

WHAT TO DO WHEN THE GOVERNMENT COMES KNOCKING

Jeff Vaden, Partner

July 18, 2017

BRACEWELL

HOW DO INVESTIGATIONS BEGIN?

- Investigations by criminal investigators (e.g., DOC/ BIS, ICE, FBI, CBP, Texas AG's Office, Houston Police Dept.)
- Referrals from civil investigative agencies (e.g., SEC, OFAC, Department of Health & Human Services)
- Complaints/Tips from Competitors, Whistleblowers, including current and former disgruntled employees
- Press coverage (e.g., Wall Street Journal)
- Referrals from other investigations based on cooperating individuals or corporate defendants

INVESTIGATIVE TOOLS

- Witness interviews
- Grand Jury (subpoenas and testimony)
- Search Warrants
- Covert operations (e.g., consensual monitoring, Title III, unrelated foreign intelligence gathering)

POSSIBLE PURPOSES OF A GOVERNMENT VISIT

- Matters Related to the Company
 - Serve a Subpoena
 - Grand jury subpoenas. Grand jury subpoenas are issued by a local court or a federal district court typically at the request of a prosecutor. The subpoenas may require testimony or documents and physical evidence. The subpoenas may be to the company or individuals within the company.
 - Subpoenas for documents. The company typically has 30 days to collect the documents that are subpoenaed and furnish them to the government (although may agree to production on a “rolling basis”). Thus, before handing anything over, the company can consult with a lawyer. No documents should be produced before they are reviewed by counsel. Sometimes, the government may agree to limit the scope of otherwise expansive requests.

POSSIBLE PURPOSES OF THE VISIT

- Matters Related to the Company
 - Service of a Subpoena
 - Subpoena for appearance of a witness. A witness subpoena compels the appearance of a witness to obtain testimony, usually at some time in the future. No witness should testify before he or she has met with counsel, in-house or otherwise.
 - Administrative subpoenas. The Inspector General Act of 1978 gives each federal agency inspector general the power to subpoena documents to assist in the performance of the agency's regulatory functions. Some agencies also have the power to issue administrative subpoenas for documents and testimony.

POSSIBLE PURPOSES OF THE VISIT

- Matters Related to the Company
 - Interview Employees
 - Government agents often conduct “sweep” interviews in conjunction with the execution of a search warrant (discussed below). Sweep interviews are designed to corner key employees before they have an opportunity to speak with counsel and can appear very coercive. Agents may seek to interview various employees, either on or off company premises.
 - Typically, the first objective of an agent serving a subpoena or warrant is to interview whomever will talk to him or her. Agents view this as a final opportunity to get information when both the company and the interviewee are unprepared, and before the company fully appreciates why the agents are there. An unprepared employee who is contacted by the government agent is unlikely to realize that the questioning may lead up to a subpoena or warrant.

POSSIBLE PURPOSES OF THE VISIT

- Matters Related to the Company
 - Interview Employees
 - The interview may be designed to elicit information about an individual or the company, or about another company that does business with the company.

POSSIBLE PURPOSES OF THE VISIT

- Matters Related to the Company
 - Execute a Search Warrant
 - A search warrant enables government agents to select and confiscate documents, computers, and related data thought to be important for their case at the time the warrant is served. Search warrants are issued by a local or federal judge or magistrate based on a determination of probable cause.
 - Government agents have a substantial advantage when executing a search warrant. Agents are experienced in conducting searches, will have time to prepare for and rehearse the search and will surprise the company. The reason for the search warrant may not be immediately clear and the government will not explain it. Additionally, the agents may arrive in large number, armed and wearing raid jackets. Government agents are increasingly using search warrants to investigate their cases, such as work site enforcement, export control/economic sanctions, and healthcare fraud.

POSSIBLE PURPOSES OF THE VISIT

- Matters Related to the Company
 - Execute a Search Warrant
 - A government search of a company's offices is extremely disruptive; it can cause panic among employees, and it can result in the loss – if only temporary – of critical documents and computer-related data that the company needs to function.
 - Although a search warrant can be executed immediately, the company and its employees have the right to contact the company's attorney and should do so right away.

POSSIBLE PURPOSES OF THE VISIT

- Matters Related to the Company
 - Execute a Search Warrant
 - Almost always, government agents attempt to question employees while searching for documents. Agents consider searches a perfect time to catch employees off-guard and obtain potentially damaging information. Employees should understand that, despite the potentially coercive setting, they do not have to answer questions and may have a lawyer present if they decide to do so. Thus, it is important that the company inform employees of their rights as quickly as possible.
 - The dinner-time knock at the door to interview employees.

POSSIBLE PURPOSES OF THE VISIT

- Matters Related to the Company
 - Conduct a Government Audit
 - Most businesses face possible health and safety inspections, immigration inquiries, corporate tax and employment-related inquiries, and other regulatory inspections and inquiries by the government.

