



You've Been Served:
What Does the Company Do When a Federal
Grand Jury Subpoena Arrives at the Door?

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Hypothetical scenario

- You are at your desk on Monday morning (sipping your first cup of coffee and checking your email).
- Your assistant walks in and says there are 2 FBI agents in the lobby who want to speak with you.
- The federal agents have a grand jury subpoena for the company for business records.
- Your assistant also says the federal agents want to speak with you - they have a “few questions”
- What do you do?

Rule No. 1 - Keep your cool



Rule No. 2 – Have a plan & follow it

- Federal Grand Jury investigations are serious, time consuming, expensive, and stressful events
- The company must have an action plan to respond to a grand jury investigation:
 - Document retention and production policy (spoliation letter)
 - Point of contact for questions from investigators
 - Compilation of business records
 - Preparation of witnesses for interviews and testimony
 - Internal investigation to figure out what is alleged to be wrong (outside and independent counsel)
 - Gather facts and find a solution to the problem

What is a Federal Grand Jury investigation?

- Federal investigation to gather facts and evidence
 - Generally, criminal in nature (unless qui tam (false claims) – which involves civil investigative demand (CID))
- United States Department of Justice (DOJ) and United States Attorney's Offices (USAO) handle grand jury
- Grand jury investigations of companies and individuals to investigate allegations of crime
- Federal violations of law under Title 18 of the United States Code and other federal statutes
 - Examples: wire fraud; mail fraud; bank fraud; tax fraud; money laundering; FCPA; conspiracy; sale of counterfeit goods; false statements; obstruction of justice

What Triggers a Grand Jury Investigation?

- Whistleblower complaint (internal or external)
 - Disgruntled employees (former and current)
 - Disgruntled customers (former and current)
- Audits and reports
- SEC disclosures
- Incidents and accidents



What is the Federal Grand Jury?

- Investigative body selected by US District Court
- Pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, grand jury proceedings are secret
 - Grand jury must have 16 to 23 members
 - Typically serve 18-month terms – may extend
 - Investigate whether there is probable cause
 - Broad authority to gather evidence
 - Only the prosecutor presents evidence to GJ
 - No requirement to hear exculpatory evidence

How long can the Federal Grand Jury investigation take?

- Most federal crimes have a statute of limitations of 5 years.
 - DOJ has a lengthy period of time to conduct an investigation.
 - Review voluminous documents
 - Interview numerous witnesses
 - Investigation creates uncertainty for the company and employees



Federal Grand Jury - Subpoenas

- GJ subpoena for documents
 - Business records (ex. invoices; receipts; checks; wire transfers; business correspondence)
 - Email communications – internal and external (be careful what you put in an email)
 - Innocuous phrase (“clean up the files”) may be interpreted as obstruction of justice (e.g. Frank Quattrone prosecution)

Federal Grand Jury - Subpoenas

- GJ subpoena for testimony
 - Senior Leadership
 - Management
 - Employees
 - Customers

*counsel cannot be present during testimony in GJ!

*witness not entitled to a copy of of testimony in GJ!



"Our books are balanced. 50% of our numbers are real and 50% are made up."

What Should the Company Do?

- Develop and follow a company plan or protocol for responding to GJ investigation;
- Assemble the team to respond to the GJ investigation (hire outside counsel);
- Decide whether to conduct internal investigation;
- Preserve documents to avoid allegations of obstruction of justice (spoliation letter);
- Documents need to be compiled, organized, reviewed, and numbered for production:
 - Attorney Client Privilege issues
 - Electronic discovery (“e-discovery” or “ESI”) issues
- Interview witnesses.



Determining “Status” in the investigation

- What is the person’s status in the federal investigation?
 - DOJ classification of “status” and categories:
 - Witness
 - Subject
 - Target
- Need to confirm person’s status with the AUSA and/or Agent in writing before decision on testimony
 - Privilege issues
 - Independent counsel

