A request for documents from the SEC—whether by letter requesting voluntary production or by subpoena compelling production—is a serious matter with significant consequences. How one responds to such a request from the start can substantially affect how the investigation proceeds and may even affect the ultimate outcome of the matter. Responding to a document request requires promptly engaging with the Staff, preserving records, gathering relevant facts, and negotiating the terms of any production, while protecting privileges. While any production can be costly, counsel can reduce the risk of unnecessarily broad productions and expensive court fights, which can damage reputations and lead to unnecessary private litigation.
Voluntary Document Productions

Q 3.1  Must you respond to a letter from the SEC requesting that you “voluntarily” produce documents or information?

While not legally required (if you are not associated with a regulated entity), normally you should treat a letter from the SEC Division of Enforcement (“Enforcement”) seeking voluntary production as if it were a subpoena. Failure to comply with a voluntary request could result in several adverse consequences. First, it is highly likely that the Staff of the SEC Division of Enforcement (the “Staff”) will issue a subpoena for the same or even more information. Second, the Staff may conclude that you have something to hide. Third, the Staff may be less flexible in the inevitable negotiation of the subpoena. Finally, cooperation or non-cooperation is a significant factor the Staff and the Commission consider in resolving a matter.¹ Voluntary or informal investigations arise out of law enforcement investigations with potentially very serious consequences for any and/or individuals involved.

The SEC investigative process often begins with an informal, preliminary inquiry known as a MUI (Matter Under Inquiry). A MUI is an inquiry that provides the Staff with an opportunity to examine an
issue for a sixty-day period. If the MUI is not closed within sixty days, it is presumed that the Staff has a basis for an investigation and the matter is automatically converted into an informal investigation. The investigation will remain informal unless and until the Staff obtains a formal order of investigation, which may be issued by the Commission or, more often, by the Director of Enforcement pursuant to delegated authority. Once a formal order is issued, the Staff attorneys designated as Commission officers in the formal order have the power to issue subpoenas in the matter compelling production of evidence.

The Staff’s decision to proceed informally should not be considered a reliable indicator of the seriousness of the investigation. The most important practical difference between an informal and a formal investigation is that only a formal investigation authorizes the Staff to issue a subpoena to compel production of documents and testimony. Parties to informal investigations are generally granted similar procedural safeguards as those in formal investigations and, in either case, the Staff may share any material you provide with other enforcement agencies, such as the DOJ. All SEC investigations are non-public.

Many companies prefer to avoid formal investigations and are willing voluntarily to provide significant materials to the Staff to avoid encouraging the Staff to obtain a formal order of investigation. In informal investigations, the Staff is dependent upon the company’s cooperation, which may afford the company a better opportunity to help shape the investigation. Indeed, the company may wish to volunteer to have its own attorneys, or independent counsel reporting to the Audit Committee or similar body, first conduct an internal investigation and then report its findings to the SEC, which allows the company some control over the scope of the investigation. Also, formal orders may attract more institutional attention should the company decide to disclose the existence of the investigation, which often is done once a subpoena is issued. Companies also generally find it beneficial to be viewed by the Staff as cooperative. On the other hand, insurers under many directors’ and officers’ policies take the position that they are not required to pay defense costs until a formal order has been entered. Hence, parties have sometimes requested the issuance of a subpoena so that they can recover the costs of defense of the investigation from insurers.
Compulsory Document Productions

Q 3.2  If the SEC issues a subpoena, may you move to quash it or resist production in other ways?

By statute, the SEC may subpoena witnesses and require the production of any records reasonably relevant to a lawful inquiry. A party is not entitled to move to quash an SEC subpoena to that party, but neither is the subpoena self-enforcing. Instead, the SEC must ask a federal district court to enforce it. If a party challenges the validity of an SEC subpoena, the SEC must show that (1) the inquiry is being conducted for a legitimate purpose within the authority of the SEC; (2) the subpoena is not too indefinite; (3) the information sought is reasonably relevant to the inquiry; and (4) the subpoena complied with required administrative procedures and was not issued in bad faith or for improper purposes. This is not a difficult standard for the SEC to meet.

While courts have indicated that a showing of improper purpose, such as harassment, may be a basis for denying enforcement of a subpoena, we are not aware of any successful challenges on this basis. One circuit court indicated, in dicta, that proof that a formal investigation was undertaken solely because of political pressure could be a basis of denying a subpoena when it reversed an order denying subpoena enforcement and remanded for further fact finding. But instances of successful opposition to SEC subpoena enforcement actions are few indeed. And, under the provisions of the Right to Financial Privacy Act, which specifically allows a motion to quash in limited circumstances, the wife of an alleged law violator, who was not herself the subject of the SEC investigation, quashed a subpoena to a bank for her bank account records without prejudice to the SEC refiling. Citing the Second Circuit’s “heightened scrutiny” test for subpoenas to innocent family members of those subject to investigation, the district court concluded that the SEC failed to carry its heightened burden to show that the information could not be obtained from another source or by a more narrowly drawn subpoena. But even such partial success against SEC enforcement of subpoenas is rare. Moreover, not only is a party likely to lose the SEC subpoena
enforcement action, but the filing of the action will put into public view what might have remained confidential, often with serious allegations of law violations being made in a proceeding where the party will not have the opportunity to rebut the allegations, even though the SEC may lack evidence to support the allegations.

**Initial Response to Document Request**

**Q 3.3 What steps must be taken to plan for production to the SEC?**

The American legal system generally provides for broad discovery of all relevant information and the standard for relevance in agency investigations is even broader than in typical civil litigation. Moreover, over the course of the twentieth century, the volume of paper records maintained by American companies expanded tremendously with the development of photocopiers and other new technologies. Efforts in the closing years of the twentieth century and in the twenty-first century to go “paperless,” especially when combined with ever expanding email, Facebook, Twitter and other types of electronic communications, have again exponentially expanded the amount of discoverable information, along with the time and expense involved in locating, reviewing and producing that information. Indeed, the technological intrusion of an SEC investigation can be shocking to the uninitiated. Executives today may use for their work not only company-issued desktop and laptop computers and smart phones but also their personal electronic devices, laptops, tablets, smart phones, and personal email, Twitter and similar accounts, even if only occasionally. To the extent that these were used for company business, these may all be within the scope of an SEC subpoena or voluntary document request and steps need to be taken to ensure that responsive information is not inadvertently deleted. This obviously raises privacy concerns for company executives and employees, which companies need to take care to address.

The four steps to production, whether paper or electronic, are (1) identify and preserve the responsive information; (2) collect the information; (3) sort and analyze the information in a reasonable, efficient manner, including making privilege determinations; and (4) produce the responsive non-privileged material.
What must be done first to identify and preserve information upon receipt of a request for production from the SEC?

The immediate tasks are to learn the universe of responsive documents and develop a plan to search for them. You must ensure that all responsive documents and information requested are preserved for review and possible production. Later, you may narrow the scope of what is reviewed, but first you must preserve everything of potential relevance. Failure to preserve and collect responsive information at the outset not only risks significant increased costs from having to redo the effort later, but risks having the data altered or destroyed before it can later be collected. Sometimes severe sanctions can result.

One study found that in civil litigation from 1981 to 2009 about three of every four judicial sanctions for e-discovery violations were against defendants (with more cases in 2009 than all years combined before 2005) and that thirty-six e-discovery sanctions cases resulted in either dismissal or default due to:

- Failure to preserve evidence: 20
- Failure to produce: 7
- Both failures to produce and to preserve: 9

Counsel must identify and speak with possibly relevant custodians of documents and with the company’s IT staff to gain an understanding of the company’s data systems and tools. Automatic data-preservation systems, such as computer programs that regularly delete emails after a specified time, must be halted to ensure that no responsive information is lost. This may include stopping the overwriting of backup tapes, if that is still the company’s practice.

A litigation or document hold should promptly be distributed to all potential custodians of responsive documents to ensure that they take immediate steps to preserve all requested information. A sample
litigation hold for a company is included as Appendix 3A. Counsel may have an obligation to preserve any records he or she knows may be relevant to a future claim, even if they are not yet the subject of a request to produce.21

There are four common steps to identifying the scope of the discovery response, preserving the necessary materials and gathering needed information potentially to narrow the scope of the SEC request:

- First, attempt to determine the relevant subject matter based on the SEC request and what appear to be the potential claims and defenses, which may be broader than the specific, initial request from the SEC. It may not be possible to determine at this early stage what the SEC is really investigating.

- Second, identify potential custodians and individuals with responsive information and determine whom to interview to determine what records and information exist. Make sure that each of these individuals receives the litigation hold.

- Third, determine the relevant period and to what extent records are available for that period.

- Fourth, as a result of your analysis, outline the locations of documents and data storage systems to be included in the search. This analysis should include estimates of time and expense involved in various aspects of the potential search, which may be useful in negotiating reasonable limitations should the requested search prove unduly burdensome in time or money expenditures.

