Managing Government Investigations

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Since the creation of the Health Care Fraud Prevention and Enforcement Action Team (HEAT) interagency task force in 2009, the Departments of Justice (DOJ) and Health and Human Services (HHS) have substantially increased their coordination of criminal and civil enforcement, yielding historic numbers of health care fraud investigations and litigation, and skyrocketing settlement payments. In the face of this intense compliance climate, corporations need to be increasingly attuned to how and why investigations occur, and how to respond when they do. This chapter provides guidance on what to do when the government starts asking questions.
The Beginning of a Government Investigation

Q 1.1 How does a government False Claims Act investigation begin?

A False Claims Act (FCA) investigation can begin in several different ways:

1. **Routine screening audit.** In the course of a routine screening audit, an insurance carrier or government computer may notice data irregularities, such as a sudden increase in a particular reimbursement code or a volume for one procedure that bears an unusual relationship to the volume for other procedures. Any apparent irregularity can trigger an investigation, even if it can be easily explained or was an honest mistake.

2. **Informal complaint.** In many industries, an informal complaint—even one unrelated to fraud—filed by an aggrieved employee or a business competitor in this country or abroad can trigger an inquiry that can grow into a full-fledged government investigation and may lead to an FCA investigation.

3. **False Claims Act complaint.** An FCA, or qui tam, complaint immediately starts an investigation. In the past such complaints were typically filed by disgruntled employees, but increasingly they are filed by anyone who sees an opportunity to collect a government bounty to make money.
4. **Government project.** Government projects and investigative initiatives often cast wide audit nets in the hope of catching serious problems. In this scenario, the government might not even know what it is looking for, but if it notes any irregularities, the likelihood of an investigation increases dramatically.

5. **Indirect involvement.** Even if the government is not already investigating your company, your company could be drawn into an inquiry of one of your employees, customers, clients, joint-venture partners, or even competitors.

**Q 1.2 How does the government choose a target?**

A number of things can trigger an investigation, including:

1. Something your company does may distinguish it from others in a computer review or audit;

2. Someone, whether the person is honest or not, may have a grievance against your company and think he can be satisfied by making your corporate life difficult;

3. An Assistant U.S. Attorney (AUSA) or member of the DOJ may want to look your company over in the hopes of getting credit for developing a model for a new nationwide enforcement project; and

4. If your company is a big player, or in an industry subject to increased scrutiny, like the health care and life science industries, the media and the current political climate might compel politicians to pressure the government to investigate.

**The Government’s First Contact**

**Q 1.3 How does the government use informal phone calls or requests for information?**

An informal phone call may be the first sign that a government investigation is underway. Informal requests to the company for information can also signal that a government investigation is underway. It is not uncommon for government investigators to contact an employee outside the workplace in an attempt to gain valuable information. Such visits can be intimidating and are designed to catch employees off guard.
The first thing to do in this situation is to identify the government agency requesting the information. Counsel can then advise what, if anything, management should say to the Company’s employees or how the company should otherwise respond. Regardless of how casual the inquiry appears or how harmless the answer may seem, government questions are often very focused and an answer given too quickly without the benefit of legal counsel may prove disastrous for the company.

The government also often attempts to contact employees informally—even at their homes—prior to contacting the company. Given the intentionally invasive nature of such probes and the likelihood that an employee will be confused or uncertain in the face of such questioning, employees should be advised of their rights and obligations before the government calls. Additionally, employees should report all government contacts to counsel.

**Q 1.4 How does the government use subpoenas or Civil Investigative Demands?**

Subpoenas and Civil Investigative Demands (CIDs) are formal processes by which the government seeks information. Subpoenas and CIDs are served on a company and require the production of records or testimony in connection with ongoing government investigations. Both devices generally allow for some time to make a detailed and complete response. Your attorney often can negotiate an extension to the original deadline imposed by the subpoena.

