

When FBI Comes Knocking: A Guide For In-House Counsel

By **Sarah M. Hall** (January 30, 2018, 11:24 AM EST)

For many in-house counsel or corporate executives at small or startup companies, an active criminal investigation of their company will be their first time dealing with the criminal justice system. This can be a confusing and intimidating experience. Below is a basic guide to assist in-house counsel and corporate leadership in determining two important threshold questions: (1) Is my company under criminal investigation, and if so, (2) what should I do?



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Is the Company Under Investigation?

It is important to recognize that there are a range of possible warning signs that your company is under criminal investigation — some are obvious and some are not. Below, such signs are listed in order of the most obvious to the most subtle:

- 1. An employee or former employee receives a “target letter” related to the company’s business.** A target letter is a letter from a federal prosecutor advising the recipient that he or she is the “target” of a grand jury investigation. Such a letter informs the target that the government intends to charge him or her with a crime, but before charging, the person has the option to voluntarily testify before the grand jury to tell his or her “side of the story.” Assuming that the subject matter of the investigation (which is typically generically described in the target letter) relates to company business, this is a strong indication that the company is under investigation too.
- 2. Law enforcement executes a search warrant at your company, or at a facility or home connected to your employee, former employee or business partner.** It is an obvious sign that your company is within the scope of a criminal investigation if agents execute a search warrant at your company’s offices or facilities. Less obvious is when search warrants are executed at homes or other locations connected to your employees, former employees or business partners. If you learn of a search at a location other than your company’s offices, you may be able to determine if the investigation implicates your company by reading the search warrant, which agents are required to leave at the location of the search.
- 3. A law enforcement agent attempts to speak to your employees, former employees or business partners about your company.** This is a likely sign that the company is under investigation. As in-house counsel or a member of company leadership, you may learn that your current employees were approached by agents (assuming the employees do not accede to a common request by agents to keep the interview confidential). However, you may or may not learn that your former employees or business

partners were approached. A “knock and talk,” or “field interview,” is a common investigative technique used by federal law enforcement. Typically, agents will not approach individuals at your corporate office, but rather at their homes or other locations early in the morning (before work) or in the evening (after work) to preserve the element of surprise in hopes the individuals will talk to them. Agents must show their official badges or credentials and will often provide their business cards.

Many federal agents, including agents of a federal department’s office of inspector general (such as the U.S. Department of Health and Human Services Office of Inspector General) investigate both civil and criminal violations. It may not be apparent if the agent is investigating a criminal or civil violation. You, as in-house counsel or a corporate executive, out of an abundance of caution, should assume the investigation is, or will become, criminal. Investigations that start out civil in nature can quickly “go criminal,” and evidence obtained in civil investigations can readily be shared with criminal agents and prosecutors.

4. Your company receives a grand jury subpoena for documents related to the company’s business. Depending on the nature of the documents requested, this could be a clear sign that the company is within the scope of the investigation. Federal Rule of Criminal Procedure 17 governs the issuance of federal grand jury subpoenas, and also provides for contempt penalties for noncompliance. A federal grand jury subpoena can be served at any place within the United States, so even if your company is located in, say, Cleveland, a federal grand jury subpoena can be validly issued from anywhere else in the country. The receipt of an inspector general (IG) subpoena could indicate either a criminal or civil investigation, but as noted above, the most prudent course is to assume the investigation is, or will become, criminal. Likewise, a subpoena from the U.S. Securities and Exchange Commission, a Health Insurance Portability and Accountability Act subpoena or a civil investigative demand (CID), while civil on its face, could later go criminal, and the documents you produce in response to it could be turned over to criminal investigators.