Q 3.5 What if the SEC request for documents is overly broad and unduly costly to preserve and collect?

In many cases the Staff’s initial request is extremely broad. It is an invitation for counsel to approach the Staff in a cooperative manner to engage in productive negotiations over the terms of the request. The SEC’s investigative powers are akin to those of a grand jury’s broad power of inquisition.22 Moreover, the Staff themselves effectively serve as the grand jurors responsible for shaping charging decisions.
Counsel may confer with the Staff to try to determine what the SEC is concerned with obtaining. Defense counsel can explain business procedures and why the initial request is broader than what the Staff may need, explaining why the request will cause unnecessary delay and expense and will result in collection of a good deal of information that the SEC will not find helpful. Counsel must be prepared to offer reasonable alternatives which should get the SEC substantially all the information it needs more quickly while saving the client from unnecessary expenditures of money and time. At the same time, counsel likely will assure the Staff that, should the Staff later determine that the compromise is inadequate, they can revisit the need for a broader search.

Counsel cannot eliminate all cost and burden, but should concentrate on the items that cause the client the greatest burden if, in good faith, they may be carved out of the scope of responsive documents. The Staff normally will want to avoid receiving a large dump of irrelevant documents. Among the items that may be subject to negotiation are:

- **Return dates and extensions:** The Staff often requests completion of production within an unreasonably short period of time to start the process, but the Staff normally will agree to reasonable requests for extensions, especially if you volunteer to make rolling productions of groups of documents as your collection and review allow. It is not unusual for it to take many months to complete a large production.

- **Time periods covered:** Counsel may be able to limit the period of time covered by the SEC requests and in this way reduce the burden of the search.

- **Scope of request:** Through discussion, counsel sometimes may convince the Staff to limit the scope of the request to the core of what they are seeking, while assuring them that the broader category will be preserved in case it is later needed, explaining in detail why this will save time and money for all concerned and is still highly likely to provide the Staff with all of the information they really need.
• **Priorities or order of production:** The Staff may find what they want early in the production and review and not insist on further production.

• **Records covered:** Through discussion, counsel may find a way to focus the Staff’s attention more directly to the group of documents most likely to contain the responsive information, after explaining what specifically is retained and available.

• **Custodians:** Often the Staff can be convinced to limit the search to the records held by the central players in the transactions of interest so that tangential sources do not require expensive searches which are unlikely to lead to discovery of highly responsive information.

• **Alternatives to production:** Sometimes a narrative description, summary, chronology, or an oral presentation may substitute for production of large quantities of documents and more directly answer the questions the Staff has without the Staff having to sort through and analyze large amounts of material. This may lessen both the costs of production and the chance that the Staff may miss or misinterpret important information because of either the sheer volume or their unfamiliarity with the systems or terminology. Indeed, the Staff may sometimes request such alternative forms of production, although they lack the authority to compel such compilations. Often, the Staff may seek “documents sufficient to identify. . .” This may serve as an invitation to provide information in a narrative form. But while narrative responses may allow you to present the facts in the most favorable light, they also may be admissible at any later trial as an admission.23

• **Alternatives, especially for some individuals and small businesses:** The Staff prefers that the entire production be made electronically but does permit productions by photocopy.24 The Staff may be particularly receptive to paper productions where individuals or small businesses are recipients of requests. This may occur where the number of documents is relatively small, but the costs would be comparatively large if the normal electronic specifications were imposed.
Electronic data, which is often voluminous, expensive and time-consuming to collect and review, requires special consideration. Rule 26(b)(2) of the Federal Rules of Civil Procedure, which imposes some limits and procedures on document productions in order to reduce costs and burden, and recent amendments to Rule 26(b)(1), which narrowed the scope of discovery to “relevant” information and added a “proportional to the needs of the case” test, do not apply to SEC investigations. However, these provisions may be helpful comparative guidance in negotiations with the Staff.

Q 3.6 Are there special considerations regarding negotiations with regard to electronic data?

Even a relatively limited document request may involve tens or hundreds of thousands of pages of electronic documents, and for a major corporation can easily run into millions of pages of documents. Copies of all responsive electronic documents must be collected and eventually provided to the SEC in as close to identical form to the original as possible. This will require the use of special forensic tools and, in most cases, the hiring of outside forensic technicians with experience in dealing with the special requirements of SEC productions. This is discussed in more detail in Q 3.7. Failure to protect, collect and deliver true copies of requested information consistent with SEC protocol can lead to severe penalties. Counsel should keep in mind that courts have held that this obligation applies to counsel as well as clients.25 Moreover, as discussed in Q 3.8 below, use of search terms and other methods of electronically reviewing large numbers of documents is almost always necessary because document-by-document review is both cost-prohibitive and less efficient than well-run electronic searches.26

As previously noted, SEC document requests generally demand access to all responsive information. In this technological age of instant communication, many employees will use not just their company-issued devices and accounts but any of a number of personal devices and accounts. This can greatly complicate the search for responsive documents and increase the expense of production. While some companies attempt to limit this problem ahead of time by prohibiting use of personal devices and accounts for business use without the express permission of the company, given today’s demands
for instantaneous communications, even these companies generally face this same collection problem. Moreover, when personal devices and accounts must be searched, the threats to individual privacy are front and center in any document review. Counsel should thus be especially diligent in negotiating with the Staff the narrowest scope of any search for information from personal devices and accounts. Privacy problems can cause particular problems for companies collecting information internationally. For example, the European Union’s General Data Protection Regulation provides, among other things, comprehensive privacy protection for information about individuals, with severe sanctions for violations. Where an SEC demand requires producing information from another country, it may be advisable to consult with counsel from these other jurisdictions who are expert in their local privacy protection laws and blocking statutes. Where compliance with an SEC demand would violate the laws of another country, you might respectfully ask the Staff to use its ability to obtain information from overseas through its arrangements with foreign securities regulators rather than persist in seeking such information from the company directly.

For individuals and small businesses, the costs of electronic production may be prohibitive, and the Staff may offer to have SEC technicians do the work if you will provide them with your computers and other electronic devices. This is a dangerous offer to accept. Obviously, this could reveal privileged information to the SEC, and the safeguards the Staff offers are never wholly satisfactory. Moreover, such an approach risks waiver of privilege to third parties, including the DOJ and private litigants. In any event, doing so means that the SEC will know more about your documents than you do, and even if they share the “relevant” documents with you, you cannot know what they are withholding. Perhaps a document you may recognize as exculpatory will not be relevant to their less educated eyes. More importantly, it is seldom the case that you can be certain that somewhere on the computer, perhaps in a deleted file that is still recoverable in a deep forensic search, there is not some document that can cause you problems. The Staff may well alert other authorities if, for example, an employee used the computer for some unauthorized activity of questionable legality and outside the scope of the securities laws. Finally, allowing complete access to irrelevant and personal information raises privacy concerns.
Q 3.7 Do you need to hire outside vendors to handle or assist with electronic discovery?

Few companies and law firms have the internal IT expertise to respond properly to an SEC document request of any magnitude, and even if a company does, it is often advisable to hire an independent forensic firm. The SEC employs a team of forensic examiners, and it usually insists that exact copies of electronic evidence be provided to it in searchable form that includes all required metadata fields pursuant to a specific production protocol. Metadata is unseen electronic tracking information stored electronically and reveals information such as when, what and by whom changes have been made to the document. Generally, simply hitting “delete” for a document does not actually delete either the content of the document or the accompanying metadata but only the link between the name of the document and that information. The company is best protected if a respected outside vendor hired by its outside counsel—so that the attorney-client privilege attaches to communications with counsel—oversees collecting, storing and delivering documents to be produced. If problems arise, as may occur in any sizable document production, the Staff is less likely to accuse the company of intentional or reckless wrongdoing and may more readily accept the explanation and corrections offered by the outside vendor. Moreover, expert vendors can often alleviate the burden resulting from the collection of massive volumes of documents and suggest means for most efficiently reviewing them.

Another important process that often is better handled by an expert vendor is the forensic copying of servers, electronic data repositories and electronic devices of key personnel who are most likely to possess the most important documents requested. Forensic copying of electronic data sources is necessary because ordinary copying or forwarding of an electronic document alters the document and its metadata. Also, documents can be purposely or inadvertently deleted. Severe penalties for spoliation may result. Modern forensic duplication technology and equipment makes it possible to duplicate electronic documents while preserving the metadata.
Q 3.8 How should you develop electronic search terms?

Searching electronic documents normally involves the use of search terms to determine which documents will be collected and reviewed. These search terms usually are developed by outside counsel, working with in-house counsel, through consultations with and/or interviews of company custodians. Counsel not only learns how and where records are retained, but also the relevant business terminology and special company lingo and project code names that can be used as search terms to locate those responsive documents. Significant documents already available can also be used as a source for key terms.

