

Production of Documents to Federal Agencies



The past dozen years have seen a profound transformation in the way litigation is conducted. Boxes of documents

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tion) Best Practices Recommendations & Principles for Addressing Electronic Document Production, The Sedona Conference 2–3 (2007).

Government agencies have been required to keep pace with the times to manage data effectively during government investigations. However, in an information

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technology industry that often lacks reliable uniformity on data formatting, electronic documents can pose challenges for an agency requesting data from multiple sources with dozens of different formats. *See generally id.* at 8. For this reason, agencies have developed their own unique, internal discovery format requirements in an attempt to make the electronic document production process more efficient for investigators, more predictable for the investigated party, and less burdensome and expensive for both.

The public nature of agency guidelines makes compliance by counsel relatively easy so long as due care is exercised, but non-compliance can bring with it significant consequences for a company that is producing data to a government agency. This article will discuss the standards for production of documents to the U.S. Department of Justice (DOJ), the Securities and Exchange Commission (SEC), the Federal Trade Commission (FTC), the Commodity Futures Trading Commission (CFTC), and the Consumer Financial Protection Bureau (CFPB).

U.S. Department of Justice

The DOJ has taken a number of steps over the years to establish electronic document submission standards, but has recently done so on an internal division-by-division approach. Allison C. Stanton, *DOJ Director Talks About Investigations and E-Discovery Technology*, Metropolitan Corporate Counsel, Feb. 25, 2013, available at <http://www.metrocorpcounsel.com> (responding to interview request labeled “Tell Us About Any Recent Guidance from the DOJ relating to e-discovery.”). This practice allows the agency to cater its document production protocols to the industries that it most commonly investigates. Observers of and lawyers within the DOJ suggest that the agency has taken proactive steps toward improving its digital production policies to be receptive to the complicated, and often very expensive, litigation process in which the subjects of investigations might find themselves. Ben Kerschberg, *Surviving e-Discovery With the Department of Justice’s Antitrust Division*, *Forbes*, Feb 14, 2011, <http://www.forbes.com>.

The DOJ’s Antitrust Division has published a prominent example of agency production standards. DOJ Standard Specifications for Production of ESI, Attachment B to Joint Case Management Statement and [Proposed] Order: DOJ Standard Specifications for Production of ESI, *United States v. eBay Inc.*, No. 12-CV-05869-EJD (N.D. Cal.

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May 31, 2013), available at <http://www.justice.gov>. The fourteen-page document is relatively comprehensive in its requirements, but leaves a number of elements to the discovery negotiations between the parties. Kerschberg, *supra* note 4. The standards require that data be presented in an image-based format and that a number of relevant metadata fields accompany each submission to the agency. *United States v. eBay Inc.*, *supra* note 5, at 1. The standards are wide-ranging in the formats covered by their requirements, including categories for “(1) email and other electronic messages (e.g., instant messaging), (2) other electronic documents, (3) hard copy docu-

ments, (4) shared resources, (5) databases, (6) audio and video data, and (7) foreign-language materials.” *Id.* at 1. Each format is then provided its own section, complete with supplementary information to be submitted with each document provided by the various methods. *Id.* at 1–4.

The standards go into considerable detail on how de-duplication of document pools must be conducted. *Id.* at 4–5. A detailed plan on how the corporation is planning on conducting its de-duplication must be submitted to DOJ before its execution. *Id.* Additional steps must be taken to maintain a record of the flow of information between the holders of the data within the company, to make easier the DOJ’s task of tracking that data through the company’s infrastructure and employees. *Id.*

The standards discuss the specifics of document identification, metadata, privilege, and sorting methods down to the manner in which spaces should be used in the numbering of files. *Id.* at 5–7. Details of what kinds of metadata must be provided are also spelled out in considerable detail, and in a way that would demand precision when collecting data for submission. *Id.* at 5–9. Finally, the standards provide two checklists that summarize all of the previously delineated requirements faced by the subjects of the investigation. *Id.* at 10–11. These checklists include the form in which each type of document must be produced (such as hard-copy, email, etc.) and what metadata fields must be populated to be compliant. *Id.* Additionally, an example cover letter spreadsheet is provided that includes multiple fields of information organized by document custodian, along with various details of the size and type of data provided. *Id.* at 12.

Some have noted that recent DOJ investigations have featured proactive narrowing of the scope of requested documents on the part of the agency itself, avoiding overbroad data requests in favor of more specific requests focusing on the investigation at hand. Kerschberg, *supra* note 4. However, these requests often come with raw corporate digital files. *Id.* This approach allows the DOJ to construct conclusions from the data rather than relying on the interpretations provided by the party being

investigated. *Id.* DOJ staff has expressed the critical need for companies to have comprehensive document retention and production practices already in place within their own corporate structure before the agency production process begins. Stanton, *supra* note 3.

