

“Sir, We Have a Search Warrant”

What To Do When FBI, DOT, FAA, OIG Is at Your Door

The Aviation Symposium Webinar Series



Presenters



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Today's Agenda

- Who comes calling?
- Why are they calling?
- What do they want?
- When and where do they come from?
- How will they get what they want?
- How should you respond?



Who comes calling?

- Federal Agencies/Regulators
 - US Department of Transportation (USDOT)
 - NTSB
 - FAA
 - Office of Inspector General (OIG)
 - SEC – Disclosure/Securities/FCPA issues
- State Agencies/Regulators
- US Department of Justice
 - FBI
 - DOJ Fraud Section
 - Civil Investigations
- Local United States Attorney Offices



U.S. Department of Transportation

- USDOT Office of the Assistant General Counsel for Aviation Enforcement and Proceedings
 - Monitors compliance with and investigates violations of the DOT's aviation economic, consumer protection and civil rights requirements



Office of Inspector General - USDOT

- Authorized by the Inspector General Act of 1978
- Duties and Responsibilities (Section 4):
 - Audits and investigations relating to programs and operations
 - To keep the Secretary and the Congress fully and currently informed concerning fraud and other serious problems related programs and operations, and to recommend corrective action
 - To make criminal referrals to the Department of Justice whenever OIG “has reasonable grounds to believe there has been a violation of Federal criminal law”



Office of Inspector General - USDOT

- Authority (Section 6):
 - Access to Agency records and employees
 - Can issue subpoenas for documents (only) to outside/third parties
 - Legislation to issue subpoenas for witness testimony



Office of Inspector General - USDOT

- Staffing: Auditors, Investigators (civil and criminal), Program Evaluators, Attorneys
- Focus on false claims, false statements, fraud, embezzlement, licenses, certificates, unapproved parts



USDOT-OIG Annual Statistics

(April 1, 2016 – March 31, 2017)

- 4,489 Hotline Contacts/Reports/Complaints
- 305 Investigations Opened
- 226 Investigations Referred for Criminal Prosecution
- 47 Investigations Referred for Civil Prosecution
- 64 Indictments
- 57 Convictions
- *Over \$980 Million in Restitution*



National Transportation Safety Board

- Independent Safety Board Act - 49 USC §1131
- 49 CFR § 831.2: NTSB is required to investigate accidents involving aviation, highways, railroads, pipelines, hazardous materials, and other accidents that are catastrophic, involve recurring issues, or otherwise fulfill NTSB's safety mandate.



Federal Aviation Administration

- 49 USC § 46101/49 USC § 40113 – FAA can investigate if there is reasonable ground that a person violating Air Commerce and Safety Part of Title 49, or regulations thereunder
- 49 USC § 106(t)/49 USC § 42121 – investigate aviation safety whistleblower issues



FAA

- 14 CFR Part 13 (Investigation and Enforcement Procedures)
- Investigates violations of
 - Federal Aviation Act of 1958
 - Hazardous Materials Transportation Act
 - Airport and Airway Development Act of 1970
 - Airport and Airway Improvement Act of 1982
- Has full range of investigatory tools



U.S. Securities and Exchange Commission

- SEC Primary Mission Is to Protect Investors
- Sample Violations Leading to Investigations
 - Insider Trading
 - Material Misrepresentations or Omissions
 - Manipulation of Securities
 - Whistleblower Retaliation
- SEC Has Administrative/Civil Authority
- Makes Criminal Referrals



Why are they calling?

- Responding to complaints from
 - Customers
 - Competitors
 - Employees
 - Whistleblowers
 - Victims
- Media Reports
 - Formal complaint not needed
- Referrals to Agency
 - Other Agencies
 - Congress
- Agency Priorities



What do they want? Information!

- Documents
 - Financial Records
 - Operational Records
 - Accounting Records
 - Compliance Records
 - All Communications
- Electronic Information
 - Email, texts, social media
 - Archived materials
- Cooperation
- Interviews



When and Where Do They Come From?

- When? Depends on Circumstances
 - Exigent? Anytime.
 - Ordinary Course of Business
- Where? federal / state / local
 - Complaints
 - Audits
 - Investigations
- Civil and criminal investigations may proceed on parallel, independent tracks
 - But (with restrictions) criminal investigators may have access to civil investigation material



How Will They Get What They Want?

- Public Domain Sources
 - Media Reports
 - Litigation Files
- Audit
- Requests for Information
- Civil Investigative Demands
- Administrative Subpoenas
 - OIG Subpoenas for Documents
- Interview Requests



How Will They Get What They Want? (cont'd)

- Compulsory Interviews When Available
- Grand Jury Subpoenas
- Search Warrants
- Agent Interviews
- Grand Jury Testimony



How Should You Respond?