Just as one should do in court before incurring substantial collection expenditures, counsel may seek agreement from the Staff concerning the methodology to be used in gathering responsive information. This may be important with regard to the use of search terms for locating responsive electronic documents. In general, following careful study of the SEC request, and before expending time and resources reviewing a significant volume of materials, it is desirable to discuss the search protocol with the Staff to give the Staff an opportunity to comment on the protocol before it is implemented. Often, the Staff will request this information. However this discussion is started, the Staff may make suggestions as to search terms and custodians and, although in the course of doing so the Staff ordinarily will remind counsel that it is the company and counsel who are responsible for identifying and providing all responsive documents, Staff participation in developing the protocol greatly reduces the risk of having to redo the search.

One approach to consider, which the Staff has sometimes permitted, is using technology assisted review (TAR), which is sometimes called predictive coding. TAR uses software to “learn” from information entered by an attorney who is reviewing a sample of documents and marking them as responsive or not. The software identifies coding and linguistic patterns, applies them to the larger group of documents and culls what it predicts are the most responsive documents. Advocates of TAR argue that it can be more reliable and less expensive than human review. While TAR is not yet widely accepted by the
SEC and there are very few court decisions providing guidance in this area, its use is gaining traction.\textsuperscript{32} Moreover, while TAR may be less expensive, it can still be costly.\textsuperscript{33} Before beginning a TAR-based review, counsel should discuss the proposal with the Staff. From the authors’ experience, the Staff may agree to such a review, but reserve the right to have the document review done all over again using search terms.

**Q 3.9** How should you respond to a subpoena for electronic storage devices, rather than documents?

Occasionally, the Staff will not only request production of broad categories of documents, but will seek to compel production of electronic storage devices, such as computers, smart phones and network devices or thumb drives.\textsuperscript{34} Indeed, in a few instances, when a witness has been called to testify, the Staff has issued a forthwith subpoena (which calls for the immediate production of information, typically in exigent circumstances)\textsuperscript{35} for immediate production of any smart phone, laptop or similar device the witness may have brought to the testimony room.\textsuperscript{36} For this reason, counsel should advise the witness not to bring such devices to the testimony room. Moreover, counsel should consider declining to comply with such a request for devices since such requests may be overbroad (acting as an unlawful search and seizure), rather than being the “records” request to which the authority of the SEC is limited by section 21 of the Securities Exchange Act of 1934.\textsuperscript{37}

Enforcement’s procedures provide that forthwith subpoenas should be used sparingly after consultation with others in Enforcement and only when there is a “specific reason to believe [the witness or custodian] may destroy or falsify records” or where he or she is a “flight risk” or “uncooperative or obstructive.”\textsuperscript{38} Courts have questioned the overuse of forthwith subpoenas in other contexts.\textsuperscript{39}

Any subpoena for electronic devices raises questions of privilege, privacy and overreaching in that they are likely to lead to discovery of information outside the authorized scope of the SEC investigation. Counsel should be cautious because compliance, followed by a motion to suppress, rather than refusal to comply and a motion for a protective order, may be held to be a waiver of any objection.\textsuperscript{40} It also
raises the concerns discussed at Q 3.6 above with respect to accepting Staff proposals to have its technology experts do the search on your devices.

Because, as discussed above at Q 3.2, SEC subpoenas are not self-enforcing, the best course may be to decline respectfully and require the Staff to enforce the subpoena in court, in which case counsel’s objections to production will be heard by an independent third party.

**Q 3.10 What best practices should be followed in the information collection stage?**

Because Enforcement has a specific protocol for electronic productions, the collection should be done in a fashion that will enable a compliant production. Normally, the Staff will include with the document request itself a copy of the SEC’s Data Delivery Standards setting forth the document production specifications it demands. These standards are also described in detail in the SEC Enforcement Manual. Because these specifications are both specific and complex, and failure to comply with them in detail can lead to problems with the Staff, extra expenses incurred because of the need to complete production a second time, and potentially significant sanctions, it is best to engage an expert forensic IT vendor.

**Q 3.11 What are the best practices for sorting and analyzing the collected information?**

Once all documents have been forensically collected, they must be put into a form allowing review by counsel for relevance and privilege. The initial step is to process the data by running it through specialized software to separate text into a searchable field and cull metadata into the fields required by the SEC. At this stage, software can eliminate duplicate documents, referred to as deduplication (or “deduping”), so that time is not wasted reviewing the same documents twice or more. This initial processing can be quite expensive, often costing hundreds of dollars per gigabyte of data. Sometimes, based on estimates of the expense of this processing stage, it is advisable to contact the Staff in an effort to reduce that cost before actually undertaking this processing. For example, counsel may be able to explain the significant cost
of processing the collection of documents in order to negotiate for processing a smaller volume.

Generally, the documents will be culled by using search terms to focus only on probably responsive documents and to locate probably privileged documents which went to or from or mention an attorney or her staff. Thereafter, attorneys normally review the probably responsive documents to determine whether they in fact are responsive—since the fact that a document contains a key word does not mean that it necessarily deals with the actual issues in dispute—and whether they contain privileged communications. Depending on the number of documents at stake, the complexity of the issues, and the degree of risk to the company from the SEC investigation, this review may be done by in-house counsel or law firm counsel, using either firm associates or hired attorney reviewers (or sometimes contract lawyers) who work at a lower rate. In any event, a second level of review is normally done by experienced law firm counsel to ensure quality control, make decisions when close questions of relevance or privilege arise, and identify or verify the most important documents (sometimes referred to as “hot docs”). The attorney review is both necessary to protect the company or individual whose documents are sought and the most expensive part of the process.

Cooperation in Document Productions

Q 3.12 How does counsel cooperate most effectively with the Staff on document production?

One of the most significant developments in the securities practice in the past decade, since the SEC issued its 2001 “Seaboard Report” regarding cooperation credit, has been the SEC’s growing demand for and reliance on cooperation from companies and, more recently, individuals in SEC investigations. The effects of these developments on the merits of investigations and settlements, including new processes adapted from criminal proceedings, is dealt with in detail in the next chapter of this book. However, it is clear that the SEC, the recent amendments to the Federal Rules of Civil Procedure, and the courts all expect and demand consultation and cooperation on issues
concerning the scope and methods for collecting and producing documents in SEC investigations. Furthermore, given its complexities and costs, such consultation is normally in the best interests of the company and individuals involved. There often are legitimate issues as to how to approach these discovery tasks, and most Staff members will attempt to reach reasonable solutions when issues are brought to their attention.

Under the SEC policies, an important element of cooperation credit in any settlement is the timeliness and completeness of document production. Conversely, additional charges and penalties may result from perceived non-cooperation in document production. This point was demonstrated in the SEC’s financial fraud case against Lucent Technologies, in which the SEC imposed a $25 million civil penalty for Lucent’s “lack of cooperation.” Lucent’s lack of cooperation, the SEC explained, included incomplete and tardy document productions, compounded by ineffective document preservation measures. Similarly, the SEC attributed a $7.5 million civil penalty settlement against Halliburton Company to “lapses in . . . conduct during the course of the [Commission] investigation” that resulted in delayed document production. More recently, Weatherford was fined $1.875 million for ineffective document preservation measures.

Some members of the Staff interpret cooperation to prohibit a company from sharing documents with other witnesses. However, such a position may run afoul of the ethical restrictions related to document sharing in the ABA’s standards of conduct, as well as similar rules adopted by most state bars. These ethical rules prohibit a lawyer from requesting that another person refrain from voluntarily giving information to a third party unless the failure to share the information would not adversely affect the third party’s interests. Moreover, some companies may believe that it is necessary to refuse to share company documents with former (and, sometimes, current) employees. In the view of these authors, companies should recognize that documents must be made available to allow witnesses to refresh their memories so that they can provide complete and truthful testimony, and companies should attempt to convince the Staff of this position. Furthermore, withholding such documents may undercut the company’s own interests, as an unprepared executive may misspeak due to memory lapse and leading questions and thus make misstatements.
which may be binding on the company. Without necessarily challenging the Staff directly, these types of demands generally may be resisted or disregarded. Cooperation with the SEC does not require non-cooperation with other witnesses.

Privilege Considerations and Confidentiality in Document Productions

Privilege Considerations

**Q 3.13** What steps need to be taken to protect privileged materials?

The risk of waiving privilege through inadvertent production is a significant, but manageable, risk. This risk is especially salient with electronic data, including embedded data, which can be difficult and very expensive to review. As discussed below, SEC policies, including clawback and non-waiver agreements, Federal Rule of Evidence 502(a), and common sense based on analogy to the existing Federal Rules of Civil Procedure, provide a framework to reduce this risk.

The privileges and other protections available include:

- Attorney-Client Privilege;
- Work Product Doctrine;
- Fifth Amendment protection;
- Invasion of privacy and tax returns; and
- Confidentiality Agreements.