Finally, one of the most common recommendations for dealing with a DOJ investigation (and other agency action) is active participation on the part of the investigated party. *Id.* Not only does such participation enhance the company's ability to advocate for its own interests over the course of the investigation generally, but it can also significantly decrease the amount of time and money spent to usher the company through the various stages of electronic document production. *Id.* As DOJ representatives have said, this active role can open doors to discussions with the agency about avoiding stages and types of production in the interests of time and cost saving. *Id.* However, in the end, agency expectations in terms of electronic document production must still be observed regardless of cost. *See generally id.*

Securities and Exchange Commission Guidelines

In many respects, the DOJ and SEC production guidelines are similar. The SEC guidelines have resulted from the tremendous complexity and cost associated with transferring, storing, and reviewing digital evidence. Office of Chief Counsel, SEC, *Enforcement Manual* 42, 46–48, June 4, 2015; *see generally* Thomas O. Gorman, *Defending SEC Investigations: The Basics*, Program #1883, Celesq, Inc., Oct 2, 2008. The SEC standards are similar to the DOJ's in that they delineate unique, preferred methods of conveyance for each type of data being produced, along with requirements for the maintenance of all requested documents on the company side. SEC, *supra* note 26, at 42; SEC, *Data Delivery Standards*, Oct. 2014. Also like DOJ, the SEC maintains additional requirements for documents either withheld due to a claim of privilege (requiring submission of a form naming the documents in detail and the reasoning for the privilege claim) or those lost due to destruction or simple deletion. SEC, *supra* note 26, at 44, 48.

With submissions of electronically stored information, the SEC, as a policy, will not accept data that is not either scanned collections, email, or native files. *Id.* at 46–47. This assumes SEC IT staff has not provided special dispensation in advance. *Id.* at 46. Data should be sorted by custodian and should come with summa-

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ries listing the number of records, images, emails, and attachments in the production. *Id.* at 47. Additionally, scanned files must contain a number of components, including an image file, a delimited text file, optical character recognition text, and an image cross-reference file. *Id.* Emails should be placed into a single repository and put into an easily searchable format, preferably with “delimited text with images and native attachments,” but the agency will also consider PST and NSF formats (native to Microsoft Office Outlook and Lotus Notes, respectively). *Id.*

For all stages of document production, the SEC guidelines repeatedly suggest that the subject of an investigation should be in regular contact with SEC staff throughout the process. *Id.* at 44, 48. A precise and thorough reading of the guidelines is crit-

ical to maximize the chances of getting the production right the first time, while also continuing cordial relations with the agency. Direct communication with agency staff may be helpful in addressing any unique production challenges that might exist for a particular case. *See generally* George E. Greer, *SEC Investigations and Enforcement Actions: A Practical Handbook for Municipal Securities Issuers*, Orrick, Herrington & Sutcliffe LLP 9, 10, 12–13 (2011).

Federal Trade Commission Guidelines

The FTC echoes a number of the requirements we have seen from the other two agencies. The FTC production requirements, however, come with a few caveats. Among them, the FTC requires a meeting with agency staff and the investigated party within fourteen days of the initial request for documents. Katie W. Johnson, *FTC Privacy, Data Security Investigations Require Cooperation, Honesty, Speakers Say*, Bloomberg BNA, Dec. 8, 2014, at <http://www.bna.com>. This meeting is generally intended to narrow the scope of impending discovery, lowering cost and complexity for both sides. *Id.* As the FTC Bureau of Competition production guide details, subjects like summaries of documents, preferred formats for each type of document, and metadata and production methods all come with nuances that an investigated entity should study with great care. Bureau of Competition, FTC, *Production Guide Revision 1.6*, August 4, 2015; Kevin Burke *et al.*, *FTC and ITC Issue New Final and Proposed Rules on Electronic Discovery*, Cahill Gordon & Reindel LLP, October 26, 2012. De-duplication procedures require agency approval in some circumstances but not others, and emails are generally requested in the TIFF file format. FTC, *supra* note 38, at 3. Other electronic information must come with extensive relevant metadata. *Id.* at 5–7. For this metadata, the standards provide pages of required fields that should be populated along with the documents being produced. *Id.* As with the other agencies above, the FTC provides particular production requirements based on the individual format of the information, along with the mecha-

nism by which the items are finally delivered (including, for example, the manner in which hard drives or memory sticks are provided). *Id.* at 8–13.

