



What to Do When the Government Shows Up at Your Door: Managing Major Civil and Criminal Investigations

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Importance of Having a Regulatory “Disaster Plan”

- Likelihood of businesses being subject to regulatory and/or criminal investigation.
- Can be just as devastating to businesses as true “disasters.”
- Inability to insure against cost of managing investigation, defending prosecution, or paying fines or restitution if convicted.
- Severe negative impact on publicity and company “brand.”

Importance of Having a Regulatory “Disaster Plan”

- Current regulatory environment—increasing government scrutiny.
- Greater number of investigations.
- Better equipped and trained investigators and prosecutors.
- Higher risk of not only bad publicity but severe business impact; risk of imprisonment for key personnel.
- Important to have plan before authorities show up with a search warrant.

Law Enforcement Objectives

- **Having a plan starts with understanding law enforcement's objectives when executing a warrant. Those include:**
 - Obtaining quick, unimpeded entry into a facility;
 - determining where key records and evidence are maintained;
 - “securing” the area to be searched to prevent facility personnel from destroying or removing evidence, or interfering with the search;
 - confiscating evidence, including documents, computers, and (in some cases) samples of materials for testing;
 - interviewing personnel; and
 - obtaining consent to search other documents or areas of the facility.

What Law Enforcement Already “Knows”

- Law Enforcement has already been investigating you long before serving a warrant.
- Warrant requires probable cause, meaning agents will enter your facility with preconceived notions.
- Focus on securing information that confirms their suspicions, not exculpating you and your company.
- Highly important to understand basis for warrant in addition to being prepared for their visit.

How Agents Will Act During Warrant Execution

- Show of force—will enter conspicuously and quickly.
- Identify each agent and his or her affiliation.
- If permitted, agents will fan out and “interview” personnel.
- Doing so allows them to use element of surprise to observe evidence in “plain view” before company management or counsel can respond.
- May execute warrants on multiple locations at same time.

Preparing for Agents' Visit to Your Facility

- Whatever the merits of the investigation, facility must be prepared to implement response strategy.
- Maintain control of facility and personnel.
- Ascertain purpose and scope of the search.
- Limit the scope of the search—especially the interviews of facility personnel.

Preparing for Agents' Visit to Your Facility

▪ Key Elements of Plan:

- Notify company legal counsel immediately.
- Obtain, read, and understand warrant.
- Notify other pre-determined “key” personnel whose assistance in “managing” or responding to the warrant is called for.
- Attempt to meet with agents before warrant is executed. Do so with counsel.
- Negotiate manner or method of production of evidence.
- Arrange for non-essential personnel to “take a break” during the search.

Importance of Having Counsel “On Board”

- Critical to have counsel knowledgeable about investigations process engaged early in investigation.
- Earlier understanding of investigation.
- Develop defenses.
- Attempt to avoid indictment/prosecution through early intervention.
- Determine whether warrant is defective.

What to Do if Counsel Cannot Be Present

- **If counsel cannot be onsite for execution of warrant:**
 - Have two key personnel present to assure someone is available to accompany agents who break away from primary search.
 - Train those personnel to understand agents' objectives.
 - Maintain “key personnel” contact list.

Other Important Considerations

- No such thing as an “off-the-record” discussion with agents.
- Assume any response is a potential admission against interest.
- Agents will seek consent to search areas outside of warrant.
- Being “helpful” to agents may backfire.
- No legal obligation to start-up and run processes for agents.

Other Important Considerations

- **Impact of removal of company records during search.**
 - Agents may not just take records, but company computers.
 - Demonstrates importance of attempting to negotiate the search before agents physically show up—may be able to limit impact of search on business operations.
 - Copy and/or replicate evidence gathered—e.g., photographs, samples, etc.
 - To the extent possible, identify and segregate any privileged materials.

After the Agents Leave Your Facility

- **Must have facility personnel “de-briefed” by management and counsel.**
- **Have personnel prepare memoranda to counsel recounting search, including questions asked, information produced, areas “observed,” etc.**
- **Evaluate replicated evidence with management and counsel.**
- **Consider involving experts.**
- **Anticipate where the agents will go next (customers, affiliates, home offices)**

Wrap-up

- Investigations themselves are serious and potentially catastrophic to challenges/events for businesses.
- Cannot respond to them casually.
- If you start preparing when the agents show up, it may be too little, too late.
- Planning and rehearsal make good sense and should be a part of any company's disaster plan and compliance management program.



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