**Q 3.13.1** When and how do you prepare a privilege log?

The Staff typically requests the preparation of a privilege log listing each document withheld in whole or in part under any of these claims of privilege or work product doctrine. In some instances, some grouping of documents—such as multiple copies of the same document differing only in the comments added by various parties—may be appropriate. The logs should identify the authors and recipients, date created, subject matter, and explain why each of the elements of
the claimed privilege or doctrine apply, including the attorneys and clients involved. Privilege logs generally can be provided following completion of production, although circumstances or Staff demands may differ. Indeed, some investigations end either without any charges or through settlement without the need to produce the privilege logs. Nonetheless, best practice is to prepare the privilege logs as production progresses. While affidavits may be required when a court is asked to resolve disputes regarding the claims of privilege, they are generally not necessary at the SEC investigative stage.53

**Q 3.13.2 When does the attorney-client privilege apply?**

The attorney-client privilege is intended to encourage free and open communication between a client and lawyer, which can only occur if confidences are protected.54 Since the privilege may obstruct the search for the truth, however, it is sometimes construed narrowly.55 The definition of the privilege can be summarized as protection for:

1. a communication;
2. made between privileged people, that is, client and attorney or their agents;
3. in confidence; and
4. for the purpose of obtaining or providing legal assistance to the client.56

Counsel should be familiar with the “crime-fraud exception” to the attorney-client privilege. The crime-fraud exception to the attorney-client privilege applies when the SEC can show “(1) that the client was engaged in (or was planning) criminal or fraudulent activity when the attorney-client communications took place; and (2) that the communications were intended by the client to facilitate or conceal the criminal or fraudulent activity.”57 While the circuit courts of appeals are divided on the specific level of proof required to demonstrate a prima facie case of crime-fraud, “all effectively allow piercing of the privilege on something less than a mathematical (more likely than not) probability.”58 The crime-fraud exception extends only to “those communications and documents in furtherance of the contemplated or ongoing criminal or fraudulent conduct,”59 although the Staff usually argues to the contrary.
Q 3.13.3    When does the work product doctrine apply?

The work product doctrine established by the Supreme Court in *Hickman v. Taylor*, which was substantially codified by Federal Rule of Civil Procedure 26(b)(3), protects documents prepared:

1. by a party or its representative, including its attorney and people working for its attorney; and
2. in anticipation of litigation.

The work product protection is not absolute, as it ordinarily can be overcome by sufficient showing by the opposing party that it has:

1. a substantial need for the documents; and
2. that the information in the documents cannot be obtained from other sources without undue hardship.

Courts are required, however, to “protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.” This opinion or core work product receives the greatest protection and, unlike ordinary work product materials, opinion or core work-product protection cannot be overcome by a showing of need. The work product doctrine may protect compilations of particular documents which reflect an attorney’s mental processes, such as those he determines to be material under his interpretations of the legal theories and thus shows to the client in preparation for a deposition. Work product can be asserted by an attorney independently of the client or by the client.

The crime-fraud exception applicable to the attorney-client privilege also applies to deny protection under the work product doctrine when a client consults an attorney in order to further a crime or fraud.

Q 3.13.4    What is the Staff’s position on the ability to maintain privilege over documents shared with the independent auditor?

The Staff often takes the position that any disclosure to the independent auditor waives all privilege claims. The Staff’s position is strong regarding the attorney-client privilege, but weaker with respect
to the work product doctrine. Under federal common law, courts generally have held that if a company discloses material to the company’s independent auditor, while acting in its capacity as an auditor, the company waives the attorney-client privilege. With respect to work product, the one federal appellate court decision directly on point held that a company sharing work product with its independent auditor did not waive work product protection. There are a few district courts that have found waiver, including one in the Southern District of New York. However, the majority of courts, including one in the Southern District of New York, have found that there is no waiver of work product protection resulting from sharing protected information with auditors.

Q 3.13.5 What happens if you inadvertently produce privileged information?

The SEC generally follows the provisions of Federal Rule of Evidence 502. Rule 502(b) provides that production to a government agency does not waive the privilege if (1) the disclosure was inadvertent; (2) the privilege holder took reasonable steps to prevent such disclosures; and (3) the holder promptly took reasonable steps to correct the inadvertent disclosure.

If the Staff agrees that the information is likely privileged and that the holder of the privilege has promptly informed the Staff (or sometimes that the Staff has quickly found the error) the Staff ordinarily will return or destroy their copies of the privileged documents after both resubmission of the production without the privileged documents and addition of the privileged documents to the privilege log. If the Staff disagrees that the privilege applies, such as where they believe the documents demonstrate waiver, then the Staff may seek a further justification as to why the privilege applies.

Q 3.13.6 Under what circumstances may you invoke protection from document production under the Fifth Amendment privilege?

The Fifth Amendment to the U.S. Constitution provides a right not to be forced to testify against oneself. This Amendment also provides protection from compelled production of documents where the act
of production would have a testimonial aspect adverse to the person making the production, such as by authenticating the documents. However, a corporation does not possess a Fifth Amendment privilege, and, thus, a corporate custodian cannot resist a subpoena on the basis of the Fifth Amendment. A corporate custodian is not completely unprotected though where the act of production may also incriminate the custodian; the Supreme Court has held that “the Government may not introduce into evidence before the jury the fact that the subpoena was served upon and the corporation’s documents were delivered by one particular individual, the custodian.” Similarly, compelling a corporate custodian to complete a “custodian of records” form, as the SEC often seeks, for the purpose of qualifying responsive documents as business records may violate the custodian’s Fifth Amendment privilege. The government, however, may still introduce the evidence at trial as having been produced by the corporation.

There is a split in the circuits as to whether a former employee has an act of production privilege for the production of records of a former employer. The Second and Ninth Circuits have held that there is a privilege, but the D.C. and Eleventh Circuits disagree. In SEC v. Lay, the SEC took the position that a former employee of a corporation cannot assert an act of production privilege for company records. The SEC went on to argue that the former employee in the particular case did not qualify for an act of production privilege for personal records and, to the extent such a privilege was available to the former employee, he had waived that privilege by transferring the records to a third party (in that case, a bankruptcy examiner). The issue was resolved by stipulation whereby Lay agreed to produce the documents and the SEC agreed that it would not argue for a broader waiver on the basis of his production. The Staff sometimes will agree to a similar stipulation to avoid having to address the issue of a general Fifth Amendment waiver resulting from production of specific documents to it.

The Supreme Court has also held that broadly worded subpoena requests that require a defendant to make subjective, analytically based discriminations among documents require a testimonial act to respond to them and are thus protected by the Fifth Amendment. In that case, the defendant was granted immunity for the act of production in response to a subpoena with eleven broad document requests.
and subsequently complied with the subpoena. Using the produced documents during the course of its investigation, the government eventually prosecuted the defendant. The defendant appealed, arguing that the use of the documents to pursue the investigation violated the immunity grant, which was coextensive with his Fifth Amendment rights by law, because it made use of his act of production. The Court rejected the government’s argument that using the contents of the documents in its investigation was permissible because only the physical act of producing and the implicit authentication of the documents were protected. The Court explained that the response to the broadly worded subpoena “was tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of particular documents fitting certain broad descriptions.” Thus, the government’s use of the documents in its investigation, which were identified and categorized by the defendant, made improper use of the testimonial aspect of his act of production.

Confidentiality

Q 3.13.7 May you decline to produce on the basis of privacy rights and confidentiality?

There is no general right to privacy prohibiting subpoenas for private documents, although officials “must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy.” Congress has enacted various privacy protection measures, including the Privacy Protection Act of 1974 and the Right to Financial Privacy Act of 1978, that apply to SEC productions. These statutes, however, require only that notice be given before obtaining certain types of information from certain types of institutions. The Electronic Communications Privacy Act of 1986 permits SEC subpoenas for the content of communications from third-party electronic communications service providers only after the passage of 180 days, by which time most service providers no longer retain emails or similar electronic records. While each of these privacy statutes is complex, little litigation has resulted. Moreover, these records often may be obtained directly from the sender or recipient. Similarly, while the SEC cannot obtain a person’s tax returns from the Internal Revenue Service without the person’s consent, the SEC may subpoena the
same tax returns directly from the filer. Tax returns may also be sub-
poeaed from a private accounting firm or other non-governmental third party without violating section 6103(c).95 Courts have speculated that it might be possible to compel a person who has not retained their tax returns to obtain them from the IRS and produce them.96 In each case, the issue will be whether the SEC can show that the SEC’s law enforcement needs for the information in the tax returns outweigh the privacy intrusions from production of income tax returns; it may be difficult for the SEC to make such a showing when, for example, the relevant information is available from another source.97 A lack of relevance or materiality combined with privacy concerns can sometimes enable one to obtain some reasonable concessions from the Staff concerning what must be produced; in any event, truly irrelevant, private emails—such as emails to a spouse or child about family affairs—may reasonably be weeded out before production as nonresponsive.