**Q 1.4.1 How should a company respond to a government subpoena or Civil Investigative Demand?**

The first steps in response to a subpoena is to engage outside counsel, which will ensure that the attorney-client privilege and attorney work product doctrine will protect the confidentiality of the company’s internal response. Outside counsel then work with the company to preserve potentially responsive materials, assess a strategy to respond to the government, and negotiate on the company’s behalf to narrow the scope of the company’s response to the extent possible.
Q 1.5 **How does an administrative subpoena differ from a grand jury subpoena?**

Administrative subpoenas are subpoenas issued by the DOJ, or another federal agency, without prior judicial approval. They sometimes are referred to as Civil Investigative Demands (CIDs), or as HIPAA Subpoenas. CIDs are now commonly used by the DOJ, and seek information to aid in an ongoing government investigation. HIPAA Subpoenas may indicate that a parallel proceeding is underway, whereby the AUSA’s civil and criminal teams are involved along with the HHS Office of Inspector General (OIG). In contrast to an administrative subpoena, a federal grand jury subpoena indicates a criminal investigation is underway.

Upon the passage of the 2009 Fraud Enforcement and Recovery Act amendments to the FCA, the Attorney General gained the power to delegate his authority to demand documents, depositions, and interrogatories in FCA investigations. As a result of these amendments, the use of administrative subpoenas has increased more than sixfold. The DOJ frequently uses administrative subpoenas prior to filing a complaint or until it joins a qui tam action, a lawsuit filed by the public on behalf of the government. This allows the DOJ to demand documents, depositions, and interrogatories from a potential defendant before it can carry out its own discovery.

Q 1.6 **What is a trial subpoena?**

A trial subpoena may require testimony or documents. It will name a place and time certain to appear. If an employee is subpoenaed for testimony, counsel should communicate with the government lawyers as to whether, and under what circumstances, the person will testify. Counsel will also determine whether the circumstances warrant engaging separate counsel for the employee, as is sometimes required when there is a perceived conflict of interest between the company and an employee. Depending on the circumstances, employees located outside the United States may or may not be required initially to give testimony.
Q 1.7 **What is a search warrant?**

The execution of a search warrant may occur without warning and may be the most disruptive of all government investigative tools. The probable cause standard applies for the government to obtain a search warrant, which requires the government to believe that a crime has been committed and evidence of the crime is concealed at a specific described location. It may also be the first indication of the existence of an investigation. In some instances, there may be nothing that a company can do to avoid a search warrant. However, attempts should be made to provide the government with what it needs, short of a search.

Q 1.8 **What other ways might the government seek information?**

Sometimes an investigation is well underway in advance of a company being served with a subpoena or search warrant. In some cases, a company may already be aware of the investigation. However, often a company learns of an investigation only at the time it receives a subpoena or search warrant. Some of the other tools used by the government include: (a) audits; (b) witness interviews; (c) CIDs; (d) surveillance; and (e) informants.

**Responding to the Request**

Q 1.9 **Should there be a dialogue with the government?**

In many cases the answer is an unqualified yes. If you do begin a dialogue with the government, you should consider these key objectives: establishing credibility, facilitating communication, and obtaining information. There are advantages and disadvantages of both cooperative and uncooperative responses. Cooperation may lead to reduced fines, imprisonment, and penalties and, when the government requests documents, cooperation will often result in a narrower, more tailored search and production process. On the other hand, cooperation may help the government build its case and facilitate a fine, imprisonment, penalties, or government intrusion in business, and may result in waiver of attorney-client privilege. Failure to cooperate may lead to denial of credit for cooperation and, therefore, increased penalties.
However, uncooperative responses have the potential advantage of forcing the government to do its own investigating and prove its case.

**Q 1.10 Must the company produce documents?**

Many companies participate in government programs that require the company to make various forms of information available to the government at the government’s request. For example, a health care provider participating in the Medicare or Medicaid program must grant government officials the right of access to documents relevant to the program, and the OIG can exclude a provider from a program if access is denied. Through such means, the government often tries to obtain documents voluntarily before resorting to subpoenas or search warrants.

Otherwise, the duty to comply with the government’s request for information will depend on whether the request is informal, which may not necessarily require a response (although not responding may risk attracting additional inquiries), or in the form of a search warrant, subpoena, or CID, each of which are enforceable by a court.

