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Reducing the burden of complying with law enforcement inquiries

Although recent headlines have brought the U.S. National Security Agency's surveillance practices to the forefront of American political discussion, it is not just Internet service providers and cellular phone companies who are requested to provide information to the government.

Businesses of all sizes — including community banks, regional hotel chains and other small companies — are often asked by myriad federal, state and local law enforcement authorities to provide information.

Larger companies, particularly financial institutions, are generally accustomed to responding to hundreds, if not thousands, of subpoenas and other requests every month. However, businesses that receive more than a dozen or so law enforcement inquiries every month should have a basic process in place for interfacing with the authorities and processing the requests.

There are some basic considerations that companies should keep in mind when implementing a process to respond to law enforcement requests, including subpoenas.

First, consider the nature of the information requests and work with the investigators to define their requests. Investigators may not know what data or documents the company possesses and how easy the company can access that information. The company should be prepared to explain what information is readily available.

In many cases, investigators already have a pretty good idea of what they are looking for and likely to find.

Although a subpoena may be necessary for some requests, in many circumstances the company may be able to provide the investigator with the requested information over the phone and avoid the need for a subpoena. Informally sharing information with law enforcement not only

avoids a potentially overly broad and burdensome subpoena but also builds goodwill with the investigators by quickly providing them with the necessary information.

Informal sharing also allows investigators to avoid involving an assistant U.S. attorney or state prosecutor in order to obtain a subpoena. This is a big plus for investigators who normally work on many cases at once. Of course, employees should comply with all applicable privacy laws, know the limits of what they can share and request a subpoena when necessary.

Second, the company needs to effectively communicate with law enforcement. Therefore, as an initial matter, it is important to have a designated point of contact for law enforcement.

Many large companies maintain a dedicated phone number and e-mail address. Smaller companies may simply train employees to direct all law enforcement inquiries to the chief compliance officer or similarly trained executive.

Regardless of contact point, the company should keep a record of

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each time it interacts with law enforcement. If multiple employees are handling law enforcement requests, these records serve as reference to ensure consistent communications and track the frequency and type of inquiries.

The employee supervising the process should be familiar with the mechanics of an investigation — ranging from a very basic inquiry by municipal police to a grand jury investigation.

If possible, it is a good practice for this supervisor to be either a former law enforcement officer or an in-house attorney familiar with criminal investigations. If the volume of the requests do not warrant even a partially dedicated position within the organization, it is

NEXT CHAPTER



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important to have outside counsel available to review criminal subpoenas, answer any questions and work with law enforcement, if necessary.

Having a knowledgeable person review subpoenas is important not only from an external communication perspective but also from a risk management point of view.

Law enforcement inquiries and subpoenas may serve as a bellwether for potential litigation and areas of risk which the corporation may not know about.

For example, if the company receives a large number of requests for customer records related to a particular location or business unit, this may indicate the existence of compliance issues and a potential government investigation.

By aggregating information and paying attention to specific requests, the company may be able to quickly and proactively address problems. In serious matters, legal advisers may need to be brought in to conduct an internal investigation. However, careful consideration should be given before any action is taken so as not to disturb or compromise any ongoing government investigation.

Employees who handle law enforcement requests should, therefore, be trained to recognize grand jury subpoenas, civil inves-

tigative demands and other inquiries that may indicate that the company is the target of an investigation.

These requests should be escalated to the legal department where a response should be crafted. For example, requests for company documents, such as anti-money laundering or consumer privacy policies, may indicate that the government is looking for potential malfeasance on the part of the company.

Companies should train employees to effectively "triage" the requests that they've received and notify superiors when unusual requests are received. This employee training must be specifically tailored to both the industry and company's risk profile.

At its core, the process must be verifiable, repeatable and defensible.

It is possible that an informal request for information may later be followed by a subpoena, the response to which the company must verify. Therefore, the company needs to be prepared to provide an employee who can verify, and possibly testify, regarding the business records that it has produced to law enforcement.

The company also needs to make sure that it can repeat the process that it used to gather similar categories of information and use the same process consistently.

A company can face serious consequences if the information that it produces appears inconsistent and could lead the investigator to one of two conclusions — either the company's management is incompetent or it is intentionally concealing information.

Finally, the most important consideration is that the process is defensible. If challenged, the company must be prepared to show that the efforts that it undertook to collect and review the information it produced were reasonable.

By maintaining these three core considerations, the company will be in a position to effectively respond to investigators and ultimately reduce the burden of complying with law enforcement requests.