With particularly sensitive responsive information, the Staff may, in limited circumstances, agree to review the documents without retaining copies or agree to an oral presentation of the information. This approach may be used, for example, with board minutes addressing potential transactions under active consideration or with valuable intellectual property. The fact that the SEC computers have been successfully hacked makes the production of extraordinarily valuable information a particularly sensitive issue.98

While you have the right to redact privileged information in a responsive document, you do not have the right to redact other non-responsive information in such a document. Nevertheless, where there is particularly confidential nonresponsive information in an otherwise responsive document, counsel might consider redacting the nonresponsive information and marking the redaction as nonresponsive. One should only try this approach where there are compelling reasons to do so. The Staff may let the matter go or the Staff may, after some discussion, insist on production of the redacted material.

You should be aware of the fact that if there is related private securities litigation, the plaintiff will often demand you to produce everything you produced to the SEC and use the fact that the SEC already has the documents as part of the basis to seek a limited lifting of the PSLRA stay, arguing, among other things, that there is no burden
involved in producing again what has already been produced to the 
government.\textsuperscript{99}

\textbf{Q 3.13.8} \textit{What protections can you expect from a 
confidentiality agreement with the Staff?}

There are sometimes strategic advantages to sharing with the SEC 
privileged or otherwise confidential documents. Providing such evi-
dence may bolster an individual’s or company’s ability to obtain coop-
eration credit and strengthen the ability to negotiate less aggressive 
disgorgement and penalties. In addition, producing such documents 
may enable one to argue a defense based upon those documents. A 
company, for example, may provide evidence such as interview notes, 
to bolster an argument that the company’s controls were adequate 
and its decisions were made in good faith. However, intentionally pro-
ducing privileged documents risks a privilege waiver and a broader 
subject matter waiver for undisclosed, privileged materials.

Accordingly, the SEC has a form confidentiality agreement pursu-
ant to which a producing party agrees to provide privileged informa-
tion in return for the Staff’s agreement not to claim a waiver of priv-
ilege and to maintain the confidentiality of the documents or other 
information, “except to the extent that the Staff determines that dis-
closure is required by law or . . . in furtherance of the SEC’s discharge 
of its duties and responsibilities.”\textsuperscript{100} While this agreement provides 
some protection for the producing party in later privilege disputes 
with the SEC, the answer is far from clear and requires careful anal-
ysis of the decisional law in applicable jurisdictions. For example, 
most federal courts have held that such selective waivers provide 
no protections with respect to non-parties to the SEC Confidentiality 
Agreement.\textsuperscript{101} While other federal courts have applied the doctrine of 
selective waiver on a case-by-case basis to preserve litigants’ rights 
to assert privilege when the only disclosure was to the SEC pursu-
ant to a confidentiality agreement providing for non-waiver.\textsuperscript{102} A court 
may consider a common interest between the party and the SEC, 
rather than a purely adversarial relationship, to be a significant factor 
in favor of applying selective waiver.\textsuperscript{103} Additionally, Delaware state 
courts have endorsed the concept of selective waiver to the SEC for 
work product provided to the SEC after the execution of a confiden-
tiality agreement.\textsuperscript{104} Similarly, Federal Rule of Evidence 502(e), which
states that, absent a court order, such an agreement is only binding on its signatories, will only bind the SEC to the agreement. Such an agreement, however, may be used to support an argument to curtail or prevent claims by others of a broader subject matter waiver by creating a rebuttable presumption of no general waiver.

**Technical Aspects of Document Productions**

**Q 3.14 What should be done to protect confidential information from disclosure pursuant to FOIA?**

The Freedom of Information Act (FOIA) gives any “person” the right to request copies of any documents in the possession of the SEC or any other federal government agency, subject to nine specific exemptions, which include, for example, confidential financial information whose disclosure could cause competitive harm, personal information which would lead to a clearly unwarranted invasion of personal privacy and certain law enforcement records. Recent years have witnessed a large increase in requests for company documents held by the SEC, largely because of the appearance of “research” companies which obtain company information and then sell it to hedge funds, accounting and law firms, investment banks, and others who believe the information will provide their own businesses with an edge.

SEC Rule of Practice 83 provides the method for seeking confidential treatment of information provided to the SEC in an investigation or other matter. Each page of each submission must include a Bates number of the page and the following statement: “Confidential Treatment Requested by [fill in name of company or other submitter].” Additionally, a letter must be submitted to the SEC’s FOIA office specifically requesting confidential treatment. This letter must (1) state at the top that it is a “FOIA Confidential Treatment Request”; (2) identify the confidential documents by Bates numbers, explaining when and to whom or in what matter the documents were submitted to the SEC; and (3) contain the name, address and telephone number of the person submitting the information, as well as whom to contact, if someone else, in the event that there is a FOIA request for access to the submitter’s documents. Best practice is to
Bates stamp the letter requesting confidential treatment as well and to request that it also be treated as confidential. The other documents for which confidentiality is requested, which should include any cover letter accompanying the document production, should not be submitted to the FOIA office, although some choose to do so with heavy redactions instead of writing a separate letter. If still appropriate, this request should be renewed in ten years or the request will expire at that time. Counsel should also request the return of documents as soon as the SEC’s investigation has been completed.

SEC Rule of Practice 83 further provides that a person requesting confidential treatment for personal or business information is not required to substantiate its request until after the SEC FOIA office notifies the confidentiality requester of a request for the records which the FOIA office has made a preliminary decision to grant. Nevertheless, common practice is to state in the accompanying cover letter what exemptions are claimed and explain generally why they apply so that the FOIA office will better understand why it should not even preliminarily decide to disclose the information. Once the submitter of the information receives notice from the FOIA office that a FOIA request has been made, the submitter is permitted ten calendar days in which to explain in detail why the documents are exempt from compelled disclosure under the FOIA and provide other reasons why the documents should not be produced to the FOIA requester. Once the SEC FOIA office makes its final decision to disclose or decline the FOIA request, the losing party has ten calendar days in which to appeal the decision to the SEC General Counsel.

Any appeal of a denial of a request for confidential treatment must be in writing and be prominently identified on the envelope and at the top of the first page by the legend “FOIA Confidential Treatment Appeal.” The appeal must be sent by mail or fax to the SEC FOIA office with a copy by mail to the SEC General Counsel. The person requesting confidential treatment may supply additional substantiation of the request for confidential treatment in connection with the appeal to the General Counsel, including affidavits. If the General Counsel determines that confidential treatment is not warranted, disclosure of the information will occur ten calendar days after notice to the person requesting confidential treatment, unless that person
notifies the General Counsel within that time that suit has been filed in federal district court challenging the decision, in which case the General Counsel will stay disclosure.\textsuperscript{118} However, the General Counsel may, upon ten calendar days’ notice to the person requesting confidentiality, lift the stay and disclose the documents, unless the district court issues its own stay order.\textsuperscript{119}

A party may challenge an agency’s decision to disclose information in what has become known as a “reverse” FOIA action in which the “submitter of information—usually a corporation or other business entity”—seeks to prevent the agency from revealing it to a third party in response to the third party’s FOIA request.\textsuperscript{120} The party seeking to prevent a disclosure assumes the burden of justifying nondisclosure.\textsuperscript{121} In some instances, FOIA Exemptions may be asserted to try to prevent disclosure of company information by the government even outside the context of a FOIA request.\textsuperscript{122} The landmark reverse FOIA case is \textit{Chrysler Corp. v. Brown}, in which the Supreme Court held that jurisdiction for a reverse FOIA action cannot be based on the FOIA itself, which “does not afford” a submitter “any right to enjoin agency disclosure.”\textsuperscript{123} The Supreme Court held that the APA’s standard of judicial review on the administrative record under an arbitrary and capricious standard should “ordinarily” apply to reverse FOIA actions.\textsuperscript{124} Subsequently, the D.C. Circuit rejected an agency’s argument that a reverse FOIA plaintiff should bear the burden of proving the “non-public availability,” finding that it is “far more efficient, and obviously fairer” for that burden to be placed on the party who claims that the information is public.\textsuperscript{125} The D.C. Circuit also upheld the district court’s requirement that the agency prepare a document-by-document explanation for its denial of confidential treatment.\textsuperscript{126}

**Q 3.15 What are best practices to follow when producing documents to the SEC?**

The SEC has detailed procedures for the production of documents which should be carefully followed—although when there are unusual circumstances or where application is unclear, the exact form of production is open to discussion and negotiation with the Staff.\textsuperscript{127} SEC requirements include:
• **Review platform:** Concordance and Opticon are used by the SEC for review of electronic documents, so productions must be done in a format compatible with this use. Exceptions for this requirement include: electronic phone records, trade records, banking records, and video files.