**Q 1.11 What happens if the company fails to cooperate?**

It is a criminal offense to obstruct justice, which includes interference with government audits as well as government investigations. Resistance to the government’s lawful and legitimate request for information will likely cause a subpoena or search warrant to be issued. In extreme cases, resistance may also cause the government to threaten exclusion from government programs or file obstruction of justice charges.

*Managing a Search Warrant*

**Q 1.12 What are the requirements to look for in a search warrant?**

There are several, including:

1. *Affidavit in support*—Search warrants are based upon one or more sworn affidavits submitted to the court to show that
there is “probable cause” to believe that evidence of a crime will be found at the location. The company representative or attorney should request a copy of the support affidavits from the agent, although they are usually under seal and access to them will be refused.

2. **Warrant**—The government agent executing the search is required to provide a copy of the warrant and a receipt for property taken.

3. The subject may want to consider filing a Rule 41(e) motion for return of seized property.

The search warrant is the most extreme of the government’s information-gathering mechanisms. If your company is faced with one, immediately contact experienced counsel. Government investigators will arrive unannounced and en masse to serve a search warrant. Then they will proceed to conduct a search for “evidence” in every corner of your facilities. In today’s world, these searches almost always include physical seizure of computers, databases, and servers containing e-mails and electronic versions of corporate documents.

**Q 1.13 How should a company respond when a search warrant is executed?**

There are several steps a company should take when responding to a search warrant, including:

1. The senior employee present should ask to see the search warrant and identify the agent in charge of the search. The name and phone number of the prosecuting attorney who approved the search should also be requested.

2. The agents on site may attempt to interview employees. Counsel for the company, if present, should request that the agents not do so. If the search will last a while, and it is practical to do so, all non-essential employees should be sent home. Those that remain should observe and make notes of the areas that are being searched, to whom the agents speak, and what the agents say and do.
3. Any employees who remain should be warned that they are not to interfere in any way with the search and that no documents or computer files should be altered or destroyed.

4. The company attorney or representative may indicate to the agents any material not covered by the warrant, such as a box of attorney-client privileged documents or a file of personal information an employee was holding in the office.

5. Employees should be informed that they have no obligation to answer questions other than to identify themselves, and that if they agree to answer other questions, they have the right to an attorney. Although this can be a frightening experience, employees should be urged to stay calm.

6. The investigators will prepare an inventory or receipt for the records they have seized and will ask counsel or an employee to sign it. The employee who has been designated to observe the search should prepare his or her own inventory of the records. Before signing the receipt prepared by the government, the company’s representative should make sure that it adequately describes the records seized.

**Q 1.14 What happens after a search is conducted?**

The execution of a search warrant is obviously a much more disruptive process for a company than producing documents under a subpoena, due to several factors including: (i) the shock to employees, from which it may take time to recover; (ii) the abrupt loss of documents needed to conduct business; and (iii) the inability to copy seized documents to share with counsel and to enable its lawyers to conduct a complete internal investigation.

Following a search, it is important for a company’s attorney to contact the appropriate AUSA in order to: (i) learn more about the reason for the search; (ii) see if the government will provide access to the underlying affidavit; and (iii) negotiate arrangements for obtaining access to necessary business documents.¹
Q 1.15 Does a grand jury investigation impose different obligations from a typical search warrant?

A grand jury investigation is another means for the government to gather information. The following factors should be considered: A witness has no constitutional right to be told that he or she is the potential defendant or target of the investigation. However, the DOJ’s policy is to advise grand jury witnesses of their Fifth Amendment rights and, if applicable, of their status as “targets.”

Q 1.15.1 What is a target?

A “target” is defined as “a person as to whom the prosecutor or the grand jury has substantial evidence linking him/her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.”

Q 1.15.2 What is a subject?

A “subject” is defined as “a person whose conduct is within the scope of the grand jury’s investigation.” In some districts, the term “subject” is interpreted broadly and most witnesses are advised to consider themselves subjects.

Q 1.15.3 Will the target be notified?

While the government has no legal duty to notify a target before indictment, the DOJ encourages prosecutors to notify targets of their status a reasonable time before seeking an indictment to give the target an opportunity to testify before the grand jury. Notification is then provided to a target by letter.

