

LAW ENFORCERS AT THE GATES?

Preparing Your Company to Respond to Unannounced Government Visits



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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 HIPPA administrative subpoena issued to investigate criminal healthcare 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 U.S. Department of Justice (DOJ) criminal grand jury investigations, these labels have discrete definitions. The United States 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."¹

¹ 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.² 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.³ 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.”⁴ 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.

Search Warrants

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.

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 management 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.

² USAM Sec. 9-11.153

³ USAM Sec. 9-11.154

⁴ USAM Sec. 9-11.152

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 *Upjohn v. U.S.* decision.⁵ 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 contacted 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.

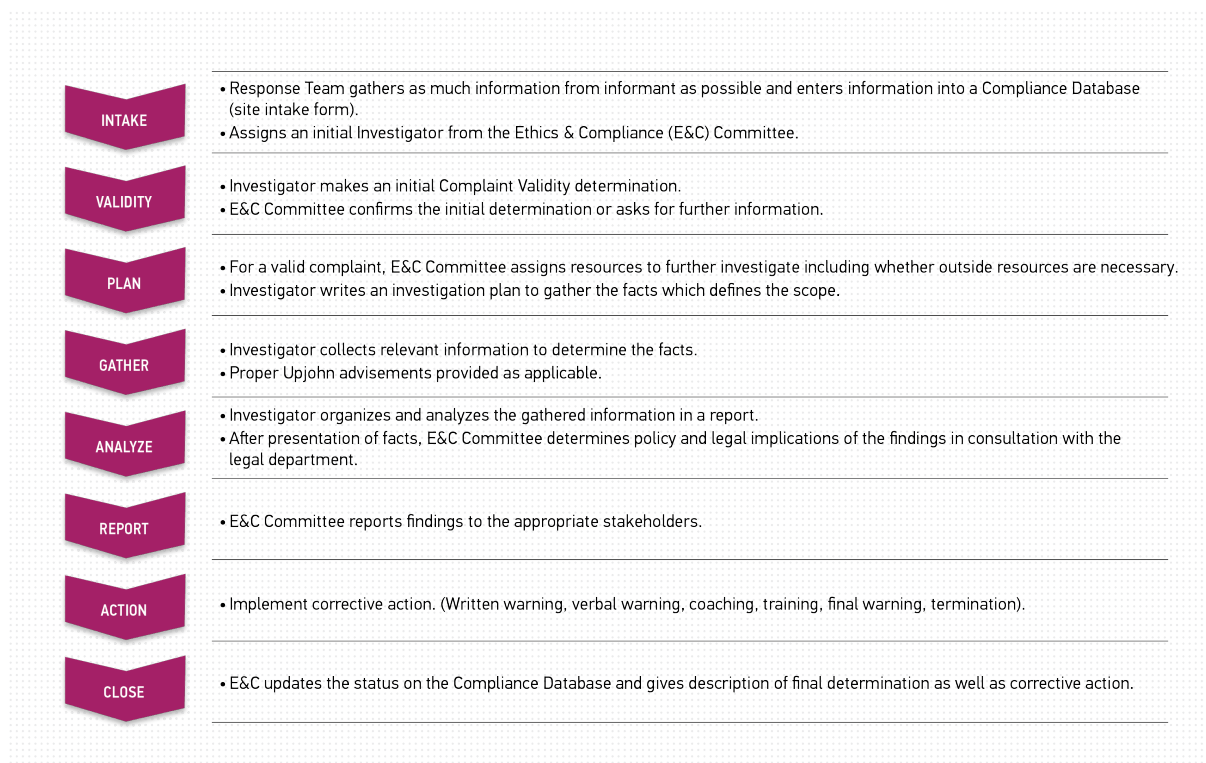
STEP 4: Notify the government that the company and its employees are represented and that interview requests should go through counsel.

⁵ 2449 U.S. 383 (1981).