• **Formats of production:**
  1. Scanned documents in Tagged Image File Format (TIFF) to include optical character recognition (OCR) or extracted text;
  2. E-mail; or

All of these records, except spreadsheets, should be converted to TIFF files, including emails, with Bates numbers on each page. TIFF files also allow easy redaction when necessary. Each should include the native file versions, which should be linked, allowing the reader to look back and forth at the versions of the documents. If the original documents were in PDF, then an alternative to TIFF files is conversion to searchable PDF files, which also permit easy use of Bates numbers and redactions. Spreadsheets should be produced in native format with a place marker for Bates numbers for each spreadsheet. In the event that spreadsheets or other normally native format documents require redactions of privileged portions, then a TIFF file will have to be used even though it will be more difficult for the SEC to review. Alternatively, or should the SEC object that it is losing access to the metadata, including formulas used on spreadsheets, you may discuss producing the document in native format after redacting the privileged portions. You should not do this without first obtaining the Staff’s agreement because the act of making the redactions will change the metadata.

Each document should include thirty-three metadata fields as specified by the SEC. The SEC often prefers that these productions be organized by individual custodian, although the SEC generally requires only one production of identical documents; thus, it may be prudent to discuss with SEC counsel how they want production of, for example, a single email sent to multiple recipients. Different Staff may
have different preferences. You may, for example, attach a file stating who received each identical document and when that occurred. Also note that, “[i]f copies of a document differ in any way, they are to be treated as separate documents.”128

All data productions must be produced using industry standard self-extracting encryption software. Passwords for documents, files, compressed archives, and encrypted media should be provided separately either by email or in a cover letter separate from the data.129

Financial Industry Regulatory Authority (FINRA) Rule 8210 permits FINRA Staff to demand production of documents, including electronic records, from members and associated people. However, FINRA rules do not specify the technical specifications for electronic productions, except from companies for insider trading investigations. Thus, following SEC electronic production guidelines should generally also work for FINRA productions, although this is not required. FINRA does require, however, that all submissions be encrypted and that the encryption key be provided separately to FINRA.130

The DOJ’s discovery production standards are very similar to those of the SEC, so there should be little conflict when producing to both agencies.131 However, since the specifications are not precisely the same, counsel producing documents to both agencies should consult with Staff from both agencies at the outset as to joint productions to ensure that there are no disagreements down the road.

If, for any reason, you deviate from the SEC specifications without pre-approval from the Staff, you should normally specify in writing what those deviations are when you produce the documents. Providing less than complete and accurate information to the SEC can have severe adverse consequences. However, if you discover that something you have told the Staff is incomplete or otherwise not wholly accurate, it is generally best to inform the Staff of the mistake quickly, state how it happened, and correct any misinformation—hopefully before the Staff discover it themselves. Such errors can lead to distrust, so they need to be corrected promptly to avoid misunderstandings.

When documents are produced, they may be mailed or delivered to the SEC Enforcement Division Central Processing Unit (ENF-CPU) at SEC headquarters in Washington, D.C. or, for electronic productions
of under 10MB in size, they can be emailed to: ENF-CPU@sec.gov. The company generally should request that the documents be provided with confidential treatment pursuant to 17 C.F.R. § 200.83A(a), which will help to avoid, for example, the risks of disclosure of company secrets to competitors pursuant to FOIA requests.132

Completing Document Productions

Q 3.16  What are certifications of completeness?

Often, as a condition of settlement, and increasingly at other times, the Staff will request (or demand) a certification from an individual, a company executive or company counsel that the production provided by the individual or company is complete or identified on a privilege log, and that no agreement by the Staff to limit the scope of production was requested in order to delay or avoid production of responsive documents.133 This sometimes presents a dilemma since no certifier can know what responsive documents may exist of which he or she is unaware, and there is no accommodation in the certification for unintended non-production of responsive documents. The Staff does not demand a certification in every settled case, even though SEC settlement policy generally requires such a certification.134 When a demand is made as a condition of settlement, counsel should attempt to qualify the certification to exclude any limitations to which the Staff has agreed and to avoid certifying to inadvertent non-disclosures. In addition, to protect the certifying party, the certifier may be able to rely upon sub-certifications, possibly from an expert vendor overseeing the production, if one exists, which explain the document search in detail, including the steps taken to ensure complete production, a description of the methodology used, the scope of the search, any tools and assumptions used, and an opinion on the completeness and accuracy of the search and production. Thereafter, should a problem arise, the certifier can show his or her good faith reliance on these sub-certifications with their full explanations of the bases for the certifications.
Notes to Chapter 3


3. See 17 C.F.R. §§ 200.30-4(a)(1), 202.5(a) (2019); SEC ENFORCEMENT MANUAL §§ 2.3.3, 2.3.4.

4. See SEC ENFORCEMENT MANUAL, supra note 2, § 2.3.4.

5. See 17 C.F.R. § 202.5(a) (2019); SEC ENFORCEMENT MANUAL, supra note 2, §§ 2.3.3, 2.3.4, 3.2.6, 3.2.6.1.

6. See, e.g., SEC, Form 1661, Supplemental Information for Entities Directed to Supply Information to the Commission Other Than Pursuant to Commission Subpoena, at 1–2 (2016) [hereinafter SEC Form 1661], https://www.sec.gov/about/forms/sec1661.pdf (applying to regulated persons or entities directed to supply information other than pursuant to a subpoena); SEC, Form 1662, Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena, at 1–2 (2016) [hereinafter SEC Form 1662], https://www.sec.gov/files/sec1662.pdf (applying to witnesses requested to provide information or testimony voluntarily or directed to do so pursuant to a subpoena). See also SEC ENFORCEMENT MANUAL, supra note 2, §§ 3.2.3.1, 3.2.4; see also Linda Chatman Thomsen, Internal Institute for Securities Market Development 2005 Program, https://www.sec.gov/about/offices/oia/oia_enforce/overviewenfor.pdf (noting that informal investigations generally feature procedural safeguards: “Interviews with witnesses are typically conducted with a court reporter present and a verbatim transcript is usually produced. Although the staff cannot administer oaths or affirmations in a preliminary investigation, if a witness is willing to testify on the record, the Staff, after obtaining the witnesses’ consent, will have the court reporter administer an oath. A criminal statute, which prohibits the making of false statements to government officials, 18 U.S.C. § 1001, applies even if the witness is not under oath. If the witness is placed under oath, then false testimony may be subject to punishment under federal perjury laws as well.”).

7. See 17 C.F.R. § 240.24c-1 (2019); SEC Form 1661, supra note 6, at 2–4 (applying to regulated persons or entities directed to supply information other than pursuant to a subpoena); SEC Form 1662, supra note 6, at 3–5 (applying to
witnesses requested to provide information or testimony voluntarily or directed to do so pursuant to a subpoena). See also SEC ENFORCEMENT MANUAL, supra note 2, § 3.2.3.1.


9. See SEC ENFORCEMENT MANUAL, supra note 2, § 3.2.3.


15. See Wheeling-Pittsburgh Steel Corp., 648 F.2d at 130 (“[B]eginning an informal investigation by collecting facts at the request of a third party, even one harboring ulterior motives, is much different from entering an order directing a private formal investigation . . . , without an objective determination by the Commission and only because of political pressure. The respondents are not free from an informal investigation instigated by anyone, in or out of government. But they are entitled to a decision by the SEC itself, free from third-party political pressure, that a ‘likelihood’ of a violation exists and that a private investigation should be ordered.”); but see United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) (“official curiosity” is a sufficient basis for law enforcement agencies to satisfy themselves as to compliance with the law).


18. See id. at 804–05; Collins v. CFTC, 997 F.2d 1230 (7th Cir. 1993) (holding that in a Commodities Futures Trading Commission (CFTC) case, the CFTC had to meet a heightened burden to compel production of tax returns in an investigation); McVane v. FDIC, 44 F.3d 1127, 1138 (2d Cir. 1995) (applying heightened scrutiny test for subpoenas to family of subject of investigation).

19. One example of where the use of personal accounts may constitute a business purpose is Elon Musk’s use of his private Twitter account to discuss


22. See SEC v. Jerry T. O’Brien, Inc., 467 U.S. 735, 741 (1984) (“Congress has vested the SEC with broad authority to conduct investigations into possible violations of the federal securities laws and to demand production of evidence relevant to such investigations.”).

23. See FED. R. EVID. 801(d)(2); cf., e.g., SEC v. First City Fin. Corp., 890 F.2d 1215, 1224–25 (D.C. Cir. 1989) (chronology created by company at request of SEC is admissible pursuant to residual hearing exception in Rule 803(24) since replaced by Rule 807).

24. See SEC ENFORCEMENT MANUAL, supra note 2, § 3.2.7.


27. See, e.g., General Data Protection Regulation (EU) 2016/679 (GDPR), a European Union regulation on data protection and privacy for all individuals within the European Union and the European Economic Area.


