Taking a Broader View of Compliance Risks and Enforcement-Readiness: Tips on Maintaining Good Regulatory Relationships, and Preparing for Grand Jury Subpoenas and Search Warrants

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Introduction

Every compliance professional knows that one of the most important factors that helps reduce the risk of aggressive governmental enforcement is an effective and well-documented corporate compliance program. When companies and their executives first discover they are under criminal investigation, the first reaction is often total shock and disbelief. This element of surprise gives the government a tremendous advantage at all stages of an investigation. Rare is the company that ever suspects or anticipates that it could possibly become the target of a criminal investigation. Accordingly, this false sense of security removes any incentive to take precautionary measures.

This article broadens the preventive focus of compliance by offering some additional protections across the full spectrum of enforcement—including some practical **precautionary** suggestions for demonstrating "good corporate citizenship" and maintaining productive relationships with regulators, as well as some **responsive** tips on how to be better prepared to respond to grand jury subpoenas and search warrants.

Keeping Things Civil: Tips on Maintaining Good Relationships with Regulators and Inspectors

Every company should strive to demonstrate to the regulators that it is committed and qualified to objectively self-police its own operations in a responsible, trustworthy and lawful fashion. Once that level of trust is established over time, the regulators are more likely to direct their limited regulatory resources toward the inspection of other companies. Precautionary steps that are taken well in advance of the events that trigger governmental scrutiny can minimize the chances that trouble with regulators will escalate. If a civil inspector never makes a criminal referral, the prosecutor never becomes aware of the problem. However, timing is everything. Once an investigation begins (or even appears likely), the maximum benefit and negotiating leverage associated with these efforts vaporizes. In other words, the time at which these steps are taken will control how the prosecutor will interpret them. If the steps have been in place for years, the prosecutor is more likely to view them as genuine good-faith efforts.

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Most prosecutors recognize how difficult and counterproductive it is to prosecute a company that has gone beyond mere codes of conduct and policy statements—and has actually taken concrete and identifiable steps to demonstrate the company's financial and institutional commitment to compliance and self-governance. The more steps a company undertakes to prioritize compliance, the more ammunition it has for persuading the prosecutor not to seek criminal charges. Like most things in life and business, you get what you pay for. A sound and effective compliance program must be tailored to the operations and risks of that particular company, fully implemented, and constantly re-evaluated and improved.

In contrast to the proactive steps briefly described above, those measures taken "after-the fact" will be much less persuasive and are likely to fall on deaf ears. Prosecutors will often view these efforts as purely "reactive" measures, taken only in response to the investigation, and designed to get the company out of trouble. The government may even see them simply as a company's attempt to "buy its way out" of a criminal indictment. In short, once a company is "caught," a company's pledge of additional funds for future compliance, statements of good intentions, and expressions of general concern about compliance are ineffective and unpersuasive. Nothing speaks louder than those steps taken by the company well in advance of any sign of trouble.

One of the more obvious and general suggestions for avoiding regulatory problems (which is commonly ignored) is to prioritize, establish and maintain good working relationships with regulators and inspectors. Ideally, this attitude would be easy to achieve, well received, and mutually reciprocated. Occasionally, this balance does occur where the agency adopts a "customer service" model or philosophy. However, even in those adversarial situations where confrontation and suspicion abounds and arises solely from the actions and attitudes of the regulators, it is the company that must diligently strive to solve the problems and improve the communication. Even though this scenario may appear unfair at first glance, the company must always remember who loses when these problems are left unaddressed, regardless of which side "started it." The following is a list of additional practical suggestions that address those factors that have traditionally spawned regulatory criminal investigations:

Tip 1: Maintain respect (or at least its appearance)

Every company employee and representative should strive to be respectful toward inspectors. These individuals may in fact have limited technical competence, and may be viewed as "nit-picky bureaucrats." However, conveying a disrespectful attitude and spawning a bad relationship can escalate and come back to haunt your company—not the inspector. Joint investigations between local, state and federal agencies are becoming commonplace. The federal agencies often rely upon inspectors to determine who the "bad actors" are within each industry sector, since these individuals are on the "front line" of enforcement. It is wise to think twice before doing anything that might invite the wrath of a scorned inspector and cause a referral to be made to criminal investigators.