Tools for Understanding the Enforcement Process and Conducting Internal Investigations

Once a company becomes aware of a potential compliance violation, either through an internal complaint or through the initiation of a government investigation, it needs to promptly and thoroughly conduct an internal investigation. What follows are some handy tools designed to help you better understand the enforcement process and to prepare you to take appropriate actions after being notified of actual or potential enforcement action, whether through a hotline tip or an enforcer’s knock on the proverbial company door.

The Matter Intake Process



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INVESTIGATION PROTOCOL

STEP 1: INTAKE

- Ethics and Compliance (E&C) Committee members (regardless of nomenclature) are alerted to a potential compliance issue via one of the company’s intake mechanisms (hotline, website, manager complaint, legal, etc.). For reports initiated through human resources or the legal department, a member of the E&C Committee will gather as much information from the informant as possible and enter the information into the compliance database (usually a site intake form).
- If a report of an actual or potential violation of the company’s E&C program comes in via the E&C hotline, the outside vendor personnel receiving the call shall forward the report to the E&C Committee for review by e-mail.

- If the report comes in any other way, any member of the E&C committee receiving the report should e-mail a summary of the report to the rest of the E&C Committee. The E&C Committee will assign an investigator (a member of the E&C Committee). If a report requires immediate investigation, the chair of the E&C Committee will assign an investigator and communicate the decision to the E&C Committee.

STEP 2: VALIDITY DETERMINATION

- The investigator will decide if the complaint is valid and requires investigation. If it is determined to be invalid, the investigator will enter his or her reasoning into the compliance database. Investigation ceases.

DETERMINING COMPLAINT VALIDITY

A valid complaint has the following qualities:

- Reasonable basis in fact (evidence exists)
- Involves a violation of corporate policy

On the other hand, an invalid complaint has these characteristics:

- A lack of specificity
- Vague
- Willful harassment of employer (reasonable person standard: Does the complaint express a genuine concern about a workplace violation, or is it intended merely to annoy or irritate the employer?)

STEP 3: PLANNING

- If the complaint is considered valid, the investigator notifies the appropriate stakeholders and works with the E&C Committee to develop an investigative plan involving the appropriate resources (e.g., legal, human resources, security, internal audit).
- The E&C Committee should determine whether others will be included in directing
- and performing the investigative plan. Other stakeholders may be included by considering the apparent nature of the report, such as the following:
 - Matters relating to financial concerns may include the Chief Financial Officer (CFO).
 - Matters relating to employee conduct may include the global vice president of human resources.
 - Matters relating to potential violations of state or federal law may include the General Counsel.

LEVEL OF RESOURCES THAT ARE BROUGHT TO BEAR

In the day-to-day life of the company, there will be “complaints” or allegations of misconduct that come from sources other than the Board of Directors or government agencies (e.g., letters to the chief executive officer, hotline, complaints to human resources) and that do not on the surface present issues of potential misconduct. For example, a complaint may allege that an employee attended a scientific conference at which representatives of competitors were present, when such attendance in and of itself would not constitute misconduct. Similarly, an employee might have given a local reporter a copy of a document that the company had already made publicly available on the company’s website.

The above matters should be pursued, although initially not necessarily with the same level of resources as would be deployed for matters indicating a more serious risk. Appropriate compliance, legal, or other professionals should

undertake the appropriate degree of inquiry to determine whether the matter presents an issue of potential misconduct. There are instances in which such situations can be properly addressed through perhaps a few telephone calls or brief interviews by the right individual. However, in more resource-intensive investigations, it is just as critical that the investigator provide documentation to justify any conclusion that there is no credible evidence of misconduct. It is also critical that the investigator not have reached any factual conclusion before going through the necessary steps to justify that factual conclusion.

WRITTEN PLAN

The investigator should begin an investigation with a written objective and investigative plan. The investigative plan should be informed, at a minimum, by the following questions:

1. What happened?
2. When did the company know what happened?
3. What was the response to what happened?

Invariably, both the objective of the investigation and the investigative plan will need to be updated or revised as more information is obtained in the course of the investigation. Such changes may lead to a broadening of the scope of the investigation and therefore of the relevant team (including going from a situation where the investigation can be competently handled internally to one where an outside firm may be needed for expertise, staffing numbers, or independence). There can also be cases in which the investigation becomes less complex than originally thought. It is always more efficient to deal with these issues via a written plan.

