Vinson&Elkins

10 STEPS for Responding to a Government Search of Corporate Premises in Antitrust and Other Investigations

The U.S. government has become increasingly aggressive in its investigation of antitrust and other matters. The government commonly kicks off an investigation by sending FBI and/or other federal agents to serve a search warrant. If federal agents show up at your company, here is a succinct guide about what to do:

1 Contact Counsel Immediately

You need experienced counsel *immediately* involved. There is good reason for this. Counsel can assert an attorney-client relationship with respect to the employees that will make it more difficult for the agents to interview frightened and unprepared witnesses and obtain statements that are incorrect, incomplete or out of context and as such harmful to the company.

2 Prevent the Destruction of Documents

All employees should immediately be instructed not to delete documents, shred documents, destroy or remove emails, or otherwise hide potential evidence. You may believe that your employees would never shred documents or delete their hard drives. Yet in the *majority* of white collar searches or cases, one or more people delete or destroy documents in some fashion, frequently under the guise of following document retention policies. This can be very damaging to the individuals and to the company—and be far worse than the troubling documents that are deleted or destroyed. This is so for three reasons. First, destroying documents in anticipation of a federal investigation can be prosecuted as a separate crime, and this case may be easier for the government to prove than the original crime under investigation. Second, the destruction of documents gives the government powerful evidence of an individual's consciousness or awareness of guilt. Third, since it is difficult to truly destroy documents, the prejudicial evidence is frequently recovered anyway, and the government's case is that much stronger. One of the early steps in any case will be to put in place an appropriate document hold.

3 Do Not Obstruct the Search

Do not interfere with the search. Forcible resistance or interference could be illegal. You should be cordial but not overly helpful. The agents are just doing their jobs, so there is no benefit to expressing frustration, or anger, or in protesting the company's innocence to the agents. Indeed, as we explain below, no substantive statements (including expressions of innocence) should be made at all. Frequently, the agents will want to make copies of computer systems and individual hard drives. This can cause great disruption. The company should not interfere with the agents, but work with them to minimize the disruption. Further, without disturbing the search, you should observe what the agents do and how they conduct themselves. Make detailed notes about where and what they search.

4 Do Not Make Any Statements

It is common practice for the agents to attempt to interview employees. The government tries to do this because this may be the only time they are able to interview people without lawyers and with no preparation. In almost every instance, the people who are interviewed in this setting say things that are later unhelpful to themselves and the company. Many people believe that they are required to talk to the government agents or that they can persuade the agents that they did not do anything wrong. First, no one is required to submit to an interview. Second, it is useless for people to try to convince the agents that they did not do anything wrong, as decisions of this nature will be made by prosecutors and only after thorough consideration. In short, individuals can only hurt themselves and the company by submitting to interviews during a search; they cannot help. However, it is improper for the company to *instruct* an employee to decline an interview request. Thus, it is essential to provide employees with legal counsel. The lawyer can tell the government that it is representing the individual employees. There are restrictions on government agents that may limit or prohibit them from talking to represented individuals without their counsel being present. In addition, the lawyer can advise the employees appropriately about the risks of speaking with the agent without preparation or adequate protection.

5 Instruct Employees Not to Talk to Each Other About the Case

Employees should further be instructed to not discuss the case with other employees, and certainly not with anyone outside the company (other than the company's counsel). Again, the temptation will be great for employees to discuss the matter and possibly to "get their stories straight." This is counter-productive. When employees speak to one another about the substantive matters under investigation, they leave themselves and the company open to charges of obstruction of justice.

6 Obtain a Copy of the Warrant and a List of Materials Seized

The company should ask the agents for a copy of the search warrant, as well as an itemized list of materials seized and/or copied. A search warrant is signed by a judge after review of an affidavit that spells out the evidence supporting the issuance of the warrant. Typically, the affidavit is under seal, but the warrant itself (which spells out the categories of items to be seized) is not.

7 Make Clear You Are Not Assenting to the Search

The warrant entitles the agents to conduct the search. However, the agents may also ask whether the company agrees or assents to the search. The answer is "No." Here's why: If there is a legal error in the search (because the affidavit made false assertions about the case to the judge, or they seize items beyond the scope of the subpoena), counsel may be in a position to suppress the evidence that the government obtains from the search. However, if the company assents to the search, flaws in the warrant will not matter.

8 Prepare Overseas Affiliates for Similar Raids

It is now a common occurrence that the U.S. Department of Justice will work in tandem with foreign prosecutorial agents, particularly in the European Union, Japan, Korea, Canada, and Brazil. In large cases, these governments will attempt to execute simultaneous raids in the United States and overseas. You should alert your affiliates about this possibility. However, this does not mean that they should delete or destroy documents. Document destruction can be a crime even if it occurs overseas.

9 Get Ready for Press Inquiries and Consider Public Disclosure Obligations

The company should be prepared for press inquiries and consider how to handle the public relations aspect of a governmental investigation. This concern is particularly acute for public companies, which may also have disclosure obligations to shareholders. Public relations aspects need to be handled in consultation with counsel so that statements are not counter-productive to the overall strategy.

10 Prepare for the Next Steps

The execution of a search warrant usually means that the government has undertaken an investigation of what it believes is evidence of the commission of a crime. Frequently, this is based on biased information provided by some other company, including competitors. In a criminal prosecution, the company faces substantial risks to its reputation, along with monetary fines, executives exposed to criminal prosecution, restrictions on travel for foreign executives, and possible debarment from government contracts. At the beginning of any case, the government will have much more information than the company. Information is power, so it will be essential for counsel representing the company to learn as quickly as possible everything it can about the possible exposure of the company.

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