Perhaps a more productive approach is for a company to view and treat these inspectors as it would difficult but valuable, customers. Just as key customers bring in necessary income, "mistreated" regulatory inspectors have the potential to drain large sums of money and impose additional "costs." Just as a business can't operate without loyal but difficult customers, a business can be seriously harmed by an inspector with a grudge. In short, inspectors should be handled with care and minor disputes should be put in their proper perspective.

Tip 2: Demonstrate objective good faith

Every regulated company should strive to convey "good faith" compliance efforts and demonstrate this attitude through proper file maintenance and concrete actions. Mere intentions or future plans will not be sufficient. Every company claims to care about compliance. Regulators will probably only respond favorably to those actions which are actually taken. The critical test is not whether your company thinks that it is a "good corporate citizen," but whether an objective reviewer of your regulatory files would reach that conclusion. Remember, some day these files may have to "speak for themselves" if they are reviewed by a prosecutor or even a jury. In addition, for better or worse, these files often remain in place long after a particular inspector's tenure with the agency. Depending on the content and attitude reflected in these files, they can either serve as the company's protective shield or the government's spear. The ultimate goal is to build up a high level of trust over time and to convince the regulators that your company has made the necessary staffing and resource commitments to be able to "self-regulate." As previously noted, governmental perceptions are often the reality in the regulatory context.

Tip 3: Avoid the appearance of bad housekeeping

One factor that is certain to invite increased regulatory scrutiny of any facility is the appearance of "bad housekeeping." Even though such conditions may not actually constitute a regulatory violation, they often raise broader concerns and invite speculation of more serious and systematic problems. In other words, the regulators may fairly assume that a company that does not take the effort to maintain a good image or keep orderly records may also be "cutting corners" in other, more significant areas. In short, bad housekeeping is likely to generate complaints from neighbors, and invite aggressive regulatory inspections.

Tip 4: Create a process for addressing employee complaints or concerns

A large percentage of criminal investigations are triggered by "whistle-blowing" calls from current or former employees. Some of these governmental informants are legitimate, while others are extremely biased and have an "axe to grind" against the company. Recognizing that it is better to hear bad news early and keep it in-house, companies can monitor these potential concerns and problems before they get referred to the government. One way is to create a confidential process or mechanism that invites, addresses and incorporates employee concerns and complaints. The company must keep careful track of the responses, and it must strive to address as many of the concerns as it can (within reason). If the employees perceive that their employer is at least willing to listen to complaints, this reduces the level of animosity that often fuels the decision to call the government. Another advantage of such a process is that it can be used to undermine the credibility of those disgruntled employees who simply rushed to the government without even giving the company an opportunity to address, and possibly correct, the underlying problem.

Tip 5: Maintain continuity with agency inspectors

Companies should designate one person (or two at most) to serve as the primary contact people who will regularly meet and communicate with inspectors and the agencies, as well as receive and cen-

tralize all regulatory correspondence. These individuals should possess the necessary qualifications, including high intelligence, familiarity with company operations, excellent social and communication skills, and a high level of interest in this position. This job must combine the qualities of public relations, customer service, and sales. This position is an extremely vital component to maintaining good relationships with the agency. The right person can make tremendous contributions, while the wrong person can be disastrous. These contact people should also be adequately trained and instructed as to the importance of their responsibilities.

This company official also should be tasked with the responsibility of meeting with agency representatives on a regular basis. He or she can informally canvass them for current or upcoming regulatory priorities, as well as unresolved problems and possible suggestions on how the company might be able to improve. This level of genuine concern should go a long way in helping to establish credibility with the agency. In addition, this contact person should also take detailed notes of each agency encounter and inspection, including the comments made and any observations of the inspectors' attitudes. Over time, these notes will record and plot such changes in attitude that may serve as one means of predicting the likelihood of a more aggressive enforcement effort in the future.

Tip 6: Monitor inspections

It is highly recommended that every company designate at least two individuals to accompany inspectors during regulatory tours of the plant or facility. During inspections, these representatives should avoid unnecessary confrontation. If the inspector questions the presence of two representatives, they should explain that it is company policy based on the company's desire to work with regulators. They should also convey that the company wants to discover any problems that may exist and assist in providing the necessary information. These individuals should take careful and detailed notes of the inspection (usually immediately afterward).