The investigator shall update the claims reporting database within the network system as appropriate.

STEP 4: Collection of Relevant Information

As this section will relate, the investigator should gather information through document review, electronic forensics, and interviews (including complainant, subject of complaint, and witnesses).

PURPOSE OF THE COMPLIANCE INVESTIGATION: DETERMINE THE FACTS

The purpose of a compliance investigation is to determine the relevant facts, not to “prove” a case. Addressing the relevant facts through corrective or disciplinary action is a separate part of the compliance process, once the facts are established.

Compliance investigations must be conducted in a professional manner by individuals with appropriate backgrounds, including certain technical expertise (production, manufacturing, distribution, finance, etc.), to the extent those issues are relevant to the investigation.

There are circumstances in which investigations must be conducted by outside firms (such as potential conflicts of interest, need for additional resources or expertise, etc.), and they will be subject to certain procedures. However, it is more common that investigations will be conducted wholly or primarily by internal staff. Internal investigations are the primary focus of this hotline process.

INTERVIEWS AND UPJOHN ADVISEMENTS

If an interview is conducted by attorneys and there is any question that the interviewee may think that the attorney represents the interviewee rather than, or in addition to, the company, the so-called Upjohn advisements (amended as appropriate for non-U.S. jurisdictions) should be provided. They can be summarized as follows:

- The interviewers represent the company only, not the interviewee.
- Information provided in the interview is protected by the company's attorney-client privilege, which is controlled by the company, not the interviewee.
- Information shared with the interviewers may be used by the company against the interviewee.
- The company may decide whether to waive the privilege and disclose information from the interview to third parties, including the government.

PREPARATION/SECURING DOCUMENTS

Once a matter is identified for investigation, the investigator should log the information into the case management database and the lead investigator (and investigation team) should be identified.

The investigation should, in addition to identifying all possible internal witnesses, be prepared to consider other relevant documents, such as e-mails, memos, individual and department files, expense reports including company credit card records and receipts, travel reports, time sheets, and electronic log-in data. Care should be exercised before reviewing such documents without the knowledge or consent of the involved employee. Asking an individual to provide such documents often results in cooperation, even in cases where the information provided is unflattering to the individual providing it.

However, there can be instances in which an individual is not cooperative and the company may need to exercise its right to review such documents according to its rights under company policies and any applicable local, state, or national laws. Those rights, such as reviewing e-mails without knowledge or consent of the author or recipient, are normally best exercised on as limited a basis as necessary (both in terms of the scope, meaning the date range/subject matter, and the individuals who actually review the e-mails) to meet the needs of the investigation. In some situations involving potentially very serious issues in which outside counsel is taking the lead, a process in which documents are secured before interviews may be appropriate. However, judgment should be exercised in less serious cases.

NUMBER OF INTERVIEWERS AND STYLE OF INTERVIEW

In the vast majority of cases, interviews should be done in the presence of at least two persons besides the interviewee. Both interviewers should take notes, although one should have the primary responsibility for doing so. It is fine if only one of the interviewers asks questions. The interview and the notes should be discussed among the interviewers as soon as possible after the interview to ensure completeness and accuracy.

Although nervousness and anxiety are commonplace in compliance interviews, most people are inclined to be forthcoming if questioned politely. It is normally most effective to allow the interview to be conversational in tone and allow the interviewee to speak for as long as he wishes about whatever he wishes. An interviewer should have an outline of topics to be addressed, but that outline should only serve as a guide. All of the topics should be covered eventually, but not necessarily in the order in which the interviewer has written them. Resist the notion of "controlling" the interview in the same sense that a lawyer would want to control testimony during cross-examination in a trial. Rather, interviewees are more likely to give candid, truthful, accurate, and useful information if they are allowed to speak naturally and at their own pace as opposed to following a questioner's list, which may give the interviewee an opportunity to pause and be more calculating in their responses. Of course, there are also people who will lie or conveniently "forget" material information, particularly if they believe that it is damaging to them personally. Thorough, professional investigations will nonetheless often result in documentation or other witness statements to establish the truth.