5. A current employee, former employee or business partner receives a grand jury subpoena related to the company’s business. Again, as in-house counsel or a corporate executive, you are more likely to learn that your current employees (as opposed to former employees or business partners) have received a subpoena. If the subpoena requests documents, you will likely be able to determine if such documents relate to the internal operations of your company, or if your company is more likely a witness that merely possesses documents relating to a third party, such as a customer or business partner. Conversely, if the subpoena calls for testimony only (but not for documents), it likely will be unclear if your company is under investigation. Sometimes, prosecutors will issue a subpoena to a current employee relating to alleged misconduct at his or her prior job. While technically outside the scope of the employee’s work for your company, such a subpoena should be taken seriously, especially if the employee performs the same type of work for your company as he or she did for a prior employer. Note, however, that if a financial institution receives a subpoena for your company’s bank records, the institution ordinarily will be subject to a nondisclosure order and, accordingly, will not be allowed to advise you of the subpoena.

6. The company or an employee receives a legal request notice from an internet service provider. Prosecutors can issue a subpoena or serve a search warrant on internet service providers (ISPs), such as Google and Microsoft, for email subscriber information (i.e., the name, address and contact information used to set up a web-based email account) as well as content (e.g., emails, photos, address books, etc.). The policy of many ISPs is to notify their customers that the ISP has been served with legal process for the customer’s data. However, if the prosecutor seeks a nondisclosure order, you will not learn that your company’s or employee’s emails have been collected. But if the prosecutor does

not seek such an order, or if the order expires, many ISPs will notify the customer. Although the notifications may not specifically tell you the investigation is criminal, out of an abundance of caution, you should assume that it is.

The Company Is Under Investigation — What Should I Do Now?

Based on the above, you now know, or have reason to believe, the company is under criminal investigation. Here's what to do next:

1. Contact counsel before you do anything else. The most important step a company can take when it concludes or strongly suspects that its corporate activities are within the scope of a criminal investigation is to quickly contact counsel. The first few hours and days are critical. Compare this situation to a heart attack — your patient is in critical condition and what you do (or don't do) right away could determine whether the company lives or dies. This is a "bet the company" moment. Seek help now, and do it before you respond to any law enforcement inquiries.

2. Retain counsel who regularly practice corporate/white collar criminal defense. Especially within small or startup companies, there may be an inclination to turn to corporate attorneys, whether in-house or at outside firms, that the company has previously retained to handle transactional, regulatory or civil litigation matters. While contacting such trusted counsel as a first step is an acceptable approach, the stakes are too high to try to use such counsel as your criminal defense counsel. Similarly, trying to handle a criminal investigation in-house with attorneys who have no criminal law background frequently leads to missteps that cannot be undone, particularly in light of potential conflicts or privilege concerns, or if in-house counsel may be a target or a subject of the investigation. As a noncriminal practitioner, you may not think the criminal investigation is active or threatening, but think of a criminal investigation like an iceberg. You will only see a small portion of what law enforcement is doing; the rest of the investigation will be conducted without notice to you. Before you know it, the company ship could smash into the iceberg and sink like the Titanic. You want your client — the company — to be counseled about what could be happening without your knowledge, such as employees wearing wires, informants recording phone calls, and agents combing through the company's bank records or preparing to arrest top executives. Experienced criminal defense counsel can advise you of many of these likely unknowns, the risks they pose and what can be done in response.

3. Retain all documents and other materials. Experienced criminal defense counsel will advise you on this important topic, but in the hours and days leading up to the company retaining outside criminal defense counsel, ensure that the company and your employees retain (and do not destroy) documents and other materials that the government may regard as evidence. If your company has an auto-delete policy for emails and other electronically stored information, or a regular document shredding schedule, the safest course is to work with your information technology staff and office manager to suspend such policies (thereby preserving such materials). Criminal penalties for obstruction of justice are severe and once evidence is destroyed, the bell cannot be unrung.

Conclusion

As in-house counsel or corporate leadership, the realization that your company is under criminal investigation is a significant and sobering moment, both in your career and in the life span of the company. Taking the right steps immediately upon learning — or suspecting — a criminal investigation is underway can make all the difference between a successful defense strategy where risks are mitigated

and managed, and handing the government a case against your client, its employees and executives on a silver platter.

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