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WHAT TO DO WHEN THE GOVERNMENT SUBPOENA ARRIVES

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A subpoena is an order of a court (or a government agency) that requires an individual to testify or to produce documents, or both, on or before a certain date. There are many different types of subpoenas (state, federal, grand jury, administrative, etc.). If your company is served with a subpoena, the following advice could be helpful:

- Do not attempt to respond to a subpoena without the assistance of an attorney. The subpoena may call for documents to which the government is not entitled, such as attorney-client privileged documents and certain quality assurance documents. It is in the company's best interest that all communications with the government concerning a subpoena be through an attorney experienced in subpoena compliance. In certain circumstances, even the act of producing documents may result in unwanted consequences.

- Unfortunately, subpoenas issued in health care-related investigations are often extremely broad. In many situations, government attorneys are willing to negotiate and narrow the terms of the subpoena or to agree to a "rolling production" of documents, where documents are produced over a period of time as they are located, numbered and copied.

- Some subpoenas appear to require the recipient of the subpoena to *create* documents in response to the subpoena. The government cannot generally require you to create documents to give to them although this may be something you are willing to do as part of negotiating with government counsel on other requirements of the subpoena.

- Receipt of a subpoena is obviously a sign that an investigation is underway. It is possible that the subject of the investigation is not your company, but Company X, and that the government is only seeking documents from your company to learn something about your company's relationship with Company X. Nonetheless, you should be aware that, depending upon what the documents turned over to the government reveal, the government may decide to turn its focus on your company.

- Agents will, in most cases, personally serve the subpoena on a custodian of records at the company and, while doing so, often attempt to interview one or more of the employees on site. All employees should be made aware that they are under no obligation to be interviewed and have the right to have an attorney present if they do decide to be interviewed.

- Even if no attempts are made to interview employees when the subpoena is served, it is quite possible that the government will attempt to contact employees at home to interview them without the company's knowledge. Employees should be advised that government agents may attempt to contact them at home and should be advised of their rights and responsibilities in the event this happens.

- In responding to a subpoena, be sure to identify for the attorneys working with the company all documents that are particularly important (whether the documents help or hurt) to ensure that the attorneys are aware of the existence of these particularly important documents. All documents should be reviewed by legal counsel before they are produced to the government.

- Immediately upon receipt of a subpoena, all employees should be instructed not to destroy, alter in any way, or throw away any documents. While some companies have document retention/destruction policies in place as a normal practice, these policies may allow for the destruction of certain documents that the government is seeking through the subpoena. Therefore, standard document retention/destruction policies should be immediately suspended once a subpoena is served on the company.

- In health care cases, the government has made increasing use of Authorized Investigative Demands (AIDs) that require the production of documents only. The only witness testimony that can be compelled under an AID is the testimony of the custodian of the records about the records' authenticity, source, location, etc., not, e.g., what the document means or why it was prepared.

- Finally, even if you think you or your company has done nothing improper, receipt of a subpoena is a serious legal development that should be taken seriously and should be addressed by competent and experienced counsel.