STEP 5: Factual and Legal Analysis

The investigator organizes and analyzes the gathered information in preparation for reporting and presentation. After presentation of the facts, the E&C Committee determines policy and legal implications of the findings in consultation with the legal department.

THE INVESTIGATION ITSELF MUST BE CONDUCTED IN ACCORDANCE WITH COMPANY'S CODE OF CONDUCT

At the outset, the interviewers will obviously want to introduce themselves and explain who they are, their relationship to the company, and their role in the interview (e.g., company management has requested that we review the procurement operations for this location). This would also be the time to indicate, as applicable, that the interview constitutes company confidential information, that the interviewee is obligated under the company's code of conduct to cooperate with the investigation, and that they are not to speak with others about the interview (subject to exceptions in the case of the interviewee obtaining their own personal counsel or other personal advisors). If the interviewee is not the target of the investigation (and reasonably appears unlikely to become a target), it may be useful to inform them in order to make the interview more relaxed.

Investigations must be undertaken in a professional manner in accordance with the company's code of conduct and its provisions regarding respect for individuals. Tactics such as lying to interviewees, being unduly harsh or aggressive with interviewees, implying that one can make a "deal" with an interviewee and so forth are not permissible.

In addition, the following principles should be observed and participants in the investigation should be informed of them, unless it is apparent that they are already aware:

- An investigation does not presume any wrongdoing or any other facts. The objective of the investigation is to determine the facts as best as possible.
- Employees are expected to cooperate with internal investigations.
- There is no stigma attached to being questioned during an internal investigation.
- There is no stigma attached to being the target of an investigation if no wrongdoing is found.
- Confidentiality of the investigation must be preserved by the investigators, sharing information only on a need-to-know basis.
- Individuals interviewed or requested to provide documents as part of an investigation must maintain confidentiality, and not discuss the subject of the interview with others (although they may need to let their supervisor know that they were requested to participate in a confidential internal investigation).
- The company's policy prohibiting retaliation against individuals providing evidence of misconduct will apply.

STEP 6: Reporting to Stakeholders

The Ethics and Compliance Committee reports findings to the appropriate stakeholders.

CONCLUSIONS: INVESTIGATION REPORT

It is not unusual for facts that completely change the tenor of the investigation to arise late in the investigations process. For this reason and to avoid the disruption of giving out misleading or incorrect information that may be acted upon prematurely, the investigators should avoid making conclusions before the investigation is complete. It may be necessary to advise a small number of managers of the progress of an investigation before it is complete, but the audience of such reports should be limited to a need-to-know basis and such progress reports should be clear that all the facts or document review are not complete.

Once the investigation is complete, the facts should be memorialized, usually in a written report, but sometimes it may be more appropriate to deliver the report orally at a meeting in which the conclusions are set forth. The length and content of the report can be tailored for the circumstances, but the report should identify the subject and scope of the investigation, date and duration, any limitations on the investigations process (if applicable), and conclusions. Depending on the audience of the investigation report, the identification of individuals interviewed, and supporting documents might not be shown in the report, but the investigator should have such information readily available in written form in case it becomes necessary to produce later.

STEP 7: Corrective Action

The company should implement corrective action as necessary (e.g., written warning, verbal warning, coaching, training, final warning, termination). The individual assigned to investigate and prepare the report shall conduct his/her investigation and report findings to the E&C Committee, who shall then determine whether any action is necessary.