Tip 7: Request post-inspection debriefings

Company representatives should routinely request a brief meeting at the conclusion of any inspection to determine the concerns (if any) the inspector might have. If no concerns are mentioned, this should be duly noted as well. Over time, the company's files will not only contain important substantive information, but will also reflect a sound process implemented by a responsible company. If necessary, these files will be readily admissible at trial as business records and will serve to bolster the credibility of the company. The inspectors should also be asked if they would provide the company with a copy of any written report. Once again, the importance of keeping detailed notes that record exactly what was communicated by the inspector during this meeting cannot be overemphasized. These notes should be incorporated it into a detailed memo to the file.

Tip 8: Document compliance expenditures

Companies should make every effort to try to accommodate reasonable requests for corrective actions, especially if they are not too costly. In addition, detailed records should be maintained of all the requests; what was done in response; the total amount of money, time and resources spent on each task; and the dates on which the requested tasks were completed. Records should also be kept

that plot out the expenditures from year to year, with an estimate of what percentage of the company's "bottom line" is spent on compliance. This type of "compliance accounting" may go far toward demonstrating good-faith. The goal should be to maintain these records in a similar fashion as other financial documents (e.g., accounting, tax or insurance records). While the failure to keep accurate records of compliance expenditures is not a punishable offense, the presence of these records can be extremely persuasive in defending a company and showing its commitment to corporate compliance. Too many companies simply fail to accurately itemize and keep track of these expenditures because they fail to see the utility or purpose.

Tip 9: Don't ignore problems—Try to resolve them

Company representatives should always follow-up and follow-through when presented with regulatory requests or when problems are discovered and communicated. Many times individuals may sincerely believe the request is unnecessary, unreasonable or too costly, or that the problem is trivial. In the presence of such requests, company representatives must not overreact and must avoid taking the matter personally. Efforts must be taken to insure that such conflicts do not escalate. In addition, all perceived "attacks" upon the individual inspector should be avoided. Such attacks usually only serve to invite unwelcome and repeated "counterattacks" by the regulators that may last for years. At the time the requests or demands are made, if necessary, representatives should express their disagreement or even disappointment, as well as the need for company officials to review the findings before deciding how to proceed. Also, if certain "run-ins" do occur with regulators, company representatives should seek to re-open communications at the earliest appropriate time, even if this means risking another uncomfortable disagreement. Silence is not always golden. Facing the prospect of additional tense discussions is far better than being completely unaware of the potentially hidden dangers that may be masked by silence.

Tip 10: Pick your fights

After company representatives have carefully and logically analyzed the available options (perhaps with the advice from experienced compliance counsel), they may conclude that they simply cannot comply with the regulatory request (for a variety of legitimate reasons). However, this decision should be the result of an objective and informed evaluation of the factual and legal basis for the regulatory request, as well as the direct and indirect consequences surrounding a petition or challenge. In short, some disputes are worth fighting, but some are not. If the company decides not to comply with the request, the next recommended step is usually not to take formal action, but rather to establish an ongoing dialogue. One possible approach might be to write to the inspector (with a "cc" copy to his direct supervisor) requesting a meeting to revisit the problem and address some of your company's concerns.

In general, it is advisable to avoid cutting the inspector out of the loop and instantly rushing to his supervisor. "Going over" the inspector's head can be ineffective, counterproductive and is likely to lead to negative consequences. First, the supervisor will usually start by consulting the inspector to get his or her story. Second, the inspector may feel embarrassed or disrespected, and may want to retaliate. Third, your inspector is a repeat player and is likely to return for future inspections more frequently, with even more "scrutiny."

On the other hand, if your response letter is placed in their files and simply ignored, you will have managed to put the ball back in their court. If no action occurs, it will be more difficult in the future for the agency to accuse you of lacking good faith.

Companies should recognize that this approach does not require them to completely "cave-in" to every regulatory request. However, even if formal actions are eventually taken, at least the company will have demonstrated a prior willingness to try to work it out. For those requests or demands that will inevitably be imposed, try to seek a workable solution that allows implementation over a period of time. This is another area where the company's past good-will with the regulators should pay off. In short, regulatory problems rarely just go away, and the files and correspondence will remain intact. Borrowing from the principle of compound interest, the longer the problems remain unaddressed, the larger your company's "bad faith" debt will have accrued.

