

Fox Rothschild Podcast

Featuring Partner Matthew D. Lee

Interviewer: Welcome to Foxcast Legal Listening

We're talking today with Fox Rothschild partner Matt Lee about what to do if government investigators show up at the front door. Matt has a wealth of experience on both sides of investigations. He started his career as a trial attorney with the U.S. Department of Justice and now represents companies that are on the receiving end. You could say he knows them inside and out.

So Matt, nobody wants to be the subject of a federal investigation. We've seen all the images on cable news reports: An army of agents in matching green jackets carrying boxes of documents out the front door. It looks painful. So what's the right response?

Matt: Well, you're right, of course. Nobody wants to have a team of federal agents show up at the front door of their place of business. But there is some good news, and that is that your company can survive this, if you're prepared. And there are some key steps any company needs to take in order to limit the damage in the event that this happens.

Interviewer: That's really encouraging. So let's start at the beginning then. Which federal agencies are most likely to come knocking on the door?

Matt: Well, there is actually a pretty long list of federal agencies that could potentially show up at your doorstep, and it includes many of the well-known names such as the FBI and IRS, but it also includes lots of lesser known entities such as the Postal Inspection Service. You also have the Securities and Exchange Commission, the SEC, the Drug Enforcement Administration, the DEA, and Immigration and Customs Enforcement, or ICE, just to name a few.

Interviewer: That is a real alphabet soup of federal agencies. How does a company end up on their radar?

Matt: Well, there are many things than can trigger a federal investigation. Some of the more common include things like an audit, a routine audit that might be conducted by the Internal Revenue Service. We are starting to see more and more criminal investigations prompted by whistleblowers. It can also be things like suspicious activity reporting by a federal institution. That's when your bank reports a suspicious financial transaction that can catch the attention of federal investigators. We are also starting to see more and more self-disclosures that can bring scrutiny from federal investigators. What this means is a company discovers something has gone wrong and brings it to the attention of federal law enforcement which triggers an investigation.

Interviewer: That's interesting. So, once an agency is tipped off and opens an investigation, how does it go about gathering evidence?

Matt: Well there really are three primary ways a federal agency conducts an investigation and gathers information, and every one of them is pretty intimidating.

The most common way is simply by using a subpoena. And a subpoena can be either issued by a grand jury or by an agency administratively. No matter which way the subpoena is actually issued, it is a legal document that compels a company to divulge information and documents.

Another common way law enforcement agencies conduct investigations is through a search warrant. This is used when surprise and document preservation are the primary goal of the agency. A search warrant can only be issued by a federal judge. When a search warrant is issued it gives federal agents the legal right to enter your business and collect certain, specified information as well as to potentially interview your employees.

And the final way law enforcement agencies conduct investigation is by showing up unannounced at an employee's home and conducting an informal interview. They can also do this at your place of business.

Interviewer: So how should a company respond?

Matt: That really is the most important question to be asked. And the way a company should respond to a law enforcement inquiry or investigation depends on what is known as their status in the investigation.

Interviewer: What do you mean by status?

Matt: In every investigation, law enforcement will typically categorize an individual or a company by status. And there are three different statuses that can be assigned to someone who is under investigation.

Number one, you can be a "target." This is the worst status that you can be assigned. This means investigators or a grand jury have substantial evidence linking you or your company to a crime, and the prosecutor views you as a likely defendant. So if you are categorized as a target it really means there is a high probability you are going to be criminally charged in the investigation.

On the other end of the spectrum is "witness." This is really the best position to be in if you find yourself implicated in a federal law enforcement investigation. If you are categorized as a witness it means the agents have information or documents that connect you to the investigation but you are not implicated in the crime, you are simply a bystander with information the federal agents are interested in obtaining.

In the middle is the "subject" category. This really means that you are in the middle. It that means you or your company's conduct is within scope of the grand jury's investigation. So you are more than simply a witness to a potential crime, but you are not quite a target. That means you are not necessarily going to be charged in the federal investigation but your conduct is within the scope of what is being investigated.

Of the three, being categorized as a witness would be the best and being categorized as a target would clearly be the worst. Subject obviously falls right in the middle.

Interviewer: So all things considered, how does your status effect your response?

Matt: Your company, or the individual's status in the investigation really is going to dictate how you respond to the investigation. This is a very tricky question and it is not an easy one to answer. It really depends on the facts and the circumstances of every case and every investigation so there is really no clear answer we can give. But there are some general guidelines to follow.

Generally, if you are a target, if you have been identified as a target of a federal investigation, you are in all likelihood going to want to take advantage of the right to remain silent and that means invoking your Fifth Amendment right not to incriminate yourself. That means not voluntarily speaking to investigators and not voluntarily providing information that could be used against you. This isn't always going to be the case, but it is generally going to be true in most cases where you are the target.

Now on the other hand, if you are a witness – and again witness is the least culpable category you can be in – it means you are you're not really at risk of being criminally charged. So generally, if you are a witness, it is often a best bet is to cooperate with an investigation and tell investigators what you know. Of course, that is not a hard and fast rule, and every case, as I said, is a little bit different. But generally if you are in the witness category you are going to be in a much more cooperative posture with respect to the investigation

Lastly, when you are a subject, it's a little bit more tricky because once again you are in the middle category. You are not a witness but you are not a target either. And so it really will depend again on the facts and circumstances – if you are a subject – whether you want to cooperate with the investigation and voluntarily speak with investigators, provide information or provide documents. On the other hand, there may be instances when you are subject that you don't want to do that. Again, this is where there are no hard and fast rules to follow. It is really a case-by-case decision. That's really why, in our view, it's critical that you consult with an experienced white collar criminal defense attorney to give you the proper advice on how to deal with the implications of a federal investigation, regardless of whether you are a target, a witness or a subject.

Interviewer: That's great insight. Thanks Matt. And thanks for taking some time to sit down with us.

Have specific questions about responding to federal investigators? Matt can be reached at Fox Rothschild's Philadelphia office at 215.299.2765 or via email at mlee@foxrothschild.com. That's M-L-E-E at Fox Rothschild dot com.

Fox Rothschild LLP is a national law firm with 800 attorneys in 21 offices coast to coast. Our clients come to us because we understand their issues, their priorities and the way they think. We help clients manage risk, and make better decisions by offering practical advice. Visit us on the web at www.foxrothschild.com.

#