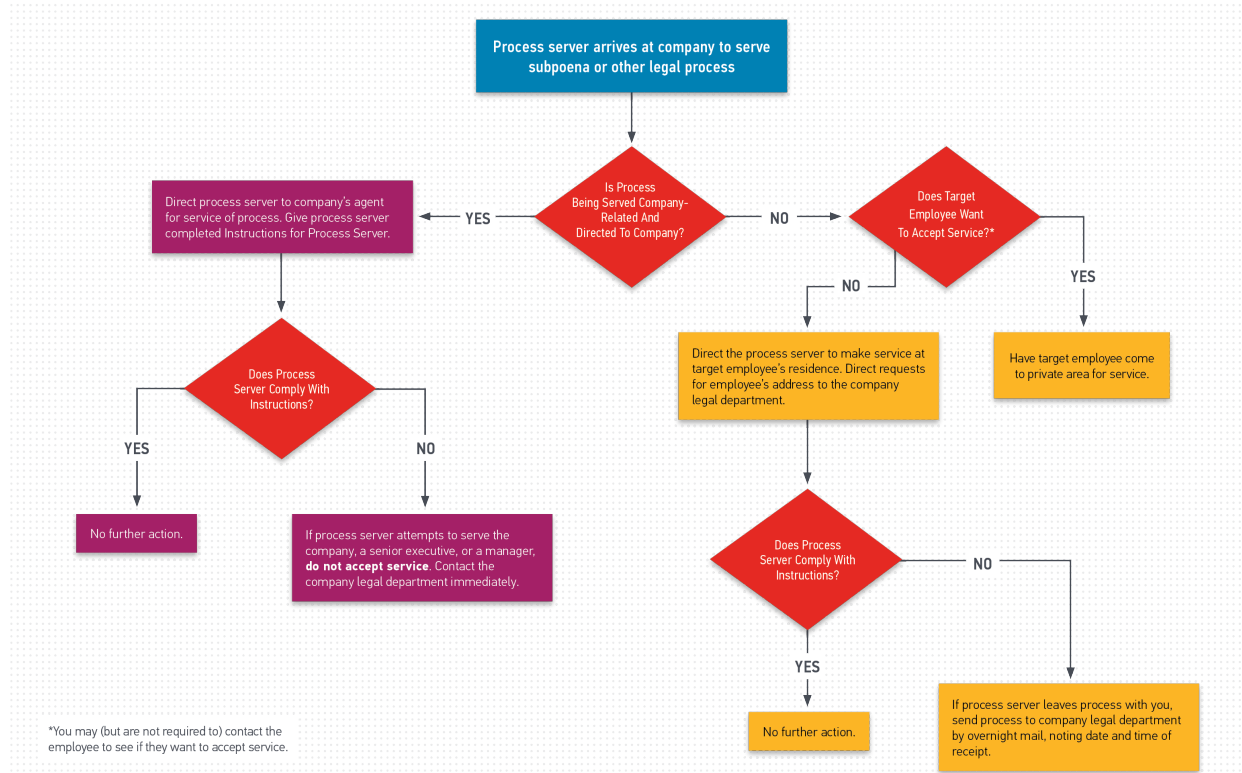
STEP 8: Close-Out and Follow-Up

Update the status on the compliance database and give a description of the final determination as well as corrective action. When the investigation report is concluded and the investigation is closed, those facts should be logged onto the case management ledger. The E&C Committee or other responsible department, which might well be someone different from the lead investigator, should then follow up to ensure that any corrective or disciplinary action determined as a result of the investigation is actually carried out:

1. Upon completing any recommended action, the individual assigned to investigate the report shall save any related documentation.
2. The individual assigned to investigate the report shall investigate as appropriate and complete the following fields:
 - *Disposition*: Enter a brief description of the findings and conclusion of the matter.
 - *Date Closed*: Enter the date the matter was closed or resolved.

PROCEDURE FOR SERVICE OF LEGAL PROCESS, WAGE WITHHOLDING, SUBPOENAS, OR SUMMONS

Standard Procedure for Handling Process Servers (Subpoenas)



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- Ask the server to sign the facility visitor log.
- Determine if the service is a) directed to the corporation and is company-related or b) directed to an employee or a subcontractor and is not company-related, then follow the appropriate subsection below.

