determine whether the investigation is material to investors. This is a [difficult analysis](#), as there are no bright lines to follow. It depends on who is asking and what they are asking about. You may need to seek guidance from outside securities counsel. If you decide disclosure is needed, then you'll likely look to give the minimum amount of detail possible because whatever you say can and will be used against your company.

Any type of government investigation into your company must receive the highest attention of the board of directors, senior management, and the in-house legal team. A CID is nothing to take lightly, as *civil* can morph into *criminal* at any time. Unless you have extensive experience dealing with a CID and the agency that issued it, your first call should be to outside counsel. Brace yourself for a big time commitment and an expensive process. Finally, consider developing a playbook now for how you'll deal with any type of government investigation, including a search warrant, so that if the day comes, you're already prepared.

About the Author

Sterling Miller has spent almost 25 years as an in-house lawyer, including three stints as general counsel. He is certified by the [IAPP](#) (CIPP/US). You can read his award-nominated blog “Ten Things You Need to Know as In-House Counsel” at www.TenThings.net and follow his regular posts on [LinkedIn](#)® or Twitter® [@10ThingsLegal](#). His second book, *Ten Things You Need to Know as In-House Counsel: Practical Advice and Successful Strategies* was published by the American Bar Association in 2017.

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