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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 focus on the initial steps, including assuring the company has competent and experienced outside counsel at the ready to supplement the in-house team.

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



BY T. MARKUS FUNK, RICHARD HOSLEY, AND  
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The ultimate mission of in-house legal and compliance teams is to avoid legal issues created by noncompliance with government regulations and statutes. But in the current world of complex regulatory schemes and increasing whistleblower activity, even seemingly minor or inconsequential missteps can lead to aggressive government responses, including parallel civil and criminal investigations.

It is the responsibility and obligation of legal and compliance professionals to ensure their organization is prepared to promptly and properly respond to the initiation of a government investigations. Establishing a trained legal/compliance “Response Team” to immediately handle unannounced government visits, such as search warrants, raids on company facilities, or surprise interviews of company employees, is a key component in management’s proactive response to government investigations.

In popular media, criminal behavior often involves stories of violent and reprehensible actions, which are obviously against all moral and ethical norms of the broader community. A company may believe it has nothing to fear because it does not engage in such behaviors. However, in the real world where companies reside, “wrongful” behavior could potentially involve contrasting interpretations of complex regulations, such as a company’s exceedance of a permit, overseas payments to government officials, the reckless submission of allegedly false claims for payment, or the corporate choice not to make a report of a negative technical finding about a product. All organizations, particularly those in highly regulated industries, must be prepared for the possibility that government investigators may someday arrive unannounced at their door.

Government investigations are often not linear, patterned, or predictable. This is particularly true where there are paralegal civil and criminal investigations. Investigations may begin with a vague complaint or a suspicion and can expand in multiple directions as the

facts evolve. Even in situations where the company is convinced it has done nothing wrong, it may take years of investigation, wear and tear on the organization, and advocacy before the government reaches the same conclusion. Large, wide ranging civil fraud or criminal investigations are a special kind of challenge. When the government has a company in its sights, it is not necessarily constrained by the initial direction of its inquiry. To the contrary, such investigations can feel like an open-ended quest by the government to probe the inside of the company for wrongdoing—whether by the company, the individual, third parties, or any and all of the above. Therefore, it is critical to know and fully understand the government investigators' process, what investigators are likely to demand, the company's rights during an investigation, and prudent steps for response.

A company's immediate response—interaction with government agents, protection of the company's rights—could set the tone and significantly impact the entire course of the investigation. A company, its legal and compliance teams, and its officers must prepare for the worst in advance by ensuring that its employees are armed with the proper knowledge, resources, and training. This memorandum provides basic guidance to help in-house legal departments proactively prepare their organization for unannounced government visits. Outside counsel with white collar investigation expertise and experience are also an invaluable resource.

## **Preparatory Steps—Establishing a Response Team; Getting to Know Your Opponent and Your Role in the Investigation**

### **The Response Team**

A Response Team should be composed of in-house legal and compliance professionals, supplemented with experienced outside counsel. But, in the case of a geographically diverse organization with many locations, the legal and compliance departments may be at corporate headquarters hundreds or thousands of miles away. Therefore, the Response Team must also include trusted senior managers at geographic locations all across the company's area of operations who can act as primary points of contact with government agents on site and as liaisons with the legal and compliance Response Team members.

### **Hotlines**

Hotlines should be established that can be used to directly notify the legal and compliance Response Team members when there is an unannounced visit by a government agent at a company facility. Telephone numbers that ring directly to the desk or cell phone of the Response Team, fax numbers, or direct email accounts are ways to quickly pass necessary information to the legal experts. These numbers should be clearly and plainly displayed at all company locations. The company liaisons must be trained to immediately contact the legal and compliance Response Team members at the first sight of government investigators. They should also be prepared to immediately fax any relevant documents, i.e. subpoenas, civil investigative demands, etc.

### **Know the Investigators and Their Toolkits**

For the Response Team, awareness of relevant enforcement agencies and their investigative tools is a must. What agencies have jurisdiction and oversight

over the company's activities? The U.S. Department of Justice? Health and Human Services? The Environmental Protection Agency? State regulators, inspectors, and surveyors? What tools do these various agencies have at their disposal? A Civil Investigative Demand authorized by the False Claims Act? A HIPAA administrative subpoena issued to investigate criminal health-care fraud? A federal grand jury convened to investigate federal crimes? Different statutes authorize agencies to use different tools to conduct investigations and collect documents. Knowledge of the relevant statutes will give the Response Team an indication of the type of investigation. And each investigative tool has certain statutory and procedural restrictions that the Response Team must know and understand.

Once an investigation has commenced, knowledge of the particular criminal investigator's and prosecutor's prior experience may also be useful. Does the agent and/or government attorney have years of experience in this area of law, or are they a relative newcomer to the intricate, and perhaps arcane, regulations at play? Years of experience in the relevant regulatory landscape could indicate the government attorney is "seasoned" and capable of quickly identifying relevant facts and issues. A more junior attorney may feel compelled to "boil the ocean" before he will be prepared to have a substantive discussion. Has the attorney spent a lifetime in the government sector, with little to no experience with the dispersed authority and information silos that exist in many large corporations? If so, a polite education on corporate America may be necessary to help establish mutual baselines. Is the attorney a former Big Law associate who is using his government experience to establish a name for himself as he makes a run at a partnership at a white shoe law firm? Is the government attorney a "line attorney" who will need to report to and seek approval from a manager, or is she a supervisory attorney vested with decision-making authority? Such a distinction could determine the nature of your response and inform as to whom is the ultimate audience for your legal team's advocacy. All of these factors should be weighed and considered as they may all have an impact on the scope, duration, and nature of the investigation, as well as the direction of your response and advocacy.

### **Know and Understand the Company's Role in the Investigation**

Just as it is important to know the government players, the Response Team needs to know and understand the company's role in the investigation. Is the company a "target," a "subject," or merely a "witness?" In the world of DOJ criminal grand jury investigations, these labels have discrete definitions. The U.S. Attorney's Manual (USAM), the DOJ's guidebook for federal prosecutors, defines a "target" as "a person [or entity] as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." A "subject" of an investigation "is a person whose conduct is within the scope of the grand jury's investigation." (USAM Sec. 9-11.151)

These categories impose certain obligations and requirements upon federal prosecutors and their agents. For example, a "target" called before a grand jury is entitled to be informed of her status and provided with written advice concerning her rights, including the right to remain silent. (USAM Sec. 9-11.153) And should a

“target” of the investigation and her attorney assert in a signed writing that the “target” will refuse to testify before the grand jury on Fifth Amendment grounds, the witness ordinarily should be excused from testifying. (USAM Sec. 9-11.154) Conversely, a “target” or “subject” may request an opportunity to testify before the grand jury investigating the case and federal prosecutors are required to give such requests “favorable consideration.” (USAM Sec. 9-11.152) These are just a few examples. The Response Team should familiarize itself with relevant provisions of the USAM and other prosecutorial guidelines.

### Summary

*Step 1:* Establish the Response Team and the methods and means of communication with them. Assure that the company has competent and experienced outside counsel at the ready to supplement the in-house team.

*Step 2:* Catalog the regulatory agencies with jurisdiction over the company’s activities. Know and understand their regulatory and statutory authority, and the principal investigative tools that this agency refers to in

its regulations or guidance manuals, available on its website, which suggest how those tools may be utilized.

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