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## COMPLIANCE

Perkins Coie LLP attorneys T. Markus Funk, Richard Hosley, and Chandra K. Westergaard layout in a three-part series basic guidance to help in-house legal departments proactively prepare their organization for unannounced government visits. In Part One, the authors focused on the initial steps, including assuring the company has competent and experienced outside counsel at the ready to supplement the in-house team. In Part Two, the authors explain what to do when a search warrant is served and how to prepare for government interviews with employees.

## INSIGHT: Law Enforcers at the Gates? Preparing Your Company to Respond to Unannounced Government Visits (Part II)



By T. MARKUS FUNK, RICHARD A. HOSLEY, AND  
CHANDRA WESTERGAARD

A government investigation can begin a variety of ways. It may start slowly with a whistleblower complaint, followed later by a subpoena or other request for documents. It may begin loudly and suddenly with a team of federal agents appearing at a company's office with a search warrant and shutting down the facility for hours as the agents seize documents and interrogate employees. An investigation may begin covertly with investigators quietly and unassumingly approaching an executive as she walks out of the front door of her suburban home in the morning. Regardless of whether the investigation begins with a strong arm or a velvet glove, it is inevitable that the organization is in for a long and exhausting inquiry, which will create wear-

and-tear on the entity and individuals and expose all to legal risk.

### Search Warrant

The execution of a search warrant can be frightening and chaotic. Government agents in raid jackets swarming onto a company site, shouting demands and waving badges and official-looking papers can unnerve even the smartest employee who is inexperienced in such matters. This confusion and chaos aids the government investigators and is often by design. The chief investigator has done dozens of corporate raids like this, which affords an advantage over the factory manager for whom this is an unpleasant first experience. A well-trained Response Team, including the local senior man-

agement member, can help alleviate confusion and angst and ensure the company's rights are preserved.

#### **Request Identification and a Copy of the Subpoena**

Typically, there will not be any company lawyers present when government agents first arrive at a site. As previously noted, large companies and corporations may have facilities spread across the country, far away from corporate headquarters where the legal team is housed. The senior manager, on-site Response Team member should function as the liaison and primary company representative with the government agents, at least until a legal team member can arrive.

The local Response Team representative cannot simply refuse to open the gate; refusal of inspection or obstruction can be separate crimes. The onsite Response Team member should engage directly with the agents, request to see a copy of the warrant, and inform the agents that the company is represented by counsel. The employee should also ask agents to delay execution of the search until the employee has had an opportunity to contact and speak with counsel. Agents are not required to honor this request, but the request should still be made. The employee should then immediately contact the legal and compliance Response Team members. As discussed above, the hotline number for the Response Team should be clearly and plainly displayed in a public gathering space in every company facility.

The Response Team, with assistance from qualified outside counsel, should prepare a training module for the managers and employees who will be on the front lines of interaction with government agency visitors. Annual updates, videos, roleplay scenario training, and the like can be helpful as the Response Team trains non-legal personnel and encourages thoughtful consideration among managers at remote locations. Training should include scenarios these company representatives might expect in the event of an unannounced government visit. For example, the representative should be trained to ask the visitor for a business card and see if it says "Criminal Enforcement Division" or similar words. The company rep should ask, "What is the reason for your visit today? Is it just a routine assignment or is there some problem you'd like us to address?" The rep should also be trained to ask for a copy of the warrant or other document authorizing the search.

Training should include a step-by-step explanation of what a government search warrant or civil investigative demand looks like. The local representative needs to be able to distinguish between a routine regulatory inspection and a search warrant. "Notice of Inspection" forms or other survey or inspection documents are routinely used for regulatory inspections of wastewater, production quality, disease potential, etc. . . . Search warrants are different. A search warrant must be issued by a neutral judicial officer after a finding of probable cause, and the warrant document will note the issuing judge. Search warrants are limited in scope; they authorize government agents to search for evidence of particular crimes in a particular location. An attachment to that warrant is likely to be a list of areas to be searched and evidence to be returned from the site that is searched. Typically, an agent will draft and sign, under oath, a written affidavit that outlines the factual basis for the probable cause finding. Upon execution, agents are required to provide a company with a copy of the warrant itself and an inventory of the items seized. They are not typically required to provide a copy of the affidavit.

A Response Team member, be it the local company representative or a legal or compliance professional, needs to read the warrant language and its attachments: What is included within the scope of the search and what excluded? Are there specific, delineated items that are being searched for? Are there specific areas within the facility within the scope of the search? At the site, the Response Team member should make a copy of the warrant and of the credentials presented by the investigators. A copy of the warrant should be immediately faxed or emailed to a Response Team attorney, if they are not present at the facility. Because the refusal of a search warrant is a criminal contempt of the court that issued the warrant, the Response Team member should also ask for a brief time to assemble the records and an opportunity to contact a company lawyer.