COMPANY-RELATED SERVICE

- “Neither this facility nor its employees are authorized to accept service of process on behalf of the corporation or any of its subsidiaries. The corporation and its subsidiaries have designated _____ as their registered agent.”
- “Please direct all service of process to _____.”
- Fill out section 15.25 and hand it to the process server.
- If the process server ignores your directions and attempts to serve process on the corporation, a senior executive, or a manager in a company-related action, immediately notify the legal department or the resource team. Attempts to serve process on anyone other than the corporation must be referred to the legal department or the response team before service is allowed.

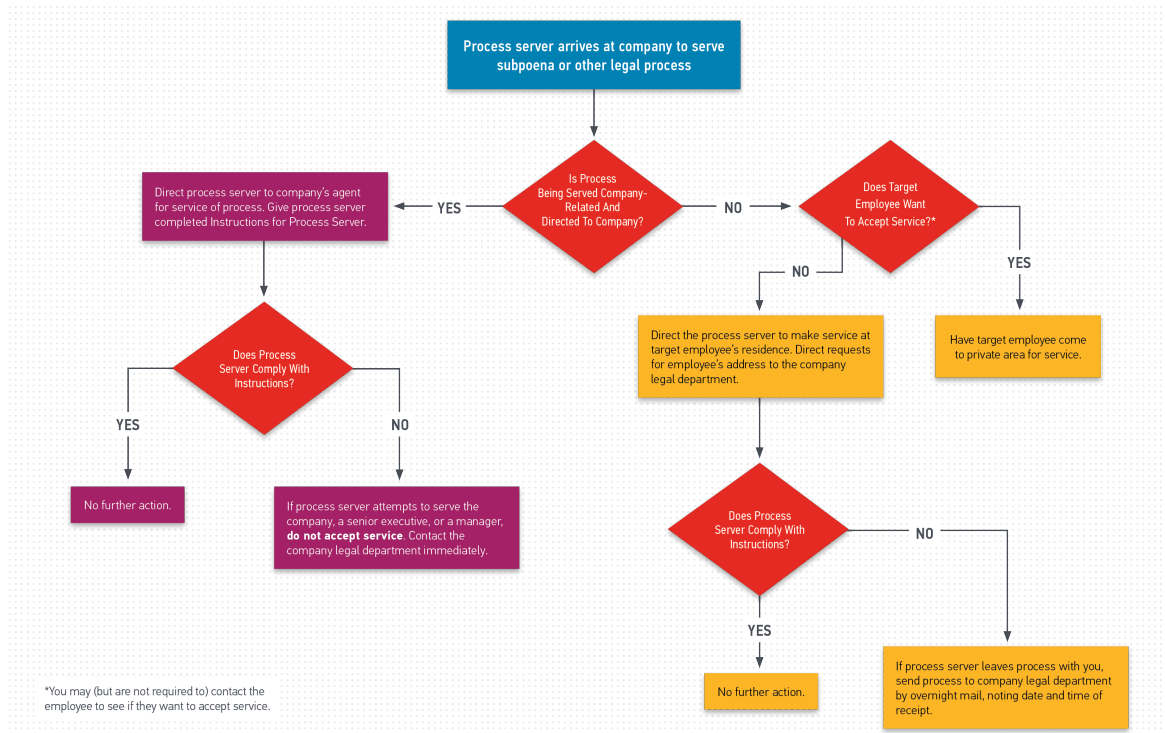
- Employees named on a document should not be notified. This is a matter for the legal department.
- A company-related process is time sensitive and must be received by the legal department as soon as possible. Overnight courier or hand delivery is required. Regular company mail is not appropriate.
- Service in Hawaii, Ohio, and Pennsylvania and notices and orders involving wage withholding (e.g., garnishment, child support) are exceptions that should be accepted at the local facility and handled by the local controller in coordination with the employee compensation and legal department.