Q 1.15.4 What is a target letter?

The target notification letter should include: (i) the date on which the target may appear; (ii) that the target is advised to consult with counsel about the matter; (iii) that the target explicitly will have to waive his Fifth Amendment privilege against self-incrimination before testifying; (iv) that, should the target testify, the target will have to
consent to a full examination under oath; and (v) that anything the target says before the grand jury may be used against him.

**Q 1.15.5 Can a target testify at the grand jury?**

Yes, DOJ policy requires that a target be permitted to testify at his request unless it would cause undue delay or otherwise burden the grand jury.

**Q 1.16 Are there often parallel criminal and civil proceedings and administrative actions?**

DOJ, U.S. Attorney’s offices, federal agencies, and federal investigative authorities often coordinate their investigative and legal efforts. When they do so, a deliberate strategy is usually employed. Coordinated efforts are encouraged by the Corporate Task Force and present difficult strategic decisions for the defense.

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**Managing the Subpoena Response**

**Q 1.17 Who should handle the company’s internal response?**

One or a limited number of individuals should be responsible for responding to government requests for documents or information. This person may be in management or in-house counsel, and should be designated as the company’s “Document Custodian” for purposes of responding to the government investigation. This process enables the company to better control its representative’s communications with the government. Together, the company’s counsel will work with the designated Document Custodian to facilitate the timely and ordered gathering, review, and production of documents. This gathering process will necessarily include review and production of all e-mail and electronic files, and it may therefore be necessary for counsel to employ an expert IT consultant. Before any production to the government is made, counsel will review all documents and determine whether the documents are responsive and whether privilege may be asserted. No documents should be informally produced, nor should any new documents be created related to the government investigation.
Q 1.18 What opportunities are there to discuss a subpoena with the government in order to clarify or narrow the requests?

It is very common for the company’s counsel to contact the government to discuss the subpoena, particularly before the response due date has passed and while the company is assessing its ability to respond.

It is not unusual for attorneys to have interpretive problems with portions of the government’s requests. To the extent that there are any ambiguities, it is important for counsel to contact the OIG or AUSA to seek clarification. When a subpoena is poorly drafted and there are substantial clarifications by the government, it is important to memorialize those clarifications in writing to the government so that there will be no disagreement later over the adequacy of the production.

Additionally, because many subpoenas are broad in scope, it is usually possible to negotiate an extension of time to comply. Skilled counsel will negotiate time for compliance with the issuing agency. Where months are necessary to comply fully, the government will often request a “rolling production,” meaning a weekly submission.

Finally, the government sometimes includes in a subpoena a request for more information than it really needs. If a company can show the burden of the complete production in terms of numbers of staff, quantity of documents, and length of time, it is possible to eliminate some of the paragraphs from the production or reduce the number of years covered by those paragraphs. But this is a request to be managed delicately, as the government typically will need to trust that the company is prepared to respond timely and comprehensively before the government will accept a more narrow response.

Critically, any change in the scope of the subpoena or any agreements regarding the production procedures should be put in writing and provided to the government.
Q 1.19  How should a corporation respond to the government’s request for information?

It is imperative that a company provide clear and specific instructions to its employees as soon as a company becomes aware of an investigation. Counsel should approve the language for specific instructions to its employees. These instructions should provide an overview of the government’s investigation and address employees’ rights and responsibilities during the course of the investigation. The instructions also should contain a reaffirmation of the company’s commitment to high ethical standards and advise employees that, as a routine matter, government representatives may seek to interview them.

Q 1.20  What should a company do if a witness is requested?

This is a complex area in which counsel should be consulted because it depends on whether the request is voluntary or not. If a grand jury subpoena is issued, the witness must appear, but may invoke their Fifth Amendment rights. Also, issues related to immunity must be considered. Immunity may be informal, by letter, or formal, by statute:

**Letter.** Prosecutors can extend non-statutory use or transactional immunity to a witness. This is commonly referred to as informal, letter or pocket immunity; and standard proffer letter for attorney or witness discussions with government.