Tip 11: Carefully monitor your company's regulatory files

Every company should conduct periodic reviews of its own regulatory files (i.e. at least on a semi-annual basis). This should include a thorough review of the files maintained on its own premises, as well as a careful monitoring of the agency's files that pertain to its facility. These public files can be a wealth of information and a valuable source for discovering potential problems that may have never been brought to the company's attention. This review may also reveal important discrepancies or inaccuracies that can be quickly corrected, clarified or resolved. Also, these monitoring efforts should be noted in your policies as further proof of your company's "good faith."

Lastly, these files are often the first source of information that a federal agency or prosecutor will request and review in deciding whether to initiate an investigation or go forward with a prosecution. You and your company will not be given an opportunity to influence this decision. Therefore, the regulatory correspondence and records have to "speak" for you. In short, these files may serve as the "silent umpire" that may be consulted without any notice. For example, silence and inaction in the face of outstanding agency requests or notices of violations can be definitive proof that the company and the recipient of the notice knew about the problem or alleged violations. In criminal terms, this documentation goes a long way to satisfy the government's burden of proving that the violations were "knowingly" committed. In addition, these unaddressed notices or requests are likely to be viewed as evidence of bad faith, irresponsible management, or simply a low-level institutional concern for compliance.

Tip 12: Compare best practices with others in your industry and stay at the top

One fact that regulators and prosecutors can never ignore is how the compliance record, practices and overall attitude of a particular company compares with other members of an industry. Accordingly, companies should carefully monitor their competitors with regard to the budgetary and personnel allocations used for compliance, and their overall compliance record. In addition, companies should continually strive to learn from their competitor's success stories as well as their shortcomings. No company should underestimate the advantages and enforcement protection associated with being perceived by the regulators as being the best in the industry. In short, companies should

strive to be at the top 10% of their industry, and should compile the objective benchmarks to support this finding.

Comprehensive and regular audits of company operations used to assess the level of compliance certainly play a role in demonstrating "good faith" and may play an integral part of a company's compliance program. Most commentators agree that it is much cheaper to correct problems of noncompliance that are discovered and voluntarily corrected by the company. The presence of such a program (equipped with accurate and detailed records) is perhaps the most direct example of a "self-regulating" entity that deserves to be "passed over" by the regulator's wrath or the prosecutor's indictment. Scarce regulatory enforcement resources should be used wisely against those companies who need to be punished, and not wasted unnecessarily on those companies who are both trustworthy and reliable in their self-regulating efforts.

However, there are risks associated with conducting compliance audits. First of all, every company who undertakes such measures must be completely willing to deal with the results, and correct the problems discovered, no matter how severe. In other words, once the problem genie is released from the company's bottle there is no way of cramming it back in and simply pretending it does not exist. Such avoidance or willful blindness throws out a large welcome mat and roadmap for prosecutors. Thus, it may just be a matter of time before they come knocking (perhaps with a search warrant). In short, in spite of the tangible benefits and good intentions associated with compliance audits, a company should carefully evaluate the decision to conduct them, and must be fully committed to undertake the necessary and perhaps costly corrective measures mandated by the audits.

In Search of Paper Trails: Tips on Responding to Grand Jury Document Subpoenas

Despite a company's best effort to maintain good relations with regulators, as well as an effective corporate compliance program, criminal investigations are not uncommon. Despite the large number of criminal investigations and prosecutions, most companies never suspect that could receive criminal subpoenas or be subjected to intrusive search warrants. A common refrain heard from clients is that: "I never thought it could happen to us. We are a good company." Sound familiar?

This high level of denial is based upon an incorrect and dangerous assumption that the government only investigates companies that are owned or operated by "bad people" who commit "traditional" or "real" crimes. However, with increasing frequency, the government is using these tools as part of a strategy to investigate all types of potential crimes.

Although many commentators believe that planning for criminal investigative responses should be restricted to the company's law department, this approach is short-sighted. The in-house compliance team can add tremendous value in both training and response. The purpose of the following sections is to provide a general overview of the most common criminal investigative tools in the white-collar arena: grand jury subpoenas and search warrants. The goal is to help compliance professionals to better understand the unique aspects of these investigative tools, and to offer practical tips so that they will be better equipped to assist the lawyers in dealing with all three critical phases: before, during and after they are served or executed.