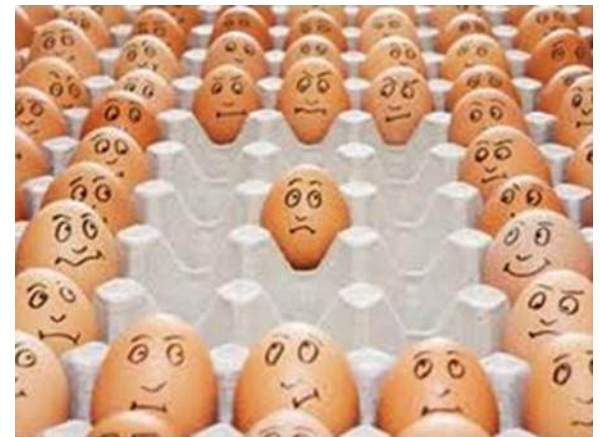


Basic Rules for Witnesses for Grand Jury Testimony

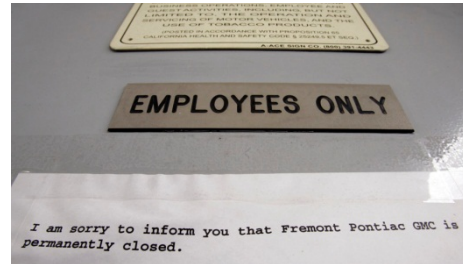
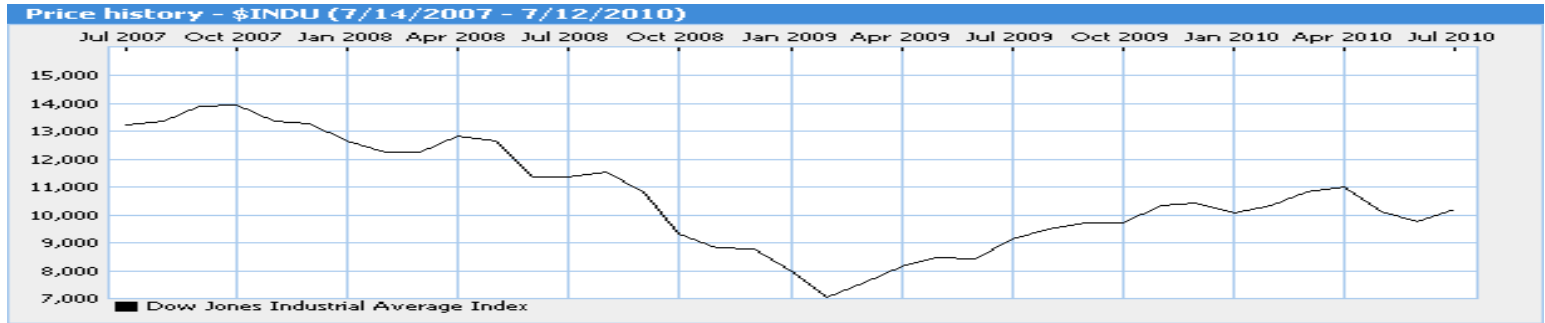
- Rules:
 - Tell the truth
 - Listen to the question, think, then answer the question asked
 - Be accurate -- “to the best of my recollection”
 - It is okay not to remember -- “I don’t recall”
 - Avoid narrative answers
 - Corporate Privilege issue (*Upjohn*)
 - Confer with counsel if necessary outside of grand jury room

Cooperation by the Company

- “Cooperation” in Federal Grand Jury Investigations;
- Cooperation does not mean Capitulation;
- Document production must be responsive and timely;
- Dialogue with federal prosecutor occurs early on in case;
- Memorialize communications with DOJ and federal agents
 - “You are not a target – just a witness”
 - Production extensions
 - Meeting to discuss case



Why is the Grand Jury investigation significant?



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Potential Consequences . . .

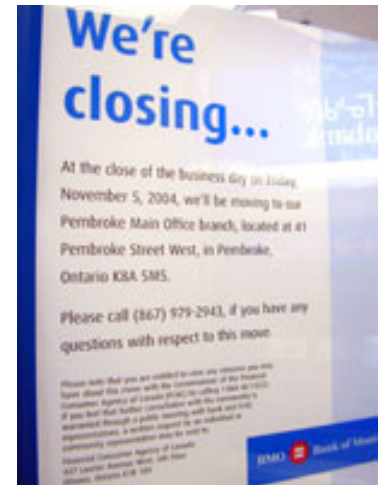
FEDERAL DEPOSIT INSURANCE CORPORATION
 WASHINGTON, D.C.
 CALIFORNIA DEPARTMENT OF FINANCIAL INSTITUTIONS
 SAN FRANCISCO, CALIFORNIA

In the Matter of
 GOLDEN COAST BANK
 LONG BEACH, CALIFORNIA
 (INSURED STATE NONMEMBER BANK)

ORDER TO
 CEASE AND DESIST
 Docket FDIC-08-359b

Golden Coast Bank, Long Beach, California ("Bank"), having been advised of its right to a NOTICE OF CHARGES AND HEARING detailing the unsafe or unsound banking practices and violations of regulations alleged to have been committed by the Bank and of its right to a hearing on the alleged charges under section 8(b)(1) of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1819(b)(1), and Section 1012 of the California Financial Code, and having waived its right to a hearing, the FDIC and the CDFI, under the authority vested in them by the FDIA and the CDFI, do hereby ORDER TO CEASE AND DESIST the Bank from the unsafe or unsound banking practices and violations of regulations for which the Bank is liable under the FDIA and the CDFI, solely for the purpose of this proceeding. The FDIC and the CDFI consented to the issuance of an ORD and the CDFI.

