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Tips For Responding To An FTC Subpoena

Law360, New York (August 27, 2015, 7:36 AM ET) -- Receiving a subpoena from the Federal Trade Commission can be unnerving and may appear daunting in the scope of its requests. In the current age of electronic discovery, a company facing such a subpoena could easily have thousands of pages of potentially relevant information that must be searched for, identified, collected, reviewed and produced. In addition, there may be requests that ask for specialized data kept by the company to be identified and produced.

To best determine and provide the most responsive and important information, it is often necessary to place limits on the parameters of documents searched, reviewed and produced to make the subpoena response feasible and to isolate important information for the FTC. Negotiations with the FTC regarding scope of discovery, time frames and even format of production can assist in reducing the burden for companies served with an FTC subpoena. Whether in-house counsel will be preparing a response to the FTC or outside counsel is preparing the response, it is helpful to consider the following general practice tips:



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Understand What the FTC is Looking For

First, analyze the subpoena requests to digest and understand what data or information the FTC needs to perform its investigation or analysis. The FTC sometimes sends quasi-form requests that may not be tailored to a company's specific data processes. Conducting a thorough examination of the request at the outset, especially if the company has responded to a previous subpoena, can help best position the company in evaluating the request, keeping in mind knowledge about the company's capabilities and retained information in order to begin formulating a discussion with the company about where potentially responsive documents and data may be located.

If you have assisted the company with responding to an FTC subpoena previously, consider comparing the two requests to each other to determine what was able to be produced on the prior matter, and where the FTC agreed to limit the scope, to assist in framing the response to a subsequent subpoena.

Understand What the Company Has

Many times the FTC will not know how a company's data is kept or what information it may possess. A thorough discussion at the outset with the appropriate company stakeholders,

including contacts in the legal department, relevant business units, and information technology personnel, with a full understanding of the requests in the subpoena, will help direct the company's response. If the company is accustomed to getting similar subpoenas, a confirmation that previous specifications and information is still relevant and possessed may be all that is necessary, with an eye out for new specifications or data points requested. If the company is new to the FTC subpoena process, or personnel changes have taken place within the company, a more fulsome discussion will be important to formulate a plan to provide a sufficient response.

Important items to discuss with company resources include careful analysis of each subpoena specification regarding at least the following parameters:

- The type of data requested by the FTC;
- The date scope requested;
- Custodians, systems, or shared locations that may house relevant data;
- Depending on volume and/or information requested, potential identification of relevant documents through keyword searching as necessary; and
- Methods of collection, review and production of responsive documents.

Discussing these issues with company contacts ahead of any communication with the FTC will allow you and the company to form a plan and action items to address with the FTC, and allows the opportunity for outside counsel to gain knowledge regarding potential areas of limitation for the subpoena in advocating for his or her client with the FTC.

Negotiations With the FTC

After a fulsome understanding of the subpoena and the company's documents and data, the next step is often to schedule a call with the FTC regarding the subpoena. The subpoena may even require the scheduling of a call with appropriate FTC personnel within a certain number of days from receipt of the subpoena. Items for discussion include:

Scope of the Subpoena

Understand from the FTC the specific information and data that is needed for the agency's investigation or analysis. The subpoena requests may have been written as intentionally broad at the outset because the FTC may want to ensure it is casting a wide net for information. However, after providing the FTC with information on what documents or data is or is not available, or types of data the company does not keep, you may be able to narrow the scope of the requests. The goal is to reduce the volume of information to be searched and reviewed, while still providing the information needed by the FTC for its analysis. Consider whether any of the following potential limitations may apply:

- Date scope;
- Geographical region;
- Custodians;
- Areas/storage methods to be searched;
- Other areas delineated in the subpoena.

Technical or Administrative Matters

Once scope is agreed upon, make sure you discuss with the FTC any technical or administrative

matters that may impact the company's response, including:

- A timeline for response to the subpoena;
- If necessary, a request to make submissions on a rolling basis or in phases;
- Categories of data or information the FTC may want earlier in the response timeframe (or what may be deferred);
- Limiting produced data to that in active storage, eliminating the need to pull from backup tapes or archives;
- Any data collection that would be unduly burdensome, as the FTC may agree to limit the initial production to avoid causing such a burden.

Consider documenting all discussions and reasons for decision when negotiating and tailoring a discovery plan. Often, the FTC will formalize any limitations or modifications to the subpoena in a letter following the call. If not, documenting the agreements reached can help to ensure all parties understand what the company's response will — and will not — include.

Collection and Review of Responsive Documents

Once the specifications and information needed are set between the company and the FTC, identification and collection of documents can begin in earnest. Many times FTC subpoenas request a response in a tight time frame, so a company may not have the response times it may be accustomed to from litigation. To limit the burden on the company, consider the following:

- Work with identified custodians or information technology employees to access and collect responsive documents or data in a timely manner.
- Assess whether documents or data reside in central locations or databases that may cause collection challenges or may require unique or specialized collection processes.
- Plainly communicate any deadlines, with time for reminders and late submissions built in.
- Create a timeline for the response, from collection through review and production. Ensure appropriate resources are available for each stage of the process, and enough flexibility is built in to address any unforeseen issues or delays.

- Utilize specific, clearly communicated processes to collect documents in the format needed for review and production. Specify format and accompanying metadata needed for production during the collection process.
- Analyze documents for confidential and privileged information. Build in time to make appropriate redaction for responsiveness and privilege, identify privileged documents needing to be withheld from production and, if required, create a privilege log according to FTC specifications.

Production to the FTC

After the data is collected and reviewed, it must be prepared for production in accordance with the subpoena. Some production considerations include:

- Analyze the subpoena instructions for production requirements. Depending on the contents of the documents and data and the subpoena instructions, this may require specialized formatting, encryption and logging of documents.
- Ensure that the instructions in the subpoena regarding items such as metadata and production format are analyzed and followed.
- Involve IT — where helpful or necessary involve your IT or litigation support in order to assist the company by ensuring complete compliance with technical instructions mandated by subpoena.
- Prepare the production and produce to the FTC in advance of the deadline, if possible, to ensure timeliness.

Closing Insights

Receiving a subpoena from the FTC can be an unexpected diversion from normal day-to-day processes of a company. However, implementing response measures that include involving counsel throughout the process, from analyzing the subpoena, through negotiations of scope, and until production is complete, can assist the company with locating, collecting, reviewing and producing responsive documents while lessening the impact on the company and its employees.

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