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AALRR Alert



Regulatory and Criminal Investigations on the Rise; Danger Abounds for the Unwary

What You NEED to Know to Protect Yourself and Your Business When Contacted by Regulatory or Law Enforcement Authorities

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Law enforcement and regulatory authorities target business entities of all sizes with increasing frequency. A January 2016 survey of general counsel worldwide revealed that nearly a third of their companies were targeted by regulators during the past two years.¹ In November 2015, moreover, the U.S. Department of Justice revised its internal guidance manual to instruct federal prosecutors that “[t]he prosecution of corporate crime is a high priority for the Department of Justice.”² Contact with regulatory or law enforcement personnel conducting investigations may come in a variety of forms, some of which are discussed below. Many of these contacts would seem fairly harmless to the unwary. The risks in such investigations are numerous, however, and you should take steps to protect your interests and those of your company before responding to any contact by regulators or law enforcement.

Informal Contacts

The most informal contact by regulatory or law enforcement personnel is simply to “show up” at the residence or place of business of the target or subject of an investigation. What might seem to be a casual conversation, however, is viewed by the regulatory or law enforcement agency as a “witness interview.” It will be memorialized in a formal report emphasizing those parts that are important to the investigator’s case

¹ C. Odom, “Third of General Counsel Feeling Regulator Heat: Survey,” *Corporate Counsel Weekly*, (survey of 1,302 chief legal officers); <http://www.bna.com/third-general-counsel-n57982066923/>.

² United States Attorneys’ Manual § 9-28.010 - Foundational Principles of Corporate Prosecution (Nov. 2015 Rev.), <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations>.

(not yours), if the interview is not, in fact, being recorded without your knowledge or consent. You should understand, no matter what you are told about the interview being informal or “off the record,” there is no such thing as a casual conversation with any regulatory or law enforcement agent. In our experience as former prosecutors who now defend clients in criminal and regulatory matters, we have seen, time and again, that these documented interviews are evaluated and relied upon by a prosecutor or regulator to build a case. Casual comments made in informal interviews are often later presented by law enforcement officials as something far more serious and can end up driving an investigation.

Growing up with the relative freedom we enjoy, it is sometimes difficult not to view the government as being “here to help.” That urge must be overcome if your interests are to be protected, however. It is not true, as you may be told, that, “You don’t need a lawyer, unless you did something wrong.” This and similar quips are an investigator’s attempt to persuade you to give an interview with your guard down and your “interests” exposed. The same strategies are used repeatedly because they are so effective. During even the most informal conversations with law enforcement personnel, you have the right to have your attorney present, and refusal to give an interview without counsel does not imply that you or your business has anything to hide. Answering a question incorrectly because you misunderstood it, are intimidated, or words have been put in your mouth can hurt far more than waiting until an interview can be arranged with an attorney representing

your interests or those of your business.

Finally, lying to a regulatory or law enforcement agent is a crime, and you should never provide false information during an interview. It is best (and easiest) to say, “I would be happy to cooperate with you, but will need to check with my (or my company’s) lawyer first.”

Grand Jury Subpoenas and Administrative Subpoenas

Federal prosecutors wield the power of the federal grand jury. The use of that power is virtually unlimited and largely unsupervised. Like a grand jury, state and federal administrative agencies generally have the power to subpoena testimony or documents in aid of their investigative and adjudicative functions. Disobeying a subpoena may be contempt and could result in criminal or civil penalties. Failure to appear when under subpoena may result in the issuance of a writ of body attachment or another form of arrest warrant (see below). Ignoring a subpoena is not advisable.

Obstruction of justice is a serious crime, and the alteration and destruction of records famously slew accounting giant Arthur Andersen and has less famously caused the demise of countless lesser-known companies. The potential pitfalls of responding to an administrative or grand jury subpoena may be less

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obvious, and potentially troubled waters should not be navigated without the guidance of experienced counsel.

Responding to a subpoena requiring an appearance and testimony or even the production of documents requires a skillful balancing between legitimate business and privacy concerns and lawful demands for documents or information. Through dialogue with prosecutors or regulators, experienced counsel can learn whether the subpoenaed person or entity is the target, a subject, or only a witness in an investigation. Additionally, after conducting a privileged internal investigation, counsel can recommend whether any response should be made at all, or whether it should be made only pursuant to a grant of immunity.