CEASE & DESIST





Counterfeit Electronic Parts

- Increased DOJ enforcement actions
 - GJ investigations and prosecutions
- Increased legislative scrutiny
 - Inquiry into counterfeit electronic parts
 - China is no. 1 source country for counterfeit electronic parts
 - US Trade Representative “Notorious Markets List”
 - Electronic waste (“e-waste”)

18 U.S.C. 2320 – Trafficking in Counterfeit Goods

- Penalties:
 - Individual – 10 years imprisonment and \$2 million fine
 - Company - \$5 million fine
 - If prior offense, then penalties increase to 20 years imprisonment and \$5 million fine for individual and \$20 million for company

Operation Chain Reaction

- A comprehensive initiative targeting counterfeit items entering the supply chains of the Department of Defense and other U.S. government agencies
 - *Two significant indictments involving Florida based Company VisionTech Components and California company MVP Micro*
 - These cases involved the importation of hundreds of thousands of counterfeit integrated circuits from China and Hong Kong for sale to the United States Navy and to defense contractors, including circuits that were marketed as "military-grade."

Test Case: Fla. Based VisionTech Components

- First federal prosecution in a case involving the trafficking of counterfeit integrated circuits
- 10-count indictment unsealed on September 2010 charging Shannon Wren and Stephanie McCloskey with conspiracy, trafficking in counterfeit goods, and mail fraud.
- From about Jan. 1, 2007 through Dec. 31, 2009, defendants generated over \$15 million in gross receipts from the sale of counterfeit integrated circuits
- Defendants imported approximately 59,540 integrated circuits bearing counterfeit marks
- As part of an agreement to cooperate with the DOJ, McCloskey entered a plea agreement and was sentenced to 38 months in prison.
- Wren pled not guilty but subsequently died before trial.

Fla. Based Daytona Aerospace, Inc.

- Daytona Aerospace, Inc., a South Florida aviation parts brokerage business included purchase, sale, and trade of aircraft parts between commercial airlines, private aircraft, other brokers, and Department of Defense.
- Defendants McFlicker and Persaud misrepresented condition and origin of aircraft parts in their responses to bids advertised by the Air Force and Navy. Although orders and contracts required the defendants to supply *new* surplus parts manufactured by Boeing, defendants instead *used* unauthorized local dealers to manufacture the requested parts.
- McFlicker sentenced to 45 months in prison. Persaud sentenced to 37 months in prison. Defendants ordered to pay \$1.4 million in restitution.

What steps can the company take?



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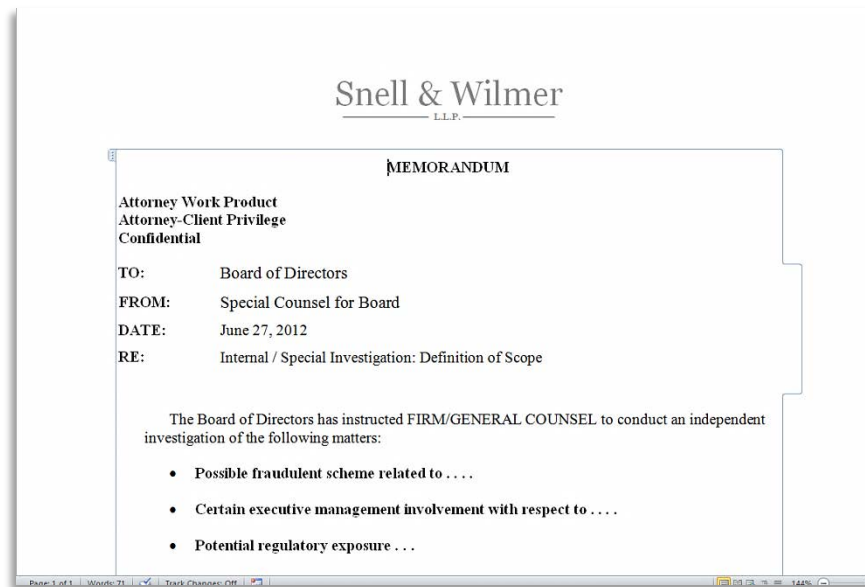


Lessons Learned from recent DOJ prosecutions

- DOJ's Intellectual Property (IP) Section is aggressive in its investigations and solicits cooperation from companies that are victims of counterfeit goods purchases.
- Consult AS6081 and AS5553 – SAE publications standardize practices to:
 - identify reliable sources to procure parts,
 - assess and mitigate risk of distributing fraudulent/counterfeit parts,
 - control suspect or confirmed fraudulent/counterfeit parts, and
 - report suspect and confirmed fraudulent/counterfeit parts to other potential users and Authority Having Jurisdiction

Internal Investigation – Option?

- Decide whether to conduct an internal investigation
- Determine if the company has problems
- Define scope and objectives of investigation
- Figure out if there are problems rather than wait and see what DOJ decides



Internal Investigation – *Why?*

- Determine and document that all illegal activity has ceased as the investigation commences.
 - Important to mitigate civil or regulatory liability
 - Preserve privilege (crime fraud exception)
 - Voluntary disclosure to DOJ?
 - Use investigation results to seek DOJ declination of prosecution
 - DPA and NPA options for company

Concluding Comments

- The company must be proactive when it learns of a federal grand jury investigation;
- Have a plan and follow it to respond to subpoenas;
- Have company counsel engage in dialogue with the DOJ early on and throughout the investigation.

Questions?

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Questions?



Thank You!

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