29. See SEC ENFORCEMENT MANUAL, supra note 2, §§ 5.2, 5.6, 5.6.1, 5.6.2, 5.6.3, 5.6.4.

30. See Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 469–72 (S.D.N.Y. 2010) (reviewing the various sanctions available for spoliation, including fines, special jury instructions and the entry of a default judgment or dismissal), abrogated on other grounds by Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135 (2d Cir. 2012); Jou v. Adalian, No. CV 15-00155 JMS-KJM, 2018 WL 1955415, at *8 (D. Haw. Apr. 25, 2018), appeal dismissed, No. 18-16035, 2018 WL 6334653 (9th Cir. Oct. 4, 2018) (listing available sanctions including monetary or contempt sanctions, preclusion of evidence or ordering that facts be taken as established, terminating sanctions, granting a default judgment against an offending party in the underlying suit, disciplinary sanctions against counsel, and criminal penalties).

34. See SEC ENFORCEMENT MANUAL, supra note 2, §§ 3.2.9.7, 3.2.9.9.
35. See id. § 3.2.8.
38. See SEC ENFORCEMENT MANUAL, supra note 2, § 3.2.8.
41. See SEC ENFORCEMENT MANUAL, supra note 2, § 3.2.7.2–3.
45. Id.
48. See ABA MODEL RULES OF PROF’L CONDUCT r. 3.4(f) (2018).
49. E.g., D.C. RULES OF PROF’L CONDUCT r. 3.4(f) (2007).
50. See id.
51. Embedded data can consist of information linked to an electronic document by its custodian that is not visible or not fully visible on the face of the document. For example, a Word document containing privileged information might be linked by a custodian to a PowerPoint presentation, which is then produced to the SEC. Thus, without a careful review of embedded data, there is an increased risk of inadvertent production of privileged information.

52. See SEC ENFORCEMENT MANUAL, supra note 2, § 3.2.7.4.


55. See, e.g., Haines v. Liggett Grp., Inc., 975 F.2d 81, 84 (3d Cir. 1992).


57. In re Grand Jury Proceedings (Violette), 183 F.3d 71, 75 (1st Cir. 1999) (emphasis omitted); see also In re Omnicom Grp., Inc. Sec. Litig., 233 F.R.D. 400, 404 (S.D.N.Y. 2006).


61. E.g., Astra Aktiebolag v. Andrx Pharm., Inc., 208 F.R.D. 92, 104 (S.D.N.Y. 2002); see SEC ENFORCEMENT MANUAL, supra note 2, § 4.1.2.


64. E.g., In re Vitamins Antitrust Litig., 211 F.R.D. 1, 4 (D.D.C. 2002) (noting that there must be an “extraordinary justification” to overcome the protection afforded to opinion work product).

65. See, e.g., In re Allen, 106 F.3d 582, 608 (4th Cir. 1997).


67. E.g., id. at 164.

68. E.g., In re John Doe Corp., 675 F.2d 482, 488–89 (2d Cir. 1982).

69. See United States v. Deloitte LLP, 610 F.3d 129, 139–40 (D.C. Cir. 2010) (holding that, although a memorandum drafted by an auditor can still contain a corporation’s work product, the corporation did not waive work-product protection by disclosing documents to its independent auditor because the auditor was not the corporation’s adversary). Beware, however, that another Circuit Court, in a case distinguished on its facts by the D.C. Circuit, previously held that such tax work papers were not work product at all since they were created to support financial statements, not in preparation for litigation. United States v. Textron Inc., 577 F.3d 21, 30 (1st Cir. 2009) (en banc), cert. denied, 560 U.S. 924 (2010).
73. *See* id.
76. *Id.* at 118.
77. *See* SEC ENFORCEMENT MANUAL, *supra* note 2, § 3.2.7.5.
79. *See Braswell*, 487 U.S. at 118.
83. *Id.* at 5–9.
86. *See id.* at 31.
87. *See id.* at 41–43.
88. *See id.*
89. *See id.* at 41–42.
90. *Id.* at 41.
91. *See also* Ronin Capital, LLC v. Mayorga, No. 16 CV 6909, 2016 WL 7394051, at *4 (N.D. Ill. Dec. 21, 2016) (framing of document requests for defendants’ emails relating to alleged wrongdoing would result in compelled testimonial responses violating the Fifth Amendment, but the court ordered the parties to meet and confer to agree on search terms to serve as basis for new requests that would not violate *Hubbell*); SEC v. Forster, 147 F. Supp. 3d 223, 228 (S.D.N.Y. 2015) (SEC’s broad document requests would require the “kinds of decisions as to responsiveness that . . . trigger the act-of-production privilege” under *Hubbell*, and defendant was not required to justify the privilege individually for each withheld document because production itself, and not the content of the documents, triggers the privilege).
92. Andresen v. Maryland, 427 U.S. 463, 482 n.11 (1976) (speaking about searches and seizures); *In re* Certified Question of Law, 858 F.3d 591, 609–10 (FISA Ct. Rev. 2016) (noting that minimization measures to limit intrusiveness “have
been recognized as important to the lawfulness of investigative procedures in various settings,” including federal wiretap, document searches, and other Fourth Amendment contexts).


95. See Jade Trading, LLC v. United States, 65 Fed. Cl. 188, 194–95 (Fed. Cl. 2005).

96. See id. (citing 26 U.S.C. § 6103(c) and Doe v. United States, 487 U.S. 201 (1988)).


100. SEC Enforcement Manual, supra note 2, § 4.3.1.

101. See, e.g., Gruss v. Zwirn, No. 09 Civ. 6441 (PGG) (MHD), 2013 U.S. Dist. LEXIS 100012, at *42–44 (S.D.N.Y. July 10, 2013) (disclosure of excerpts of privileged communications to the SEC resulted in waiver as to third-party litigants not only of the disclosures made but also as to the factual portions of interview notes not disclosed to the SEC).


103. See In re Symbol Techs., Inc. Sec. Litig., at *14.

104. Saito v. McKesson HBOC, Inc., 2002 WL 31657622 (Del. Ch. Nov. 13, 2002) (upholding selective waiver on basis that company had a reasonable expectation of privacy as to such documents because it “reasonably believed that its disclosures would remain confidential.”); see also In re Straight Path Comm’s Inc. Consolidated S’holder Litig., C.A. No: 2017-0486-SG (Del. Ch. June 15, 2020) (finding waiver of materials provided to FCC under a confidential treatment request, as opposed to entering into confidentiality agreement); see also chapter 1, Q 1.14.

105. See Fed. R. Evid. 502(e); In re Initial Pub. Offering Sec. Litig., 249 F.R.D. 457, 466 (S.D.N.Y. 2008) (discussing a selective waiver provision proposed to be included in Fed. R. Evid. 502 that was abandoned because of opposition from attorneys representing the business community).

waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary.”).  

109. See id. § 200.83(c)(2).  
110. See id. § 200.83(c)(3). A sample FOIA Confidential Treatment Request is included infra as Appendix 3B.  
111. See id. § 200.83(c)(7).  
112. See id. § 200.83(d)(1).  
113. See id. A company should also request that this letter and any letter of appeal be treated as confidential under the FOIA.  
114. See id. § 200.83(e)(1).  
115. See id. § 200.83(e)(2).  
116. See id.  
117. See id. § 200.83(e)(3).  
118. See id. § 200.83(e)(4)–(5).  
119. See id. § 200.83(e)(5).  
121. See Frazee v. U.S. Forest Serv., 97 F.3d 367, 371 (9th Cir. 1996).  
122. See, e.g., Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs, 249 F. Supp. 3d 516, 518 (D.D.C. 2017) (granting a protective order to shield from disclosure redactions to the Corps of Engineers’ administrative record for permitting decisions on the basis of FOIA Exemption 7(F)).  
124. Id. at 318.  
126. See id. at 343–44.  
128. SEC ENFORCEMENT MANUAL, supra note 2, § 3.2.7.  
130. See FINRA Rule 8210(g).  
133. See SEC ENFORCEMENT MANUAL, supra note 2, § 3.2.7.6.  
134. See id.
Appendix 3A

Sample Legal Hold Notice

IMPORTANT LEGAL HOLD NOTICE

To: DISTRIBUTION LIST (attached)
From: LAW DEPARTMENT
Date: [Month] __, 20xx
Re: Mandatory preservation of information, documents and materials related to SEC Investigation of [Company] practices

PLEASE READ THIS MESSAGE CAREFULLY

On [date], [Company] [briefly describe actions that led to SEC investigation: e.g., [Company] announced that it is delaying filing its annual report on Form 10-K with the Securities and Exchange Commission (SEC) due to an accounting issue regarding the classification of cash flows.] [Company] is cooperating fully with the SEC with regard to this matter and anticipates receiving a subpoena for all relevant documents in the immediate future. As a result, it is imperative that we immediately take steps to ensure that all information, documents and materials relating directly or indirectly to the subject matter of this [type of issue; e.g., accounting] issue are retained and not destroyed. All such information, documents and materials is now subject to a litigation hold.