**Statute.** 18 U.S.C. §§ 6001–05 provides witness with use immunity, that is, testimony compelled by statute, or any information directly or indirectly derived from such testimony or other information, cannot be used against witness in a subsequent criminal proceeding.4

A wise company will consider whether separate counsel is appropriate for employees, as well as for the payment of counsel fees and indemnification/advancement issues. Also, a company should consider appropriate strategies for culpable employees including weighing the advantages and disadvantages of discipline, termination, or continued support and employment. Finally, a company should consider that the
requested employee witness may potentially be a qui tam relator. If so, the company may not take action to terminate that employee.

**Q 1.21 Should a company provide notice to its employees of the investigation?**

News of a government investigation undoubtedly will travel quickly throughout your corporation. By providing a sense of what is happening and general instructions to your employees, you can help prevent the dissemination of inaccurate information and set the tone for an appropriate response.

**Q 1.22 How can employees be trained to improve the response to a government request for information?**

A company’s compliance plan should have written procedures that govern how the company will manage its initial responses to government inquiries, and employees should be trained on these procedures. This should include detailed procedures for employees to identify the people within the company that should be contacted if a government representative arrives at a facility, or if a subpoena is served on the company.

Meanwhile, at the first sign of an investigation, a company should immediately contact its attorney for advice. Early use of counsel enables a company to learn what is behind the government’s request, assess the scope and breadth of the investigation, and prepare an appropriate response.

There are several guidelines that companies should keep in mind when training employees in how best to respond to government investigations. These include:

1. If a government representative appears in person, the employee responsible for communicating with the government agent should know to request official identification and to write down the name, title, and agency affiliation of the government official.
2. The designated employee should also inquire into the nature of the audit or investigation. Although agents are trained to be discrete, any information that can be solicited will aid in fashioning an appropriate response.

3. An employee should always keep a copy of anything given to the government, but the best approach is to consult counsel before providing any documents to the government.

4. Employees and other company representatives should be trained to relate to government officials in a manner that sends a signal of cooperation. Specifically, employees should know the importance of telling the truth and that making a false statement to a government investigative agent, even under informal circumstances, can constitute a criminal offense.

5. If an employee is unsure about what action to take, he must know whom to contact to seek guidance and must know he has the right to seek such guidance. Even in cases that impose penalties for failure to grant immediate access to government agents such as exclusion from a government program, it is unlikely that a delay of no more than twenty-four hours to permit the company’s representative to seek advice from more senior management will be considered inappropriate.

Q 1.23 Should employees have access to legal counsel?

Employees should be advised to seek legal counsel on issues related to:

- Their absolute right to meet with government investigators or, absent some form of legal compulsion (that is, a subpoena), their equally absolute right to refuse; and

- Their right to be accompanied by an attorney, either one of their own choosing or the corporation’s counsel, in any interview with the government.

Employees should be informed that inside and outside counsel represent the company, not the employees.
Q 1.24 Should a company employ legal counsel for its employees?

The company’s counsel should not undertake representation of individual employees, because it is impossible to predict the likelihood of a conflict of interest, and should one arise, counsel could be disqualified from representing either party. It is wise to make sure employees understand that counsel for the company does not represent individual employees. Although a company may choose not to cover the legal expense of retaining a separate attorney for any employee who feels the need, the advantages of doing so usually outweigh the expense. Additionally, one attorney may be able to represent a number of employees to the extent that those employees are unlikely to be identified by the government as subjects or targets. Finally, employee training as part of a corporate compliance program is a good opportunity to inform employees of their rights and responsibilities before the pressure of an actual investigation. It is also a good time to remind employees that only the officials of the company delegated by management with the responsibility should provide, or authorize the disclosure of, corporate documents to outside parties including investigators.

PRACTICE TIP: Incorporating certain document creation, retention, and destruction issues in a corporate compliance plan is good practice to manage a company’s response to a government request. The compliance plan also can greatly expedite outside counsel’s document review process and the document production that is required if a subpoena is issued. The plan also may improve the protection of attorney-client privilege in the event of a search warrant.
Managing Government Investigations

Managing the Company’s Documents

Q 1.25 What is the company’s obligation to preserve documents?