After consulting with a lawyer, the Response Team member or the lawyer herself may decide to raise objections to the warrant, perhaps for being overbroad or not specific enough. Objections can be general or specific, but it is likely they will be immediately denied and the seizing of the records will likely proceed. If the agents deny the objection, the company representative should not interfere with or otherwise impede the search. The legal fight is likely to arise later when the items seized are offered into evidence and suppression of the seized records is raised by the defense attorneys. In a rare case, the legal team may put together a hurried motion to quash the warrant in the court from which the warrant was issued, although these are rarely granted.

#### **Educate Employees About Their Rights**

Another critical task of the representative is to ensure that others in the office are aware of their rights and remain calm throughout the ordeal. It is highly important that Response Team members and on-site company representatives know and understand what a search warrant does and does not authorize. Search warrants authorize agents to search and seize evidence and instrumentalities of a crime. They do *not* require company employees to submit to an interview. Agents may ask employees to voluntarily submit to questioning, but they are not required to do so. Conversely, the company cannot prohibit employees from speaking with government agents. Such a prohibition could potentially constitute obstruction of justice or witness tampering.

If agents seek to interview employees, the Response Team member should tell the agents that the company is represented by counsel and ask that counsel participate in any employee interviews. If the company's counsel is unable to be there in person, they can speak directly with the agents and participate in interviews by telephone. If agents refuse such a request, that information should be promptly relayed to company counsel.

#### **Inventory Seized Documents and Records**

To the extent possible, without interfering with the agents, the company representative should attempt to observe the agents as they are seizing items to get an independent assessment of what was taken. If attorney-client privileged or other confidential items are being seized, the representative should make a verbal objection and inform the agent of such. They should, obviously, inform their company attorneys as well. After the execution of the search warrant, agents are required to provide a written inventory of all items seized. Once the agents leave, the representative should do a thorough walk-through and document the items that were taken.

Computer searches are a highly specialized subset of search warrants. If agents seek to search or seizure company computers, the Response Team representative should ask the investigators to wait for a company information technology (IT) specialist to provide assistance about the specific type and extent of records that are to be retrieved. The IT specialist should deliver the requested records without expanding the collection and prepare a separate copy of the records removed so that there will be a complete record of the items.

Before the search team departs, the Response Team should request an inventory of the paper or electronic records being seized and should take time to copy two sets of the records that the agents are removing. For IT records, this would include a printout of the record set, if it is feasible to do so within a reasonable time.

When the search team has departed, the Response Team as representatives of the company should hold onto a copied set of the IT records and a photocopied set of the physical documents that were carried off by the inspectors. These are essential to the planning of the later court motions on suppression of the use of these improperly obtained records as evidence. The company's legal counsel should have made note of the objections that are made "for the record" as the physical or virtual records are removed from the site. Most of the time, regulatory agencies conducting raids will take careful note of the way in which the site managers have responded.

#### **Summary**

**Step 1:** Prior to any search warrant, a company representative should be selected at each and every facility location to act as the local Response Team member and liaison to the legal and compliance teams. The Response Team should regularly train facility employees on their rights, including the right to choose whether or not to speak with any government agents, and how to behave in government raid situations.

**Step 2:** If a raid or search warrant execution occurs, the local Response Team representative should immediately contact the legal and compliance Response Team members. Contact information for the Response Team and the company's protocol for unannounced government visits should be posted in a plain view in a common area.

**Step 3:** The on-site Response Team representative should directly engage with the government agents. The representative should request to see proper identification. The representative should inform the agents that the company is represented by counsel and that counsel is in the process of being contacted. The representative should request that agents delay their search until counsel has had an opportunity to speak with the agents. If agents refuse to delay, the representative should not interfere or obstruct the government investigators. If lawyers or compliance personnel from Response Team are able to arrive on site, they should assume the role of company representative and directly interface with the agents and observe their search.

**Step 4:** The company representative should ask for a copy of the warrant and any supporting affidavit. As previously noted, the government is not required to provide the affidavit, but should provide a copy of the warrant and an inventory of any items seized during the search. The representative should make a copy of all documents provided - warrant, affidavit, identification

documents - and fax or email those to company counsel.

**Step 5:** Once a Response Team legal member has been contacted, the counsel should call and speak with an agent on site. The attorney should inform the agent that all of the company's employees are represented by counsel and request that no interviews be conducted without counsel present.

**Step 6:** The on-site representative should attempt to observe and monitor the agents from a safe distance as they conduct their search. It is imperative that the employees abide by the commands of the investigators and not interfere or impeded with the search in any way. The representative should attempt to note what items are being searched and seized by the agents and relay that information to the Response Team upon their arrival.

