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### TOPICS COVERED TODAY

- Enforcement Environment
- Early Stage: The Subpoena,
  Preservation & Deadlines
- Getting Started: Government Communications & Collection Tips
- Communications: Disclosure & Employees

- Practical Issues on Production & Testimony
- Business Changes
- Investigation, Remediation & Third Parties
- Preparing For the Long Haul

#### **ACTIVE ENFORCEMENT ENVIRONMENT**

Enforcement under Biden Administration is now full-speed ahead, with fintechs squarely in focus for agency priorities

#### SEC

Enforcement Division's ongoing efforts to streamline the Wells process and empower frontline staff – Deputy Director Wadhwa

SEC public pronouncements: ICOs, Fund Innovation, Crypto Holdings, Tokens, Etc. – Distributed Ledger Tech Working Group

#### FTC

"We are investigating several firms for possible misconduct concerning digital assets"

"Keep your AI claims in check"

#### **CFPB**

1022 Orders on BNPL & big tech

RFI on data brokers

Focus on algorithmic bias, dark patterns, data aggregation and competition

### Early Stage: The Subpoena (or CID)

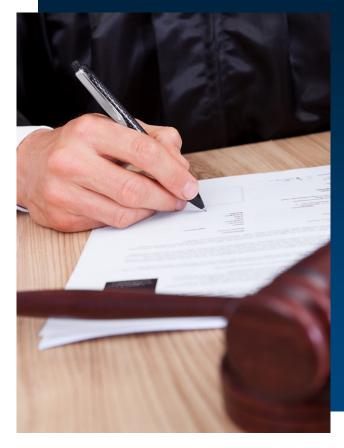
When you receive a Subpoena, read the subpoena. It provides important basic information.

#### What is the focus of this investigation?

- Many agencies include a (high-level) description of the investigation, potentially including companies and individuals involved
- CFPB: specific language used for third-party CIDs

Date range can provide a hint regarding specific events and timing triggering interest.

Read between the lines to understand the government's focus and possible theories.



## **Early Stage: Preservation**

After you read the subpoena, you need to preserve relevant documents and data.

Document Preservation Hold

Consider the data holistically.

Suspend document retention and auto-deletion policies.

• Email, slack, CRM, financial data

Send hold notice, keyed to requests and sensitive to broad disclosure of investigation within company.

Inside tip: Government often asks when the hold was implemented and may request a copy.



### Early Stage: Deadlines

Deadlines to confer with government and to raise objections.

The "return date" is the due date. But that's almost always negotiable

• Some production typically due on original return date

Typically phased production on a rolling basis.

Insider Tip: Tolling Agreements.

 Beware: some agencies are demanding extensive tolling agreements in connection with even reasonable extension requests



# Getting Started: Calling the Government

- Every agency has a process for negotiating scope and/or challenging the subpoena
- Different levels of comfort with respect to negotiations over the scope of a subpoena
- Important to have counsel that knows agency practice and the boundaries of what agency staff can agree to

## Getting Started: Collection Best Practices

- One part law, one part project management
- Designate someone within the company as the point-person
- Identify individuals in the company who are knowledgeable about specific practices hinted at and document sources
- Tracking charts
- Insider Tip: Use lawyers to respond to protect privilege/work product

## Communications: Disclosures

- Disclosure considerations both public and contractual
  - Key: Assessing materiality of facts and the investigation itself
  - Common disclosure standards
  - Often no disclosure required until you get a formal notice from the government of potential action, not just investigation
  - Securities disclosure considerations
  - SOX "material violation" standard
- Insurance: consider steps to effect coverage

## Communications: Employees

- Preparing employees for government investigations requires sweat equity
- Especially for a young company, dealing with an agency investigation for the first time can be scary.
  - Prepare employees for the fact that government likely will be reading their emails.
  - Agencies often looking for individual liability, in addition to the company
- Special concern for former employees: they may be material witnesses

# Practical Issues on Production & Testimony

### Document Production

- Agency-specific expectations regarding scope and mechanics
- Email review and tactics for limiting scope
- Preparing employees, gathering documents and preserving information

### Testimony

- Fact witnesses and corporate witnesses
- One-way testimony
- Agency differences in use of testimony

## Other Considerations

- Internal Investigation: Do you want one and will it help?
  - Privilege considerations
- Business changes during the investigation
  - If the investigation reveals violations or compliance issues, consider remedial measures
  - Benefits include: cutting off liability, leniency with the government and, for FTC, possibly undermining ability to bring a case
  - Cons include: looking guilty, creating a record reflecting counterfactuals the agency can use to establish injury
- Third-party risk
  - Derivative action/class action

## Prepare for the Long Haul

Many investigations can last years

Agencies often have a process that they need to follow, even if there is no obvious law violation

- Investigations may need to satisfy many internal stakeholders
- Fighting against sense of agency investment of time/resources

### Wells/NORA/Consent notice of possible action

- Written response
- Commissioner/agency meetings

Even if they find no violation, there are many ways an investigation can end

- Radio silence
- Closing letter



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