In large productions, counsel should draft a memo to be sent to each employee who might have responsive documents. The memorandum should include the description of each specification in the subpoena and should emphasize the mandatory nature of the subpoena. Each employee should forward all potentially responsive documents to the person in charge of the production. Where an employee has any doubt, the employee should produce the document. In addition, employees should be told to identify which files were searched and from which file or location each responsive document was produced. The company’s attorney can then decide which documents provided by the employee are indeed responsive to the subpoena.

Q 1.26 What are some other reasons to establish a document preservation protocol?

Certain documents must be retained for minimum periods of time for business or regulatory reasons. Beyond that time, if there are policies for destruction of certain records, it will reduce the volume that must be reviewed and produced to the government. Additionally, a company may even want to adopt in the compliance program a formal policy with respect to the routine copying of documents for circulation to employees who were not intended as addressees by the author. Moreover, a company should also have a policy that communications to or from counsel should be marked as “attorney-client privileged.” This will assure that privileged documents are not accidentally produced to the government in response to a subpoena. Finally, it should be the policy to retain attorney-client privileged documents in a separate file, in order to reduce the likelihood that privileged documents will be unintentionally seized by the government in the event of a search.
PRACTICE TIP: Companies often fail to include their IT personnel and offsite storage provider in the document preservation process. Both can be instrumental in ensuring that documents are properly preserved and routine destruction operations are appropriately ceased for potentially responsive materials.

Q 1.27 What happens if the company destroys files requested by the government?

Every employee must know that destruction of documents—including electronic documents—once an audit or investigation has begun is illegal. The duty not to destroy documents includes a duty to suspend the routine destruction of older documents that may be in place.5

Q 1.28 How should the company’s production efforts be memorialized?

The company should keep a record of the efforts undertaken to search for documents and the results of the search. Often it is helpful to prepare a description of each specification so that, in a large production, each employee can assist by searching their own records. Documenting the subpoena production effort enables the company to be confident that the search for documents was conducted appropriately and will enable the company to assure the government with respect to the integrity of the production in the event that questions arise later.

Q 1.29 Where should a company look for documents?

The subpoena production effort may require a search of offsite storage facilities, branch offices, and any other location under the control of the company where responsive documents might be located; this includes company documents in the hands of its agents or representatives.
Q 1.30 Do we need to produce original documents?

Subpoenas sometimes will require production of original documents. Where this is the case, a copy of each document produced may be made on paper of a distinguishing color, which can then be placed in the original file. This permits a copy of the produced document to remain in the file to enable the orderly conduct of company business while avoiding the possibility of any confusion about whether the employee produced the document. In addition, it will be clear to the company, if it becomes relevant, that any other original document, not on special color paper, has not been produced.

Q 1.31 What are “hot documents” and how should they be handled?

Documents that raise issues or questions you will want to pursue are termed “hot documents” and should be flagged. They should be catalogued by issue and a binder should be created for each person you intend to interview, with the hot documents you want to show them.

Q 1.32 Who should review the production before it is turned over to the government?

Lawyers should review the documents for responsiveness and for any privileges that may apply. The company should Bates stamp the documents and should make a duplicate set in order to have a record of what was provided to the government.

Q 1.33 How should a company produce the requested documents to the government?

In very large productions, it may be useful to scan the documents onto a computer and create a production database. This will allow for a document search by key name or key word if the investigation continues and once the specific issues of concern to the government become clearer.
A company should keep copies of all documents, establish a numbering system, and produce with cover letter that describes the production. The company’s lawyers should challenge the subpoena if production would be an admission of wrongdoing or is unduly burdensome. A strong relationship with AUSA or the government agency issuing the subpoena may be critical in obtaining agreement to narrow the scope, extend deadlines, etc.

**Q 1.34 What should a company withhold in its production to the government?**

A company should withhold non-responsive documents as well as all attorney-client privileged communications, made by and between privileged persons (attorney/client or agent), in confidence, for purpose of obtaining or providing legal assistance for the client. If documents are withheld, a privilege log may need to be produced to the government. Documents that are attorney work product may also be withheld. These are documents or tangible things, prepared by or for a party, in anticipation of litigation or for trial.

