

**The Women of the Section of Litigation**  
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*“Knock knock, Who’s There?”*

*It’s the Government: Successful strategies for defending against government investigation and securing insurance coverage for that defense”*

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**Big picture**

- Defense: Be thinking about attorney-client protections and corporate protocols
- Coverage: Be thinking about insurance coverage from the outset
- Joint focus: Counsel should be developing case strategy as a team from the outset

**1. When An Investigation Begins**

Defense.

- Getting the subpoena
- Securing outside counsel (and separate counsel)
- Attorney-client privilege issues
- Litigation Holds
- Corporate coordination

Coverage.

- Assessing potential insurance coverage: Errors & Omissions (E&O), Professional Liability [Directors & Officers (D&O)], Employment Practices Liability Insurance (“EPLI”)  
*See, e.g., XL Specialty Insurance Co. v. Bollinger Shipyards Inc., et al., Case No. 2:12-cv-02071 (E.D. La. Oct. 31, 2014) (finding no coverage for FCA suit related to subcontractor’s alleged false statements related to ship rebuilding project due to effort to avoid additional cost of reinforcements by providing miscalculation of ship hulls’ resistance to bending, because **liability policies** respectively: (1) contained exclusion barring coverage for failure of “you work” to meet a predetermined level of fitness or performance; and (2) only extended to personal injuries and property damage).*
- Determining whether there is an event that rises to the level of a claim:

*Examples:* DOJ phone call or email, investigatory subpoena, oral demand, sealed complaints, whistleblower suits, etc.

*Example policy language:*

Example 1 Definition: “Formal or informal administrative or regulatory proceeding or inquiry commenced by the filing of a notice of charges, formal or **informal investigative or similar document**”

Example 2 Definition: “Regulatory ... proceeding for monetary, **non-monetary** or **injunctive** relief commenced by ... the filing of a notice of charges, formal investigative order or similar document”

Example 3 Definition: “Any written notice received by an Insured that any person or entity intends to hold any Insured responsible for a Wrongful Act”

Example Subpoena Language: “Coverage for ‘expenses incurred while assisting the Insured in responding to a subpoena which the Insured first receives and reports in writing to the company during the policy period resulting from the performance of professional services by the Insured”

*See, e.g., MBIA Inc. v. Federal Insurance Co., 652 F.3d 152 (2d Cir. 2011) (finding policy covered subpoena because a “similar document” to a formal or informal investigative order, and covered SEC investigation and oral request for documents where MBIA has asked SEC if it could comply voluntarily to avoid adverse publicity of a subpoena);*

*Protection Strategies, Inc. v. Starr Indem. & Liability Co., No. 1:13-CV-00763 (E.D. Va. Sep. 10, 2013) (finding investigation by NASA and U.S. Attorney regarding allegations of defrauding NASA constituted claim).*

Newer Definitions – such as coverage for certain “pre-claim” inquiries, coverage for requests to appear for interview or meeting with government enforcement agency

- Assessing sub-limits and other key provisions

## 2. **First Actions**

### Defense.

- Evaluating situation
  - Determining in-house counsel and outside counsel roles
  - Identifying corporate protocols and internal controls
- Strategies
  - Internal investigation

- Assess government’s document requests and gather information
- Consider Whistleblower allegations
- Interviews (attorney-client privilege)
- Disclosures: self-disclosure, statements, regulatory filings and/or other parties

Coverage.

- Providing prompt notice of claims (e.g., claims-made policies, “related claims” language)
- Coordinating with defense counsel (e.g., where there is no written demand)

**3. Defense Considerations**

Defense.

- Conflicts of interest
- Joint Defense Agreements

Coverage.

- Securing defense coverage (e.g., evaluating proposed interim defense agreements)  
*See, e.g., Eisai Inc. v. Zurich American Ins. Co.*, case no. 2:12-cv-07208 (D.N.J. Jul 2014) (finding defense coverage for former employee’s False Claims Act suit claiming company pushed off-label uses for its drug where allegations in the qui tam action were interrelated with a prior suit by same employee against company that insurer defended).
- Agreeing on counsel and attorney rates (e.g., panel counsel and billing guidelines)

**4. Settlement**

Defense.

- Negotiation strategy with government
- Soft landing

Coverage.

- Provide notice of settlement offers
- Indemnification coverage depends on damages (e.g. maybe civil penalties are covered)
- Allocation provisions (that may require allocation of settlements between covered and excluded claims)