

Environmental Enforcement on the Rise: Practical Tips for Responding to Governmental Requests for Information

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EPA Administrator Lisa Jackson has summarized her agency's renewed emphasis on environmental enforcement activities by saying, "EPA is back on the job." In fact, the agency has received the largest enforcement budget in its history, and has nearly doubled its list of enforcement priorities for fiscal years 2011 through 2013. The EPA is not alone. The entire alphabet soup of federal agencies—including the FDA, SEC, FTC, OSHA and their state counterparts—have ramped up enforcement activities in recent years. As a result, there is a significantly greater likelihood that your business will be subject to some type of investigation.

The government's first step in an administrative, civil or criminal enforcement action is often a simple request for information. How a business responds to this initial inquiry sets the stage for how the matter will proceed and be resolved. Below are practical tips to keep in mind when your business receives a request for information from the government.

- **Get it in writing.** Recently, a client received a voicemail from an EPA official asking for all documents in connection with one of the company's waste haulers. If you find yourself in a similar scenario, should you respond to this type of verbal request? The short answer is "No." It is important to get all requests in writing, so that all parties clearly understand the scope of the information sought and the time period covered by the request, as well as the company's affiliates, customers and locations that might be affected. Without a written request, you risk being accused of failing to fully comply with a verbal request that you may have simply misunderstood. Moreover, it is harder to relay a verbal request properly to employees and others who may have relevant information. Asking the government to put its inquiry in writing is within your rights, and you should always make that request before responding.
- **Determine if the government has authority to seek the information requested.** Although a written request for information should specify the statutory authority for the request, don't assume that the agency actually has the cited authority. For example, let's say a business receives a request for information from the EPA pursuant to Section 114 of the Clean Air Act. However, the business itself is not subject to any Clean Air Act requirements. Investigation into the scope and applicability of Section 114 reveals that the government can seek information to "determine whether any person is in violation of any Clean Air Act standard or requirement." The EPA contends that its requests are aimed at finding out whether the business' customers are in violation of the Clean Air Act. This obviously presents a tricky situation for any company—being asked to provide information that may implicate liability of customers. Knowing the source of the government's authority for the request, as well as determining the applicability of the request to your business, is imperative in both limiting the scope of your response and protecting your business interests with customers and other parties that may be affected by the request. Understanding the statutory and regulatory foundation for the request is vital at the beginning of the process, and may shape the content and context of your response.
- **Beware of confidentiality agreements.** Let's assume that the business in the previous example has confidentiality agreements prohibiting release of customer information to any third party. The agreements allow disclosure only if "mandated by applicable law" and, in such cases, the business is required to disclose "only that portion of protected information that is legally required and must exercise its best efforts to obtain reliable assurance that the confidential treatment will be accorded to the protected information that is disclosed." As a result, the business must first determine if, in fact, disclosure is mandated by applicable law. A request for information absent a formal subpoena could arguably be considered voluntary—not legally mandated—disclosure. The business could refuse to cooperate and require the governmental agency to issue a subpoena, thus making the disclosure mandated and allowed under the applicable confidentiality agreement. Another option is to obtain approval from the customer to disclose the information and take steps to prevent the government from making it

public. You should also carefully consider federal and state regulatory requirements for the protection of trade secrets and proprietary business information.

- **Voluntary compliance versus litigation.** Your business should be aware of the pros and cons of voluntary compliance versus requiring the government to follow more formal procedures such as issuing a subpoena or filing a lawsuit. Generally, cooperation is the better course at the early stages of an investigation. For example, you can negotiate the scope of the request for information, the timing of any disclosure, and protections for trade secrets and proprietary information. On the flip side, refusing to voluntarily comply with a governmental request may subject you to administrative penalties. Furthermore, if the agency is forced to invoke its subpoena powers, it may seek a much broader scope of information than was covered in its initial administrative request. Working with the government, is the best way to preempt more burdensome production obligations. It is also the most cost-effective way to handle initial requests, and set a tone of cooperation that may prevent more draconian actions against your business down the road. Of course, cooperation is not always an option, so understanding the risks of fighting with the government is essential at the outset.
- **Assume your company is a target and involve counsel early in the process.** Regardless of the apparent target of the government's inquiry, assume that your business is, in fact, under investigation and may be subject to fines, penalties or otherwise embroiled in a civil or criminal enforcement action. Providing information about your customers or other related parties may reveal statutory or regulatory violations by your business, which will be pursued even if they were not part of the government's initial request. Therefore, it is important to involve outside counsel early in the process. An experienced environmental attorney can help advise your business concerning its rights and responsibilities, develop the best strategy for responding to various types of requests (subpoenas, inspections, employee interviews, etc.), help protect privileges and represent company employees throughout the process.
- **Be honest.** As we all learned in childhood, honesty is the best policy. This is especially true when dealing with the government. It is important to understand the information in your possession, review it with counsel and provide it within the scope of the request, rather than trying to hide or otherwise obfuscate the information. Handling the request in an inappropriate manner could result in claims of obstruction of justice, interfering with investigations, or other types of administrative and civil violations. Moreover, providing materially false information in any matter within the jurisdiction of the federal government is a crime. In fact, the EPA has made criminal enforcement of environmental laws a high priority. In its 2011-2015 strategic plan, the agency outlined its approach to increasing the number of criminal investigations and imposing stiffer criminal penalties for violations of environmental laws.

So what's the bottom line for your business? While certain requests for information may seem innocuous, companies should be aware of the many legal issues and potential pitfalls in responding to them. Particularly in light of the government's increased focus on environmental enforcement activities, it is wise to work with counsel to revisit your protocols for handling investigations and inspections and consider conducting in-house compliance audits before the government knocks on your door.

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