NON-COMPANY-RELATED SERVICE

- You are not legally required to interrupt business operations to summon an employee, but you may contact the employee to see if he or she wants to accept service.
- Service should not occur on premises. Direct the server to make service at the person's residence.
- Do not provide or confirm the home address of an employee. Refer such requests to the legal department.
- If the process server ignores your directions to serve process elsewhere, immediately send the envelope to the legal department, noting the source of the document(s) and the date and time they were received. Company-related process is time sensitive and must be received by the legal department as soon as possible. Overnight courier or hand delivery is required. Regular company mail is not appropriate.
- Arkansas, California, Washington D.C., New York, and Pennsylvania are exceptions, where service should be left with a receptionist or office assistant; in Florida, you must allow the server to serve an employee in a private area.

ARRESTS AND RESTRAINING ORDERS

Standard Procedure for Handling Process Servers (Subpoenas)



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- Law enforcement officers or agents requesting to issue an arrest warrant or restraining order should be directed to the legal department. If no lawyer is available, direct the agents to the senior employee onsite.
- If agents insist on issuing the arrest warrant or serving process at a company location, the most senior employee should arrange for the targeted individual to come to a private area. Try to minimize workplace disruption.
- Do not inform the targeted individual as to the nature of the request.

GUIDANCE TO EMPLOYEES (SEARCH PURSUANT TO A WARRANT)

As you know, the office is being searched by law enforcement officers. At this point, we do not have an explanation for exactly why the search is being conducted, but we would like to inform you of your rights and obligations:

1. First, do not obstruct or otherwise interfere with the search. The officers have a legal right to search the premises and to seize what is designated in the warrant as evidence.
2. Be aware that government agents may attempt to contact you at your office or home and request to interview you. You are free to talk to them, but you are not required to submit to an interview. You do have the right to say you want to confer with an attorney first, and to insist on scheduling any interview at a time and place that is convenient. An attorney can meet with you in advance and advise you. [Also, by being present at any interview, an attorney can try to avoid any confusion you may have regarding the government

agents' questions, and by taking notes the attorney can minimize any misquoting of what you say.] If appropriate, the company will arrange for an attorney to talk to you if that becomes necessary and you so desire. If you are contacted by government agents, please let the legal department know by phone and/or e-mail.

3. If you do decide to grant an interview to the investigating officers, you should be aware that anything you say can be used against you in a criminal prosecution or in a civil enforcement proceeding. This is true regardless of whether the officers give you any so-called Miranda warnings. If you do grant the interview, please inform the agents that your employer has requested that the company's counsel be present at any interview.
4. It is important that no one remove, destroy, or delete any documents, papers, computer files, e-mails, etc., while this investigation is pending. We do not want any innocent or routine destruction of documents or deletion of e-mails to be misinterpreted. We are distributing a separate notice with specific instructions regarding document preservation. If you have any questions, please contact the legal department.
5. The legal department will handle any additional requests for documents after the government agents have left company premises. If a government agent contacts you to request additional documents, please report the request immediately to the legal department.
6. If you are contacted by a member of the news media, please immediately report the contact to the corporate communications group, who will handle all media inquiries. You may refer members of the media to the corporate communications group. Please do not respond to any questions from or provide any documents to members of the media.
7. We know these matters are a distraction and regret any concern this may cause. We appreciate your patience and cooperation.
8. The law enforcement officers' search warrant allows them to conduct their search, but it does not require you to stay here. If it appears that the search is likely to substantially disrupt work, we may, at the direction of the legal department and the response team, dismiss all employees not directly assisting with the search for the rest of the day.

INSTRUCTIONS TO PROCESS SERVER

This instruction sheet is being given to you in response to an attempt to serve process (e.g., summons and complaint) on this facility. Neither this facility nor its employees are authorized to accept service of process on behalf of the corporation or any of its subsidiaries. The corporation and its subsidiaries have designated [Registered Agent] as their registered agent in the State of _____. Please direct all service of process to this agent. Call _____ for the address of the registered agent for your area. Your assistance and cooperation is appreciated. If you have any questions, please contact the legal department.