What is a Criminal Subpoena?

In addition to "rumors," or internal threats from whistle-blowers or employees, or escalating friction with regulators, one of the clearest initial signs the criminal enforcement waters are "heating up" is the receipt of a grand jury subpoena.

The Federal Rules of Criminal Procedure allow the prosecutor to seek a subpoena (which is a formal order from the grand jury) that requires the "target" company to produce any responsive documents, as well as other physical evidence.[171] This governmental investigative tool is incredibly powerful, and gives the prosecutor the authority to obtain any non-privileged evidence located within the United States, so long as the request is not "unduly burdensome." Perhaps most importantly, there are significant penalties for those who fail to comply. Accordingly, companies should create subpoena response plans and provide necessary training to incorporate the following practical suggestions:

Tip 1: Plan in advance.

Grand jury subpoenas are extremely important, and companies must take them seriously to assure compliance. In particular, since subpoenas are time-sensitive, and require a timely response, company personnel who are most likely to be served with these important legal documents need to be aware of what they are, and how they are to be given priority attention by being immediately sent to a particular in-house counsel.

Tip 2: Carefully review the subpoena

After the subpoena has been served, the clock starts ticking. Accordingly, in-house counsel need to set up a response plan (often with compliance team members)—based upon exactly what is being sought. In particular, the initial items to review include:

- The deadline for the document production.
- The types of documents being sought, including the date range and key definitions.
- Any ambiguities in the description of these documents that need to be addressed in a follow-up call with the prosecutor. Such ambiguities are inevitable since the government drafters are generally not familiar with how the documents are maintained within your company.
- The cost, timing and/or feasibility for the requested production.
- Potential ground for challenging the scope or unreasonableness of the subpoena (which is a rare occurrence).
- Determining which key personnel within the company should be involved in the control group that will be involved in the subpoena response process.

In addition to reviewing the subpoena for the logistics and timing of the production, a careful review will also often reveal the nature of the misconduct that is being investigated. Accordingly, this review will reveal clues for the company's team on how to design the likely internal investigation.

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171 While grand jury subpoenas can also require and compel sworn testimony before the grand jury, this article will only focus on the issues relating to securing and producing documents.

Tip 3: Immediately impose a litigation hold for responsive documents

Once your team understands the scope of the documents that are being sought, it is critical for the company to set up a "litigation hold" to prevent any inadvertent (or intentional) destruction of any relevant or responsive documents. Taking and documenting this step is important for a number of strategic reasons, which include: a) establishing "good-will" with the prosecutor, which may lead to more flexibility in the scope and timing of the production; as well as: b) reducing or avoiding any risk of future accusations of obstruction of justice.

Tip 4: Reach out and communicate to prosecutor

After you review the subpoena, and have an idea of the scope and logistics of the document request, it is wise for company counsel to call the prosecutor assigned to the case (which is often specifically noted in the subpoena). During this initial call, company counsel can address the following issues or questions:

- General introductions and company's intention to comply.
- Steps taken by the company to implement a "litigation hold."
- The current status of the company or any key employees in the government's investigation. In particular, company counsel needs to determine who falls within the following three categories: "Witness, Subject or Target."
- The ambiguities and need for clarifications in the scope of the request.
- Any logistical difficulties that will make the process more delayed or unreasonably expensive—with some alternative requests/suggestions to avoid these problems.
- The possibility of an extension of the production deadline, including the ability to produce on a "rolling" basis with differing deadlines.
- Any additional background information about the investigation that the prosecutor might be willing to share in order to assist the company to address any ongoing violations and/or to locate the most relevant documents or individuals with knowledge.

One important follow-up to this initial conversation is the need to memorialize in writing to the prosecutor any narrowing or changes that he/she agreed to make during the call.

Tip 5: Develop and implement a grand jury document response plan

After these preliminary steps have been taken, it is time to dive in and do the hard part—which involves determining:

- **What** documents are being requested?
- **Where** those responsive documents may be located (in both physical and electronic form)? On-site and/or off-site?
- **Who** is going to be responsible for this process?
- **Who** else within the company may have knowledge of these issues and documents?
- **When** do they have to be gathered, reviewed and produced?

- **Are** any documents privileged or confidential, and therefore need to be segregated and entered into a privilege log?
- **How** do we keep track of where the documents were located?
- **How** should the documents (or copies) be labeled when they are produced?