- Breathe
- Report Internally
 - Supervisory Chain
 - Compliance/Audit
 - Counsel
- Outside Counsel/Advisors Needed?
- Coordinate/Plan Ahead
- Know Your Rights
 - Do Not Waive
- Preserve Information
- Cooperation



How Should You Respond? (cont'd)

- Reactive - Wait and See
 - Comply with information requests as they arise
- Proactive - Internal Investigations
 - Does the matter justify an internal investigation?
 - Do you know extent of problem?
 - Do you need prompt improvements?
 - Are there reporting requirements?



Reactive: Subpoenas

- Involve counsel
- Review scope and time to respond
- Identify who should be included in response effort
- Preserve privileges



Reactive: Search Warrants

- Do Not Interfere with Underway Process
- Obtain Copy of Warrant
- Inform Appropriate Company Personnel
- Contact/Consult Counsel
- Obtain Contact Information for Supervising Agent(s) and Attorney(s)
- Observe Search Process and Take Notes
- Ensure that only items covered by warrant are taken
- Cooperate
- Do Not Volunteer Information
- Request Opportunity to Copy Important Records



Proactive: Internal Investigations

- HR or Supervisor
- Compliance or Internal Audit Department
- Investigators or other outside consultants
- In-house counsel
- Outside counsel



Why conduct an internal investigation?

- Fulfills Regulatory Requirements
 - Regulators
 - Law Enforcement/Prosecutors
 - SEC Reporting Requirements
 - Fulfills Duties of Directors and Managers
- May Limit Exposure
 - Department of Justice
 - SEC
 - Regulators
- Information is Power
- Gives Time to Contemplate Strategy/Options
- Shows Company Takes it Seriously



Investigation Plan

- Scope and purpose
- Who authorizes it?
- Who should investigate?
- Identifying key issues
- Use of consultants
- Role of Internal Audit and HR
- Prioritize
- Regular updates – no drift
- How report results?
- Disclose to law enforcement?



Investigation Plan (Documents)

- Consult with IT department; consider outside vendor
- Check state laws and employment agreements re: employee electronic information/privacy
- Understand document retention policies and schedule for automatic deletion of emails/documents
- Document hold notices
- Identify which individuals need to be involved with obtaining documents
- Identify document privileges



Investigation Plan (cont'd)

- Engagement letter
- Rendering legal advice
- In anticipation of litigation
- Mark documents privileged and confidential attorney-client communications and work product



Who Should Investigate?

In –House Counsel

- Pros:
 - Faster
 - Cheaper
 - Understand the company and its culture
- Cons:
 - External stakeholder expectations
 - Privilege concerns
 - Business vs. legal purpose *In re John Doe Corp.*, 675 F.2d 482 (2d Cir.1982)

Outside Counsel

- Pros:
 - Objectivity
 - Expertise
 - Scalability
 - Stronger privilege protection
- Cons:
 - Less familiarity with business
 - More expensive
 - Slower



Who Should Investigate? (cont'd)

- Coordinate functions between in-house and external counsel to obtain best of both worlds
- Important to have external counsel that understands aviation law and the aviation industry.



Disclosure Obligations

- Is Disclosure Mandatory or Voluntary?
 - 49 CFR § 830.5
 - Failures, Malfunctions and Defects
- If Voluntary . . . Whether to Disclose?
- What to Disclose (if not covered by an AC)?
 - Nature of error/wrongdoing
 - Evidence of intent
 - To Whom?
 - What Format?



Employee Interviews: The Basics

- Review email, texts, documents prior to interviews
- Identify Issues and Interviewees
- Identify Interviewers
- Use Third Person Notetaker
- *Upjohn* Warnings
- Explain Purpose and Subject Matter of Interview
- Use Written Interview Outlines and List of Questions
- How to Record Interviews?
- *Use Documents*
- Follow the Evidence



Employee Interviews (cont'd)

- Advise employee that he/she is expected to answer questions fully and truthfully
- Advise employee that you represent company, not employee (part of *Upjohn* warnings)
- Get affirmative acknowledgement from employee and memorialize
- Advise employee that company determines whether information should be turned over to third parties (such as the government)
- Advise employee that failure to cooperate with internal investigators can lead to disciplinary action, including termination



Employee Interviews: Common Questions

- Are you my lawyer?
 - No
- Do I need a lawyer?
 - We cannot advise you
- Who will pay for a lawyer?
 - Review company policies
 - Right to indemnification in company bylaws?
- Can a lawyer represent more than one employee?
 - Absence of conflict
 - Pool Counsel