**Step 7:** When agents depart, the Response Team should ensure they have a copy of the government's inventory of items seized. The Response Team should attempt to conduct their own inventory to ensure they have a complete understanding of the documents and other items taken by the investigators. The Response Team should conduct interviews with the eyewitness employees to fully understand the items that were taken, the employees that were interviewed by law enforcement, and any statements that may have been made.

## **Government Interviews With Employees**

### **Pre-Planned Interviews**

The company is having a bad day if the government has arrived with a search warrant, and the day is getting even worse if the government agents deliver a list of named employees who are to be interviewed at that office or factory. The named persons will be those whom the government's preliminary inquiry has targeted as key sources of information.

Generally, a company is not told at the outset how many of its employees will ultimately be interviewed. The list of witnesses itself can provide helpful insight as to the relevant issues and who may be cooperating with the government. If the government provide a list of desired interviews, the Response Team should confer immediately about the implicit signals that the list of names is sending, wondering if this investigation is focused on a particular group within the company or a particular location. If only an insider could have identified this set of employees, then it is likely that the whistleblower is one of those names on the list.

No individual can be forced to submit to a government interview without a subpoena, Civil Investigative Demand, or other court order. If the investigators do not have a formal order compelling witness interviews, the company may choose to cooperate with the government and make employees available without need for formal process. Or the company may decide it is in its strategic best interest to force the government to comply with statutory formalities. In either case, the company's counsel should insist on being present at the time of the employee interview.

### **Surprise Interviews**

Another common law enforcement technique is for agents to make a surprise and unannounced visit at an



employee's home and ask that employee if she would be willing to informally answer their questions. In such a situation, investigators are not required to warn the employee of their rights against self-incrimination, because the employee is not in a custodial setting. An employee may feel intimidated and incorrectly believe they are required to answer questions, not realizing they have a right to refuse to speak with agents.

If the company has reason to believe a government investigation has been or will be initiated, the company and the Response Team should identify the individuals most likely to be contacted by government agents. In a way that does not create undue panic or alarm, these employees should be educated and informed about their rights and the potential for contact by law enforcement. These employees should be instructed that it is ultimately their choice whether or not to speak with government agents, and that the company can assist in obtaining qualified counsel to assist the employee if the employee elects to participate in any interviews. At no time should the employee be instructed not to speak with government agents. A written form can be used to document the rights advisement to reduce risk of miscommunication or misperception of the rights themselves or the manner in which the advisement is carried out.

In many instances, the company will not learn that an employee has been contacted by law enforcement until after the interview has already occurred. In that case, the Response Team should immediately meet with and debrief the employee to find out what was discussed with investigators. Counsel should ensure employees are properly advised of their rights and responsibilities under the Supreme Court's 1981 decision in *Upjohn v. United States* (449 U.S. 383). The employee should also be properly advised as to their rights with respect to any follow up interviews with the government and the company should request that the employee notify the Response Team if they are contacted by government agents again.

The company should also contact government agents or attorneys and inform them that the company and its employees are represented and requests for interviews should be directed to counsel.

#### **Summary**

**Step 1:** If the company is aware of a potential investigation, identify employees who may potentially be con-

tacted by government investigators. Ensure those employees know and understand their rights. It is the employee's choice whether or not to voluntarily submit to an interview. Let the employee know the company will procure a lawyer to accompany them should the employee choose to participate in a voluntary interview.

**Step 2:** An employee should never be instructed not to speak with agents. This could potentially be construed as obstruction of justice. It is advisable to have a written advisement of rights form to memorialize the advisement.

**Step 3:** Should the company learn after-the-fact that an interview occurred, company counsel should meet and debrief with the employee as soon as possible. Counsel should provide the employee with an Upjohn advisement to ensure the conversation is covered by privilege and the employee does not later claim a misunderstanding of the lawyer's role. Request the employee notify counsel if they are re-contacted by government investigators.

**Step 4:** Notify the government that the company and its employees are represented and that interview requests should go through counsel.

### **Author Information**

*T. Markus Funk, the firmwide chair of Perkins Coie's White Collar & Investigations Practice, from 2000-2010 served as an assistant U.S. Attorney in Chicago. He can be reached at [mfunk@perkinscoie.com](mailto:mfunk@perkinscoie.com).*

*Richard (Rick) Hosley, a partner in Perkins Coie's White Collar & Investigations Practice, served as an assistant U.S. Attorney and chief of major crimes for the Denver U.S. Attorney's Office, as well as associate general counsel, chief litigation counsel, and head of investigations for a publicly-traded, Fortune 200 health-care company. He can be reached at [rhosley@perkinscoie.com](mailto:rhosley@perkinscoie.com).*

*Chandra K. Westergaard, a senior counsel in Perkins Coie's White Collar & Investigations Practice, was assistant general counsel and head of investigations for a publicly-traded, Fortune 200 health-care company. She can be reached [cwestergaard@perkinscoie.com](mailto:cwestergaard@perkinscoie.com).*

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