While the government will be most interested in receiving the responsive documents, it is also imperative to document the **process** or steps that were followed in the document review and gathering process, including: who was on the team, where did they look, where were particular documents found, etc.

Tip 6: Make your initial production robust and instructive.

One final tip is to make sure your initial production of documents is thorough and complete, and is sent with a detailed cover letter that outlines the process that was followed and a guide to understanding what is being produced. These steps help to send the right message to the prosecutor and investigators that the company took this process seriously and gave it the attention that it deserved.

Knock, Knock…Who's There? Tips on Preparing For, and Responding To, Search Warrants.

Another investigative tool that the government often uses to gather facts of potential criminal conduct is the execution of a search warrant. Unlike a grand jury subpoena, which is a formal legal request for a company to produce documents, a search warrant is a court order that authorizes the investigators to come and take any evidence of a crime. Obviously, when the prosecutor chooses to resort to a search warrant, as opposed to a subpoena, this is an indication that the "enforcement waters" are much hotter, and that the government has concerns that the relevant evidence might not be produced. A search warrant indicates the absence of trust, and thus requires even more attention—both in the planning and in the response.

What is a search warrant?

The Fourth Amendment of the United States Constitution guarantees the right of the people, including companies, to be free from unreasonable searches and seizures. In order to advance these rights, prosecutors are required to obtain permission from a judge before conducting a search. That permission or approval comes in the form of a search warrant. This court order will only be issued after the investigators have presented probable cause (i.e., "more probably than not") that a crime has been or is being committed, which is supported by oath or affirmation, and which describes the place to be searched and the person or things to be seized. In summary, a search warrant is a written court order that gives authority to law enforcement officers to search a defined location or area and to seize specific types of property.

One reason the government relies upon search warrants is because of the strategic advantages that accompany the elements of surprise, chaos, and confusion. At the time of the search, most companies are grossly unprepared to protect their legal interests, as well as those of their executives and employ-

ees. Unfortunately, if a search is being executed, the opportunities for learning about search warrants and setting up a response plan are long gone. During the search, the company does not hold much leverage and is forced to react. Accordingly, the following tips are organized by when they can be implemented—before, during, or after the search warrant is executed.

Before a search warrant is served

Tip 1: Be prepared and plan ahead

The main tip is that planning is essential *before* a search warrant is executed. Whenever the government executes a search warrant upon a company, the stakes are high and time is of the essence. Accordingly, one important step that compliance professionals can take is to help the lawyers develop a detailed search warrant response plan. This plan would include specific internal procedures and training for company officials and employees (including the front desk/reception personnel) so that they are better educated and better prepared to respond to a search warrant and protect the company's legal rights and defenses. Obviously, this process lies at the heart of the Compliance function. The ultimate goals of an effective search warrant response are to:

- Manage the event as smoothly as possible;
- Prevent panic by keeping employees calm and informed;
- Provide documents and items that the government is legally entitled to receive;
- Expedite the search to minimize business impacts;
- Protect and preserve the legal rights of the company and its employees;
- Maintain the integrity of privileged and proprietary information and documents; and
- Gain valuable insight into the underlying allegations that prompted the investigation.

In short, with adequate preparation and an organized response, a company can create a more level playing field, regain some control, and counteract the element of surprise arising from the search.

During the execution of the search warrant

Tip 2: Request and obtain agents' identification and review scope of search warrant

The agents serving the warrant, as well as non-company persons involved in the search, should be asked to identify themselves and to sign a visitor log (in accordance with company policy). The agents should be requested to present their government identification and official business cards, and this information should be recorded or copied for future use, reference and communications.

If the agents serving the warrant do not provide a copy of the warrant, request one. Federal Rule of Criminal Procedure 41(d) requires that the officer taking property under a warrant must give a copy of the warrant, as well as a receipt for all the property taken from the premises.

Tip 3: Gain as much information as possible

Company personnel should try to gather as much information as possible through conversations with the lead agents— important facts, including the nature of the investigation, whether the company is a target/subject, whether any company employee is a target/subject, etc. Do not be concerned if the agents do not provide any information initially.