**Internal Investigations**

**Q 1.35 Should a company conduct an internal investigation?**

In many cases, an internal investigation is advisable. If the circumstances indicate that a company is under government scrutiny, the company should consider initiating an internal investigation. If this path is chosen, the following factors should be paramount:

1. It is a good idea to include in the corporate compliance plan the procedure for authorizing and conducting an internal investigation.

2. To assure the impartiality of the internal investigation, where there is a board of directors, it should authorize the internal review.
   a. The board should establish a special committee of outside directors, who are not part of day-to-day management, to supervise the investigation.
b. The special committee should be responsible for choosing and retaining outside counsel to conduct the investigation, and should consider engaging an experienced investigator to assist counsel in advising the company.

3. Conversations with prospective counsel for the purposes of retaining counsel are privileged, as are communications between the client and the attorney who is ultimately retained.

4. In addition, work prepared by the attorney, and in some cases the investigators or forensic accountants that counsel engage and rely upon, may be protected by the work product doctrine.

5. These two protections should permit the attorney to interview employees and officers, evaluate legal issues, and advise the company in confidence.

Q 1.36 What is the role of inside counsel in internal investigations?

If the company has its own internal general counsel, one would expect that the general counsel would work closely with outside lawyers. However, it is impractical to depend upon inside counsel to conduct the investigation because:

1. The general counsel may have had a role to play in whatever is the subject of the investigation;

2. The inside counsel’s objectivity may be comprised by years of working closely with other management officials;

3. If the inside counsel conducts the investigation, it may create strains with other management officials and employees that will not necessarily heal easily when the investigation is complete;

4. Inside counsel often lack the highly specialized expertise necessary to respond to a government investigation;

5. Because the inside counsel is often involved in business, as well as legal issues, the attorney-client privilege is not as easy to preserve; and

6. Outside counsel may have greater credibility with the government.
Q 1.37 How should the internal investigation begin?

A sage outside counsel should begin the internal investigation with a review of the government’s subpoena, if one has been issued, to determine if there are any clues in the subpoena regarding the government’s interests or concerns. Other clues may come from conversations company employees may have had with government representatives and which have been reported to management. An earlier meeting with officers and managers also helps outside counsel determine where the problems may be. Other sources of information may be recent internal audits, audits by state and federal regulators, inquiries from insurance carriers, and complaints from patients or employees. The company’s counsel should contact government officials who have made contact with the company or its employees, in order to obtain information that may help narrow the scope of the investigation.

Q 1.38 How and when should employees be notified of the internal investigation?

One of the first steps to take following the decision to authorize an internal investigation is to notify employees that outside counsel has been retained for that purpose. The notice should be designed to minimize their concerns while accurately describing the scope of the investigation, and should include the following points:

1. The company has retained a law firm to examine certain matters for management. Part of that effort will involve interviewing employees and examining files, and employees are expected to fully cooperate.

2. A government investigator may contact employees at home, after hours, and without notice.

3. Employees are requested to notify management if a government official contacts them.

4. Employees have the right to speak with the government investigator if contacted or to refuse to speak with the investigator.
5. Before speaking with an investigator, the employee should require the investigator to present identification.

6. If an employee chooses to be interviewed by a government agent, the employee can choose the time and place and may terminate the interview at any time.

7. Employees should tell the truth to a government agent.

8. An employee has the right to have an attorney present during an interview by a government agent.

9. The company’s counsel is available to meet with an employee prior to an interview or attend the interview with the employee.

10. If the employee desires separate legal representation, the company can help arrange for it.

Q 1.39 How should witness interviews be handled?

After reviewing the documents, counsel will likely attempt to interview all present and former employees who may have relevant information. Interviews should generally be conducted by a team of two attorneys, or an attorney and a paralegal. This allows one attorney to concentrate on the interview and the other to take thorough notes. In addition, the presence of two lawyers provides a witness for the interviewer in the event that an employee later seeks to disavow responses to questions.

Q 1.40 In what order should interviews be conducted?

