

**PULLING THE ANTITRUST FIRE ALARM:
MOCK INVESTIGATIONS**

By Sheldon Greenblatt, Esq.

As anyone in corporate America who has ever been involved in a governmental inquiry can attest, being able to develop a strategy early on in an investigation which allows for a proactive assessment of all data sources that need to be considered in responding to a subpoena can be critically important. Such a strategy will also go a long way towards being able to satisfy the regulators and successfully defend the corporation in light of potential charges. Oftentimes, deadlines set by the government for the disclosure of information are aggressive and unattainable. However, the ability to provide information in a timely manner can be key to the government's assessment of a company's willingness to cooperate and can set the tone for the remainder of the investigation.

With the proliferation of the use of electronic communications – particularly electronic mail – the gathering, assessment and production of information has become all the more daunting. Being able to successfully represent that all relevant data sources have been identified, that all privileged documents have been properly reviewed and omitted and then that all responsive documents have been reviewed and produced may seem like an overwhelming and impossible task. Without a proactive plan in place for determining what is needed, a corporation could be faced with an almost insurmountable hurdle when presented with a subpoena or informal inquiry from the government.

In no area of legal practice is the burden of handling electronic evidence greater than in the context of an antitrust investigation by one of the federal agencies. A subpoena from the Federal Trade Commission or Department of Justice (“the agencies”) can immediately trigger the need to manage millions of digital data files for responsiveness and privilege.

A corporation's failure to proactively be prepared in advance for the possibility of such a request, can potentially lead to the production of otherwise privileged documents or a failure to properly respond to a “quick look” by the agencies. Being able to efficiently facilitate the review of your quick look documents by the government can save time, save cost and quite possibly help avoid the escalation of the inquiry.

In order to be prepared in advance for the critical process that is required to respond, the general counsel's offices of some large corporations who are faced with the ongoing possibility of antitrust inquires have begun a process of putting the corporation through simulated or mock investigations. In Europe, where competition regulators can raid a company's premises without notice at any time and search and seize documents, these mock investigations are carried out, sometimes by outside counsel, as mock dawn raids to gauge a company's readiness.

Whether it is done with advanced notice or by surprise in the wee hours of the morning, a mock investigation provides an opportunity to assess a corporation's readiness in the face of a

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possible investigation into antitrust violations and allows the company to identify and address any potential breakdowns or delays in the process so it can be refined. While such an investigation may uncover documents which could be troublesome to a corporation due to its content, or documents hidden as a result of their potential to do damage, it should be the goal of the general counsel to proactively identify such potential problem documents as soon as possible so that an assessment of risk and a strategy as to how best to deal with these types of problem documents can be addressed before an actual subpoena is received. While this may lead to an obligation to disclose the existence of such a document to one of the agencies earlier in the process than otherwise, this should be considered one of the goals of a solid compliance program and of the mock investigatory process.

In many cases, the mock investigation is done with the assistance of a law firm and/or an outside consultant who is expert in the management of electronically stored information to ensure that the response will be complete given the nature and challenges inherent in the field of electronic discovery.

In the exercise, a “mock” subpoena is prepared by the law department of a corporation. The subpoena, which requests all documents, both electronic and hard copy, which are germane to the subject matter of the investigation, is then served upon the company and the fire drill begins.

The impacted business units are then required to do a detailed search and examination to produce all documents that are responsive to the mock subpoena including documents in electronic form. The business units respond to the subpoena and the response is evaluated for completeness by the legal department and outside consultants.

In order to successfully determine whether a corporation is prepared to respond with respect to electronic discovery, a phased approach should be used. It is recommended that the following phases should be included in the mock investigation:

- 1. Initial Intake**
- 2. Data Identification**
- 3. Data Acquisition/Preservation**
- 4. Document Management and Review**
- 5. Mock Document Production**
- 6. Ongoing Support**

During the initial intake phase, the “mock” subpoena should be reviewed and a determination should be made as to what the probable relevant correspondence and discussions were. Meetings should be held between the business units; the outside consultants and counsel in which the document/data preservation notices to be sent internally are discussed and drafted.

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The IT department should then be brought into the process. It is important to draft interview questionnaires to be used in the interviews of IT personnel and other key personnel by counsel and consultants.

During the data identification phase, the key IT personnel should be interviewed to determine all sources of relevant data. In doing so, it is important to map the corporation's IT environment, document archival/backup routines and to prepare document/data preservation plan.

Next, during the data acquisition/preservation phase of the project, the data preservation standards to be employed should be presented to relevant personnel (IT, department managers, senior executives, etc.). A schedule of periodic review of preservation standards should be created and the agreed upon standards for preservation should be implemented. To protect against mistaken deletion of data, processes for taking a snapshot of active data should be discussed and implemented. In addition, backup tapes should be identified and forensic images of designated PCs, laptops, servers and other systems can be created, if warranted. Once this is completed, a central repository for documents and data collected should be implemented. If an actual review is ultimately required, the agencies may be able to review the documents produced within the central repository. The documents and data can then be categorized and preserved for potential future review and production in the case of an actual investigation or derivative action.

The document management and review phase will be crucial as counsel will be able to prioritize document and data sources to be reviewed and determine standards for identifying potentially relevant information. IT personnel and the consultants should collect and address all hard copy and electronic documents and assist in communicating criteria, timeline and status of production to counsel for use when an actual production is needed so that counsel is well prepared and aware of the timeframes that will be needed in the face of an actual investigation or subpoena. A determination of the scope of the effort and the associated costs and timeframes is a critical component of communicating with the government.

During the mock document production phase, counsel and consultants should establish a timeline for production of documents to a potential requesting party and define criteria to be used to pull documents from document review system based on a potential review team's efforts. In addition, a format for production should be chosen and the priority of information to be produced should be determined.

During the ongoing support phase, preservation standards are reviewed to determine whether they should be maintained, relaxed or enhanced.

While this process can be a time-consuming and intensive exercise, it will ensure that a corporation is prepared when investigators actually come knocking. While the exercise is specifically tailored to an antitrust subpoena, going through such a process will actually benefit

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the corporation on many levels and the applications will prepare a corporation not only for an antitrust subpoena, but for any “e-discovery” review whether related to civil litigation or an inquiry by any government agency.



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