A warrant may be served with its accompanying affidavit, which provides valuable insight into the underlying basis and justification for the search. The warrant defines and limits the scope of the search and informs the recipient of the range of items that may be lawfully seized. If no affidavit accompanies the warrant, inquiry should be made as to why there is none. This should be followed by a request for a copy before the search is initiated. In some investigations, the affidavit may have been filed under seal, in which case it will not be made available until further court action is sought (i.e., motion to unseal). Your legal counsel may be able to obtain a copy of the affidavit underlying the search warrant request if the affidavit is not sealed or if the Court orders disclosure.

Tip 4: Prepare a short statement for employees and the media

Since the execution of a search warrant is a newsworthy event, and the media is often alerted soon after the agents show up at the facility, companies should also immediately prepare a short statement for use with its employees, as well as the media. The goals of any statement made at this early stage of an investigation are clear:

- Avoid mere silence, or the dreaded (and all-too-commonly uttered) "no comment," which smacks of culpability and guilt;
- Don't make any statement that is false, uncertain, or overly defensive/adversarial;
- Convey the following basic and positive themes (assuming that they are truthful)
  - Company X was unaware of the government investigation until the agents showed up at the facility, and would have voluntarily cooperated with any government requests.
  - Company X is fully cooperating with the authorities, is undertaking its own investigation to uncover the facts, and is committed to take any actions necessary to correct any legal or regulatory problems.
  - Company X takes compliance very seriously, and has worked hard in the past to earn a strong compliance record.
  - At this early stage of the investigation, and considering the unknown facts, it would not be proper to comment any further.

Please note that the company should not actually issue the prepared statements or press releases until the media inquires about the search warrant. In some instances, there is no press inquiry at all.

Tip 5: Attempt to negotiate a narrowed scope

If the warrant is defective or overly broad, your lawyer can object and attempt to negotiate a narrowed scope. A narrowly drawn search warrant may describe certain documents relating to only

certain contracts or particular types of documents. In such instances, the government is not permitted to go through all file cabinets or records where other materials are located. In the presence of a narrow search, the company is often better off by cooperating with the government agents in directing them to the particular areas where the records in question are stored. Obviously, the company should vigorously object to any attempts by the government to go beyond the specified scope of the search. Accordingly, the company's Search Warrant Action Team (SWAT) with assistance from counsel should attempt to reach an agreement with the government agents on what physical areas will be searched, based upon the terms of the warrant and/or affidavit. If agreement cannot be reached, a request should be made that the search of the area in question be postponed until it can be resolved by company legal counsel and government counsel or the magistrate or judge who issued the warrant.

If there is any overt defect in the warrant, this should be pointed out to the agent and an objection to any search should be made. For example, if the premises the government agents demand to search are not described in the warrant, it is illegal to execute the warrant. Should the agents proceed despite the defect and notwithstanding the warning, the fruits of the search may later be suppressed from use in any case. Similarly, if the agents conducting the search go beyond the specifications of the warrant—the premises or list of items to be seized—or have passed the 10-day limit on the warrant, contact the responsible government attorney to insist that they respect the terms of the warrant. Remember that the agents cannot search *any* files or any facilities they find interesting; they are strictly limited to those designated in the warrant.

Tip 6: Advise employees of their rights during search

Contrary to popular assumptions, there is no obligation for employees to give an interview during a governmental search. Each employee can decide to consent, decline, or postpone an interview. Before there's a knock on the door, make sure your employees know:

- If an employee agrees to an interview, the employee can stop the interview at any time, and can set limits on what he/she will agree to discuss with a government agent. Even though an employee is not legally obligated to speak with government agents, he/she may voluntarily choose to do so.
- If an employee agrees be interviewed, any information must be accurate and truthful.
- No matter what assurances may be provided by government agents, nothing said during the interview is "off the record." Search warrants can be stressful events. Accordingly, many employees often speak candidly and openly with the agents in hopes of getting assurances that they will not get into trouble. However, employees must remember that agents do not have the authority to bind the government with promises of immunity or leniency. In short, the government agents can, and often do, use any statements made during interviews against that person and/or against the company in a criminal proceeding.
- To that end, employees must be careful to speak only about facts that they know first-hand, and to avoid guessing or speculating. Giving false or misleading statements can be a separate crime.