It is usually desirable to interview employees starting at the bottom of the organizational chart and working to the top. But as a practical matter, this is not always possible. For example, if the government is conducting its own interviews of employees, whether informally or before a grand jury, those employees should be interviewed by outside counsel as soon as possible after the government interview, while recollections of the interview are fresh.
Q 1.41 Are there attorney-client privilege issues to be aware of when conducting employee interviews?

Yes, the Supreme Court in *Upjohn v. United States*\(^6\) established five factors to guide courts in determining the validity of attorney-client privilege claims for communications between legal counsel and lower-echelon corporate employees: (i) the information is necessary to supply the basis for legal advice to the corporation or was ordered to be communicated by superior officers; (ii) the information was not available from “control group” management; (iii) the communications concerned matters within the scope of the employees’ duties; (iv) the employees were aware that they were being questioned for the corporation to secure legal advice; and (v) the communications were considered confidential when made and kept confidential.

Following *Upjohn*, the employer should direct the employee to participate in the interview to assist the employer in obtaining legal advice, and counsel at the beginning of the interview should make clear that: (i) they represent the company, not the employee; (ii) the employee should keep the interview confidential; (iii) the company’s attorney-client privilege protects the confidentiality of the interview; and (iv) the company may waive its privilege if it deems necessary.

Q 1.42 Should the company hire an expert or investigator to assist with the investigation?

In many cases, an expert should be hired to assist, particularly if there are complex financial, scientific, or technical issues involved. If so, outside counsel should hire and control all experts, to enhance work product protection.

Q 1.43 Should a report of the internal investigation be made to management?

Companies often want to have a formal written report of findings by outside counsel and therefore a formal report is necessary. Where a written report is desirable, outside counsel should keep in mind that the report may eventually be disclosed to the government or to shareholders in the event the shareholders file a complaint. Although the report is attorney-client privileged, if the company wishes to
cooperate with the government, it will be difficult to resist the government’s request for the report.

**Q 1.44 How should communication with the government be handled while an internal investigation is ongoing?**

During the time that outside counsel is conducting the internal investigation, if there is a formal government investigation underway, it will be important to keep in touch with the government officials conducting the investigation. While the government is often reluctant to share information early in its own investigation, by maintaining informal contact it is often possible to learn something about the issues that may be the focus of the investigation as well as the government’s thinking about the seriousness of the investigation. In addition, it is often possible to obtain from the government an informal agreement that no final position will be taken, such as the filing of criminal charges, the filing of civil false claims complaint or the suspension of government payments, until the company has had an opportunity to meet with the government and present, through its attorneys, its perception of the facts. Finally, if the outside counsel is professional and honest in his or her interactions with the government, this investigation period serves as an opportunity to develop a strong working relationship, which can be an important asset during any disagreements that may arise later on regarding the proper disposition of the case.

**Working with Other Targets or Defendants**

**Q 1.45 What is a joint defense agreement?**

A joint defense agreement (JDA) is a mechanism that allows the parties with common interest to share information without waiving the attorney-client privilege. For example, if the government is looking into cost report issues, the CFO of the company may feel vulnerable and desire separate counsel. The company’s counsel will want to interview the CFO and the CFO’s counsel may want to learn what the company’s counsel is finding from the internal investigation. A JDA permits these communications to occur while preserving confidentiality.
Q 1.46  Is it a good idea to enter into a joint defense agreement?

In many cases, a JDA will assist a company engaged in a government investigation. That said, the timing of when to enter into a JDA is important. To this end, a company should consider the number of parties that may be implicated by a government investigation, and the number of separate attorneys hired to represent those parties, the beginning of an internal investigation is often the time to decide upon whether it is appropriate to enter into a written or oral JDA.

Q 1.47  What are some advantages and disadvantages of entering into a joint defense agreement?

A JDA will allow companies to increase their information. They also keep all parties on the same page and employing the same strategy. They may reduce legal costs or not, depending on length of joint defense meetings. But the company may well suffer from guilt by association by being a part of a JDA and government lawyers and investigators frown upon joint defense agreements, and may even use them as a sign of lack of full cooperation or candor.

Q 1.48  How are joint defense agreements terminated?

JDAs can be terminated if the interests of the respective clients begin to diverge. However, the information that was shared under the agreement remains confidential.
Notes

3. Id.