

Securities and Exchange Commission
Division of Enforcement



Enforcement Manual

Office of Chief Counsel

October 6, 2008

3.2.6.2 Form of Production

Basics:

- The following guidelines for production should be set out in the subpoena or in the cover letter accompanying the subpoena.
- Generally, all documents described in the attachment to the subpoena should be produced by the date listed on the subpoena. The documents should also be produced to the particular staff member identified in the subpoena.
- The subpoenaed entity or individual is required to produce all subpoenaed items that are in its possession, custody or control. This includes items under the subpoenaed entity or individual's control or custody, but that are not in its immediate possession.
- The staff is encouraged to request document production in electronic format, in an SEC preferred format, and to include OCR text. Electronic production is preferable, especially large productions from entities, because it is less costly, the information may be stored more efficiently, it may allow the staff to search for specific terms, and it may provide the ability to tag and review data more easily. Requesting the production in an SEC preferred format and to include OCR text also reduces costs.

- In an electronic production, the subpoenaed entity or individual must maintain the originals of all documents responsive to the subpoena in the event production of the original documents is required at a later date.
- If the subpoenaed entity or individual produces documents in electronic format, the subpoenaed entity or individual should advise the staff, as soon as possible, of the size of the document production, the software used to store the document, and the medium of production.
- The staff may allow the subpoenaed entity or individual to produce documents in hard paper copies. In the event that the subpoenaed entity or individual produces documents in hard paper copies, the subpoenaed entity or individual must maintain the originals of all documents responsive to the subpoena in the event production of the original documents is required at a later date.
- If copies of a document differ in any way, they are to be treated as separate documents and the subpoenaed entity or individual must produce each copy. For example, if the subpoenaed entity or individual has two copies of the same letter, but only one of them is marked with handwritten notes, the subpoenaed entity or individual must send both the clean copy and the copy with notes.
- The subpoenaed entity or individual should produce hard copy and electronic documents in a unitized manner, e.g., delineated with staples or paper clips to identify the document boundaries.
- The subpoenaed entity or individual should enclose a list briefly describing each item it has sent. The list should include the paragraph(s) in the subpoena attachment to which each item responds.
- The subpoenaed entity or individual should also include a cover letter stating whether it believes it has met its obligations under the subpoena by searching carefully and thoroughly for all documents or materials required by the subpoena, and by producing all of the required documents and materials.
- The term “document” in the context of a production responsive to a subpoena includes, but is not limited to, any written, printed, or typed matter in the possession, custody or control of the subpoenaed entity or individual including, but not limited to all drafts and copies bearing notations or marks not found in the original, letters and correspondence, interoffice communications, slips, tickets, records, worksheets, financial records, accounting documents, bookkeeping documents, memoranda, reports, manuals, telephone logs, telegrams, facsimiles, messages of any type, telephone messages, voice mails, tape recordings, notices, instructions, minutes, summaries, notes of meetings, file folder markings, and any other organizational indicia, purchase orders, information recorded by photographic process, including microfilm and microfiche, computer printouts, spreadsheets, and other information filed or stored in computers on magnetic or optical media, on back-up tapes or recordings, or otherwise, which can be retrieved, obtained, manipulated, or translated.

- The subpoenaed entity or individual must produce all of the materials described in the subpoena. If, for any reason, the subpoenaed entity or individual does not produce something required by the subpoena, the subpoenaed entity or individual should submit a list of what it is not producing. The list should describe each item separately, noting: its author(s); its date; its subject matter; the name of the person who has the item now, or the last person known to have it; the names of everyone who ever had the item or a copy of it, and the names of everyone who was told the item's contents; and the reason the subpoenaed entity or individual did not produce the item.
- If the subpoenaed entity or individual withholds an item based on a claim of privilege, the list of withheld items should specify the privilege claimed. If the subpoenaed entity or individual withholds anything on the basis of a claim of attorney-client privilege or attorney work product protection, the subpoenaed entity or individual should identify the attorney and client involved.
- If any documents responsive to the subpoena no longer exist because they have been lost, discarded, or otherwise destroyed, the subpoenaed entity or individual should identify such documents and give the date on which they were lost, discarded or destroyed.
- Many larger accounting firms maintain and create their workpapers electronically. Electronic workpapers are often a rich source of metadata and may be easier to navigate than hard copies. Firms may raise concerns about producing electronic workpapers and other audit documents, citing to intellectual property rights in what they view as proprietary programs. The staff does not necessarily agree with the concerns but as an accommodation, may consider alternative approaches such as Web-based production and production on a dedicated laptop computer. These requests may be evaluated on a case-by-case basis to determine whether an alternative approach is appropriate in your investigation.

Further Information:

- Please refer any questions about the form of production to the Trial Unit.
- For more information on privilege logs, see Section 3.2.6.2.4 of the Manual.
- For information on the format for electronic production, see Section 3.2.6.2.3 of the Manual.
- For information on certifications of completeness of production, see Section 3.2.6.2.6 of the Manual.
- For more information about when and how to request electronic workpapers, please contact the Chief Accountant, Division of Enforcement.