- An employee has the right to counsel and the right to have counsel present during any interview with a government agent. In addition, as company employees, each person has the right to be advised by the company's counsel or to have individual counsel before being questioned or responding to any questions.
- Unless an agent makes a statement to the contrary, an employee is free to go at any time.
- An employee should not speak with the press.

Tip 7: Monitor the execution of the warrant

When the agents serving the warrant are conducting the search, the company's SWAT should closely monitor the actions and statements of the agents through the search. For example, the company may want to assign responsible employees to follow each agent or group of agents for the entire period of the search to observe their conduct and listen to their questions and statements. This is a perfect role for members of the Compliance team. These monitors should also take extensive notes regarding the places searched, which employees the agents questioned, statements made, the time involved in each part of the search, and the conduct of each agent, etc. If possible, monitors should also use videotapes, photographs, and/or dictation recorders to assist them in this task. However, all of these notes and materials should be directed and forwarded to company legal counsel and clearly labeled as "attorney-client communications." Because a search can take many hours or even days, it is crucial that the employees monitoring the search should not disturb anything the agents have compiled.

Tip 8: Streamline the flow of information (both internally and externally)

The government agents in charge of the search and all company employees should each be told to direct any questions and requests to the company's "lead person"—typically the company's lawyer or upper management.

Tip 9: Request copies of items to be taken and detailed search inventory

The company should try to obtain copies of the seized documents before they are removed from the company premises. In addition, if the agents are removing documents or records that are critical to the on-going operations of the business (e.g., computers, computer software, engineering drawings) the company has a strong and legitimate basis for such a request. Moreover, the company has the right to have its original documents and materials returned when the government has no further use for them. Counsel for the company should submit a written request for the prompt return of such items, as well as the timeframe for their return. If the government does not comply, company counsel can file a motion for return of the seized property on various legal grounds, including Rule 41(e) of the Federal Rules of Criminal Procedure.

Before the agents leave the company site and remove any seized items, the company is entitled to receive, and should request, a detailed inventory of all the items to be taken, including the types of documents. No company employee is required to sign a receipt for the inventory, nor should anyone do so if requested. However, company representatives should ask the agents to confirm that the inventory is a complete list of everything seized.

Tip 10: Avoid typical mistakes

In the absence of advance planning and adequate training, a company and its employees are far more likely to commit one of the following typical (and costly) mistakes in response to a search warrant:

- Due to a general misunderstanding of the applicable legal standards that apply to a search, a company may incorrectly try to resist or obstruct the government agents.
- Company employees may be unaware of their individual rights and may incorrectly assume that they are obligated to speak with government agents.
- Alternatively, certain employees may attempt to confront the agents or display a "cowboy" mentality in hopes of playing the role of the "company hero."
- Company management may inadvertently expand the scope of the search warrant by agreeing or consenting to certain (seemingly harmless) requests made by government agents.
- The company may lose an important and valuable opportunity to gain insight into the underlying allegations that prompted the investigation and search, as well as the opportunity to minimize the disruptive impacts of the search.

After the search

Tip 11: Memorialize the search, conduct an internal investigation, plan follow-up actions and start a dialogue with the government

As soon as the search is concluded and the agents leave, the SWAT and company counsel should undertake an initial audit of the search to document exactly what happened during the search, as well as to determine the scope of the government's investigation and its overall strategy. This initial assessment must involve a number of important tasks, including:

- Identify all offices and other areas that were searched, as well as the people who work in each area;
- Identify what was seized and interview each person about the items seized;
- Identify and interview employees with knowledge of the search events;
- Prepare a detailed report of what was asked and how the employees answered;
- To the extent that the company was made aware of certain violations or misconduct, an internal investigation should be initiated, with the goal of gaining as much information as accurately and quickly as possible, as well as planning for corrective or remedial action to prevent recurrence.

Conclusion

Just as effective compliance programs are designed to prevent, detect and respond to various risks and contingencies—including those with low probabilities but high stakes, there are additional precautions that companies need to take. On the front end, heavily regulated companies need to pay

attention to maintaining productive regulatory relationships. And on the back end, companies also need to assess their "enforcement-readiness" so they are fully prepared to properly respond to criminal investigations.

Both of these areas should be a part of the broader compliance plan and can significantly help to reduce compliance risks. Working in tandem with the legal team, compliance professionals can greatly assist in the needed planning, training, and execution to better protect the company.