Subpoenas for documents. Because a subpoena does not require prior judicial approval, prosecutors and regulators often issue overbroad and unwieldy subpoenas for production of evidence to gather as much information as possible or to avoid revealing the subject or scope of the investigation. Experienced counsel can work with prosecutors or regulators to narrow the scope of an overbroad subpoena and, if necessary, move to quash or modify it. Counsel can also serve an important role in identifying responsive documents for collection and completing a privilege review of the documents or negotiating terms, including “act of production” immunity, pursuant to which the documents will be turned over to the government. Where response to a subpoena is required, having counsel work with prosecutors to limit the scope of the response allows you more quickly to return to the business of doing business.

Subpoenas for testimony. Instead of, or in addition to, commanding the production of documents or other tangible things, a grand jury or administrative subpoena can compel the appearance of a person or entity (through a representative) to give testimony. Where testimony is sought, the agent serving the subpoena may often seek informally to interview the witness to “preview” the witness’s testimony and “lock” the witness into a single perspective on things without the benefit of pre-testimonial preparation. (See “Informal Contacts,” above.)

³ At the conclusion of the search, the agents must also leave a receipt for any property seized.

Experienced counsel can prepare you to testify before a grand jury or administrative agency so that you can preserve your attorney-client and other evidentiary privileges, as well as the Fifth Amendment privilege against self-incrimination. Through dialogue with the government, moreover, experienced counsel can also seek to negotiate an unsworn and unrecorded interview, given in the presence of counsel, as an alternative to sworn testimony.

Search Warrants

A search warrant is a court order that authorizes law enforcement officers to search a person or premises for evidence of a suspected crime and to confiscate recovered evidence. When necessary, executing officers can make forcible entry to execute a search warrant. It is a crime to interfere with the execution of a search warrant.

Although you cannot lawfully *prevent* the execution of a search warrant, observing a pre-established protocol can keep the nightmare from getting worse. In addition, you do have several important rights that should be understood. First, unless judicially authorized not to do so, agents executing a search warrant must provide a copy of it to the person whose premises are being searched.³

Second, it is standard operating procedure for agents to interview some or all of the employees present at the time of the execution of a business search warrant. They are seeking to learn about business operations, compile additional evidence to build a criminal case, or obtain incriminating statements that can later be used to pressure an employee to turn against their employer or other employees more highly placed in the company. You should assume the agents will segregate your employees and attempt to interview them. There is no obligation to speak with agents serving a search warrant, and at the time the warrant is initially presented, you should inform the agents that the business has counsel who will represent the business and its employees, and that interviews may be conducted only in the presence of counsel.

In addition, the attorney-client privilege and other privileges, such as the

spousal communication privilege, do not evaporate in the face of a search warrant. If privileged material is seized during the execution of a search warrant, you should engage counsel to assert the privilege on your behalf before the government has the opportunity to comb through seized evidence, or you may be deemed to have waived the privilege.

Finally, if you are charged with a crime, you can challenge the use of the evidence seized from any place in which you have an expectation of privacy. If a search has violated your rights, it is best to raise that transgression and other infirmities with a warrant or its execution as part of a dialogue with the government before you are publicly accused of wrongdoing. Even if you are never charged with a crime, evidence seized pursuant to a search warrant can be held virtually indefinitely. Counsel for a person aggrieved by an unlawful seizure of property or by the deprivation of property may seek a court order that the property be returned.

Arrest Warrant

Perhaps the most dramatic way — and certainly among the most unpleasant ones — you can be contacted by law enforcement is if they arrive with a warrant for your arrest. If you are being arrested pursuant to a warrant, it means that one or more criminal charges is already pending against you. Whether or not you are advised of your right to remain silent, you never have an obligation to give a statement to an arresting officer and you should not do so without counsel present. An arrest warrant is a court order that you be arrested, and there is no talking your way out of it. Moreover, it is exceedingly unlikely that your case would be easier to defend if you have made a statement to an arresting officer or agent.

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