This litigation hold means that all relevant information, documents and materials in the broadest sense of those terms to include any form of information storage (including computer files, e-mails, voicemails, word processing documents, slides, etc.) must continue to be maintained until you are expressly informed otherwise in writing by the
Legal Department, regardless of the typical document retention policy that would apply to such information. The following paragraph more specifically describes the materials that should be retained. However, if you believe that you or anyone working for you have materials that relate directly or indirectly to [Company] classification of [describe issue], but that are not specifically covered by the following section, such documents also must be preserved. You should take all steps necessary to assure that all personnel in organizations managed by you take steps to retain all requested documents. Please forward this notice to all persons reporting to you who may also have information, documents or materials covered by this notice and provide a list of their names to the person listed below in the [Company] Legal Department.

Failure to retain information, documents or materials covered under this litigation hold can result in severe sanctions against both the Corporation and any individuals responsible for such failure. Accordingly, normal document retention practices for the documents and information covered by this litigation hold must be suspended immediately and such information, documents and materials must be retained and NOT disposed of unless and until you are advised by the [Company] Legal Staff in writing to return to normal document retention policies. Absent such written statement from the [Company] Legal Department, NO documents covered under this litigation hold should be destroyed regardless of any document retention program or similar guideline or direction of the Corporation or any of its subsidies or its employees.

CATEGORIES OF INFORMATION, DOCUMENTS AND MATERIALS TO RETAIN

Information, documents and materials directly or indirectly relating to the following topics must be retained until further notice—even if it would otherwise be your normal practice to discard such items:

[Describe document requests]

The time period covered by this Notice is_______to the present, which means you should retain relevant information, documents and materials either created during that time period or that relate to that time period.
This retention notice adds to, and does NOT supersede, limit, or modify, the scope of materials required to be retained pursuant to prior litigation hold notices.

**TYPES OF MATERIALS TO RETAIN**

The requirement to retain information, documents and materials applies to ALL types of written, printed, and other materials including, but NOT limited to: paper documents, microfilm and microfiche, whether memos, correspondence, spreadsheets, decks, PowerPoint presentations, reports, handwritten notes, drafts, sales forms, invoices, files, calendars, appointment books, audio and video tapes, and diaries or other forms of communication for the categories described above. You must also continue to retain (and NOT delete) all forms of electronically stored information on desktops, servers, and Blackberry, iPhones, and other PDA devices, including, but NOT limited to, electronic documents (MSWord, PowerPoint), computerized calendars, e-mail or voicemail messages, and anything else stored on your computer or [Company]'s network. If you create documents, including memos, letters, decks and spreadsheets, that are relevant to the subject matter of this Notice, you should save major revisions as new documents so prior drafts are preserved.

For hard copy format documents and materials recorded on disposable electronic storage media, such documents, materials, information, paper, floppy discs, CDs, video or any other portable medium, you are reminded NOT to dispose of such material, and to continue to retain such material pursuant to your department’s filing systems.

For electronic management information, documents and materials in [Company]'s electronic information management systems, including any electronic records saved on your desktop computer, you are reminded that this material may NOT be deleted under any circumstances. To the extent that material exists both electronically and in any other format, all material is to be retained pursuant to your department’s filing systems. Although the Company utilizes back up of e-mail and electronic documents on a regular basis, you must NOT delete the material from your personal drives or files whether on the network or on your personal computer.
SPECIAL INSTRUCTIONS FOR E-MAIL

E-mail messages in your in-box, sent mail and folders have been and will be collected centrally (but you should not delete them). If you create or receive any e-mail messages in the future that are covered by this Notice, you must create a folder in your e-mail called “Company SEC Investigation” and move (save) each message covered by this Notice to that folder.

ERR ON THE SIDE OF PRESERVATION

Information, documents and materials covering the subjects listed above should not be removed from their current files, and files containing those documents should be maintained as they currently exist. It is acceptable to segregate those files from your other files, as long as the files containing the relevant documents remain intact. If you have any doubt about whether to retain any documents or information, you must preserve and retain the document.

The question that is frequently asked is: “Do I have to keep a copy of a document in my files if it is not the original document?” The short answer is “YES.” For the purposes of this litigation hold, you should not be concerned with this distinction. Each individual employee should keep the documents in his or her possession. However, you do not have to keep multiple identical documents. Identical documents are exact copies of a document. (However, if you have the same document in paper and electronic format, save both.) Therefore, a draft of a document must be saved, and an identical copy of a document that has additional information noted on it must be maintained. With respect to this latter situation, in which the document is written on, do not make judgments about the character of the additional writing. Even a mark as trivial as an underlined word makes the document different, and requires that it be saved. However, to the extent that you do have multiple identical copies of a document, the extra copies may be discarded.

Please instruct all business units and personnel who may have documents and information covered by the litigation hold to comply with the retention instructions in this notice. Any employees who have such documents and transfer, retire or otherwise separate from the...
Corporation should be directed to leave the documents and information at the [Company] location where they were employed and to notify the senior financial and legal executives with oversight responsibility for the [Company] operations where they were employed of the existence and location of those documents and their relevance to the subpoena.

This document hold will be included in the Schedule of Litigation Holds maintained by the Legal Staff and is available at [e.g., website “Hold 2014-__”].

WHAT TO DO IF YOU ARE CONTACTED ABOUT THIS MATTER

If someone contacts you from outside the Company, other than our outside counsel, please do not speak to him or her; instead refer their call to the Legal Department contact listed below. Also, it is important that you consult with the attorney listed below before writing anything discussing the litigation that is the subject of this Notice.

FURTHER INFORMATION ABOUT THIS NOTICE

You will soon receive a memorandum regarding complying with the subpoena and providing step-by-step instructions on how to identify and gather responsive documents.

If you need assistance in preserving information or have any questions about the subject of this Notice, please contact [Name and contact information for attorney in Company’s Legal Department].

Thank you for your cooperation in this important matter.

[Attorney in Company’s Legal Department]

Attachment

cc:
Appendix 3B

Sample FOIA Confidential Treatment Request

[Date]

VIA EMAIL AND HAND-DELIVERY

FOIA CONFIDENTIAL TREATMENT REQUESTED

[name]
ENF-CPU

[Title]
U.S. Securities and Exchange Commission

U.S. Securities and Exchange Commission

100 F Street, NE, Mailstop 5973

100 F Street, NE
Washington, DC 20549-5973

Washington, DC 20549

Re:  In the Matter of [whatever]

Dear [name]:

On behalf of [client], an encrypted thumb drive is being sent via hand-delivery to ENF-CPU. The thumb drive contains documents bearing Bates numbers [client]000000XXX through [client]000000XXX. The thumb drive can be accessed using the password that will be provided to you via separate correspondence.
These documents are being produced in response to the [subpoena\voluntary request] [issued\made] by the U.S. Securities and Exchange Commission to [client] [dated]. These documents may be responsive to Document Request [number] in the [subpoena\voluntary request].

Sincerely yours,

[signed]
Confidentiality

This letter and the enclosed documents, bearing Bates numbers [client]000000XXX through [client]000000XXX, contain confidential information and are being provided to the Commission under a request for confidential treatment. Exemption from disclosure of this letter and of the enclosed documents or files, as well as of the confidential information contained therein, is claimed under all applicable statutes, rules, and regulations, including, but not limited to, exemptions under the Freedom of Information Act ("FOIA"). We request that, before a disclosure is permitted of any part of this letter or of the enclosed materials, timely notice be given to me at the address listed above.

Regarding FOIA in particular, it is our position that neither this letter, nor the enclosed documents or files, either in whole or in part, are an “agency record” within the meaning of FOIA, 5 U.S.C. § 200.80, and may not be disclosed to third persons without prior written consent. As the Commission has noted, documents such as the confidential information contained herein ought not be deemed “agency records” or otherwise subject to disclosure under FOIA. See SEC Rel. No. 34-17582 (Mar. 4, 1981) (recognizing that “business competitors or litigants adverse to the submitter of the information” may seek its disclosure, and in order to encourage voluntary submissions, such materials should not be deemed “agency records”).

In the event that this letter, or the enclosed documents or files, or any part of the confidential information contained herein becomes an “agency record” within the meaning of FOIA pursuant to any action of the Commission or otherwise, or is judicially determined to be such an “agency record,” we request confidential treatment of such material pursuant to FOIA and the applicable rules of the Commission thereunder. See, e.g., 17 C.F.R. § 200.83; 17 C.F.R. § 200.80(b)(3), (b)(4), (b)(7). Pursuant to Regulation 200.83, a copy of this request is also being delivered to the FOIA Officer of the Commission (without enclosures).

We further request that this letter and the enclosed documents or files, and all copies thereof, be returned to us after the close of the Commission’s investigation.

App. 3B–3
Enclosures

cc: Office of Freedom of Information and Privacy Act Operations (w/o enc.)
U.S. Securities and Exchange Commission
Mail Stop 5100
100 F Street, NE
Washington, DC 20549