One item of special focus within the FTC requirements can be found in recent changes to the privilege log requirements. Alan D. Rutenberg *et al.*, *Inside FTC's New Rules For Investigations*, Law360, Nov. 9, 2012; Burke, *supra* note 38, at 2. These logs, found commonly among agency production requirements, help demonstrate the investigated party's need for the privilege designation, while also detailing the existence of the document for possible future use. The FTC requirements include a demand for eleven different fields of information pertaining to the allegedly privileged document, including: "the document's title, its date of creation, its date of sending, its author(s), its recipient(s), and a description of the factual basis supporting the claim of privilege." Rutenberg, *supra* note 43, at 1.

Commodity Futures Trading Commission

The production standards for the CFTC are noticeably similar to several of the standards discussed above. The guidelines begin their requirements with general instructions for all digital data, including instructions demanding that no data be transmitted by email, that items should be sorted by custodian, and the manner in which each file should be labeled and internally ordered. Division of Enforcement, *CFTC Data Delivery Standards*, Commodity Futures Trading Commission 2, Feb. 6, 2014. The instructions take great care to mention that the formatting required by the guidelines should be followed exactly unless special dispensation has been approved by CFTC staff. *Id.* at 1. While the guidelines do not require deduplication, they mention the practice's prevalence and provide guidelines should the producing party decide to undertake it. *Id.* at 2.

The guidelines then continue into greater detail on each type of producible document. Graphs and charts delineate the required or preferred field of metadata that should accompany each submission, along with the preferred format of

the listed data. *Id.* at 3–4, 6–8. There are also specific instructions for native format files, imaged files, PDFs, web content, and other formats. *Id.* Notably, the native file format usually must accompany the submission regardless of what accompanying formats the submitting party might offer. *Id.* at 2, 5, 9.

Consumer Financial Protection Bureau

The CFPB's production standards include features that we have seen in other agency requirements. Digital submissions fall under a number of formatting restrictions set by the agency. Office of Admin. Adjudication, *Electronic Transmission of Documents to the OAA for Filing in Administrative Adjudication Proceedings*, Consumer Financial Protection Bureau, Nov. 7, 2012. In the CFPB's case, the optical character recognition (OCR) portable documents format is preferred for most submissions, preferably in a combined PDF file within the agency's size limitations. *Id.* at 1–2. These size limitations forbid transmissions over 20 MB, but allow for a document to be emailed over a number of smaller subdivided and properly labeled attachments. *Id.* at 2. If the submission is over 200 MB, the agency requires that the submitting party follow procedures for encrypted documents and send the information on delineated forms of media like CDs, USB thumb drives, or, for larger submissions, an external hard drive. *Id.* at 2–3. The agency has a separate procedure for the general transmission of encrypted data, requiring the use of a specific email service called Zixmail to convey the information. *Id.* at 3.

The agency generally requires that submissions be done electronically, but has published additional procedures when a submission must be done on paper. Office of Admin. Adjudication, *Guidance Regarding Filing Paper Documents in Administrative Adjudication Proceedings*, Consumer Financial Protection Bureau, July 3, 2012. To use non-digital means of transmission, the submitting party must demonstrate that it would not be practical to submit the materials electronically, or that the agency director has required the submission to be provided in a different way. *Id.* at 1. The physical guidelines also

indicate what a submitting party needs to do to get approval for non-electronic submissions. *Id.* A letter must be prepared and signed, giving a detailed list of reasons the information cannot be submitted electronically before being transmitted to the agency. *Id.*

Conclusion

Compliance with production requirements has many benefits, not the least of which is the promotion of good will on the part of the investigating agency toward the company under investigation. As some commentators have noted, credibility in the eyes of the agency conducting the investigation can be one of the most valuable currencies to have as a company progresses through an active investigation. William C. Athanas & Jennifer L. Weaver, *What to do When the Government Asks for Everything: Strategies for Healthcare companies to Negotiate the Scope of Civil Investigative Demands in False Claims Act Investigations*, 10 A.B.A. Health L. Sec. 5, Jan. 2013. An additional benefit is the elimination of negotiations over document production particulars as a result of the agencies' specific and detailed technical requirements. The assiduous investigated party can use the agencies' published guidelines to produce in an acceptable format without requiring protracted and costly discovery discussions.

Compliance with government production requirements involves extensive care on the part of parties being investigated and their counsel. While the general production standards are summarized above, each agency has its own unique expectations regarding how it acquires information from investigated parties. How certain files are stored, how meetings with the agency can (and sometimes must) be conducted, and how privilege designations should be approached are just a few of the issues that must be considered when approaching the production process with due caution. Communication with the investigating agency should happen early and often while the investigated party is performing its electronic document production. Discussing and overcoming complications can go great lengths toward making the process as painless, short, and inexpensive as possible. 