BE PREPARED

Designate a Contact Person to Meet with All Government Visitors:

- All unexpected government regulators, investigators, auditors, and law enforcement officials who call or visit should be referred to a single point of contact in the company (“designated individual”).
- The designated individual may be an in-house attorney, the head of corporate security, or a Human Resources employee. Back-up should be designated to handle inquiries when designated individual is unavailable.
- The designated individual may involve other employees who have particular knowledge about the areas of inquiry.

BE PREPARED

Instructions for the Designated Company Individual

- Find out who the caller or visitors are and for whom they work. Review the government agent's credentials or business cards and make a copy of them or write down the name, title, employer, business telephone numbers, and business addresses of each agent.
- Determine if the agent has had previous contact with the company, and contact that person to obtain information about those prior contact(s).
- A good investigator never forgets seemingly innocuous discussions at the time a subpoena or warrant is served. These discussions typically are memorialized in paperwork prepared by investigators and referred to throughout the course of the investigation. A subsequent statement by a representative of the company that varies from that provided on the day the subpoena or warrant was served will be viewed as an inconsistency.

BE PREPARED

Educate Employees About How to “Answer the Door”

- Educate those most likely to first come in contact with the government agent, such as receptionists and security guards.
- Employees should determine with whom the government agent wants to speak.
- Employees should be cooperative, but provide no information outside the presence of counsel. Educate the employees!
- Immediately contact the designated individual responsible for dealing with unexpected contacts from government agents.

BE PREPARED

Inform Employees About Their Rights

- Employees are not required to agree to be interviewed; it is solely their decision.
- If an employee agrees to be interviewed, he or she may terminate the interview at any time.
- If an employee agrees to be interviewed, he or she must tell the truth. The employee should ask for a copy of any statement he or she signs.
- The employee is entitled to have a lawyer present during the interview.
***Be careful about asserting that corporate counsel represents ALL employees. *Upjohn Warnings*

BE PREPARED

Inform Employees About Their Rights

- The company must be careful to avoid even the appearance that it discourages employees from talking with government agents.
***This is an important reason that training should be done beforehand.

BE PREPARED

Instructions for all Employees

- All employees should be polite and cooperative. Since investigators frequently form an immediate and lasting impression based on the manner in which employees conduct themselves, employees should not be obstructionist or uncooperative.
- No employees other than the designated individual should volunteer information.
- The company, through its employees, must walk a fine line: making it clear that the company is willing to cooperate and has nothing to hide, while at the same time limiting any information provided to the investigator until the nature of the visit has been established. Even then, all information should be provided by the designated individual.

BE PREPARED

Instructions for all Employees

- Employees should not respond to any question unless they are sure that their response is complete and accurate.
- When served with a subpoena for documents, the employee designated to accept service should accept the subpoena politely but not make any statements regarding the company's compliance. Only after the subpoena is reviewed by counsel can the company's position be determined..
- *NEVER* give the investigators any documents, copies of documents, or other tangible evidence during the initial service of a subpoena or during an interview. While documents produced to a grand jury are afforded legal protections regarding their use, documents given to an agent during an interview might not be subject to those protections.

BE PREPARED

Instructions for all Employees

- In the case of a search warrant, employees should not speak with the investigator regarding the information sought or answer substantive questions of any kind.
- When served with a subpoena for documents, the employee designated to accept service should accept the subpoena politely but not make any statements regarding the company's compliance. Only after the subpoena is reviewed by counsel can the company's position be determined.
- Employees should not do anything that could be viewed as interfering in any manner with the search, or as destroying, altering, or removing evidence or documents responsive to the subpoena or warrant.

BE PREPARED

Contact Counsel

- After this basic information is obtained, and before answers are provided to any questions, the company should contact a lawyer who specializes in governmental investigations and describe the inquiry. Of course, if all the agent does is serve a subpoena, the lawyer can be contacted after the agent leaves.
- Questions posed by government agents should be referred to the lawyer, and, if the lawyer is not on site, the government agent can speak with the lawyer over the phone.
- Deflection of all questions to counsel should be done in a way that makes it seem routine and in accordance with company policy of deferring all questions from investigators to “the lawyers.”

SAMPLE SEARCH WARRANT

AO 93 (Rev. 12/99) Search and Seizure Warrant

UNITED STATES DISTRICT COURT

for the

_____ District of _____

In the Matter of the Search of
*(Briefly describe the property to be searched
or identify the person by name and address)*

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

)

Case No. _____

SEARCH AND SEIZURE WARRANT

To: Any authorized law enforcement officer

An application by a federal law enforcement officer or an attorney for the government requests the search of the following person or property located in the _____ District of _____
(Identify the person or describe the property to be searched and give its location):

The person or property to be searched, described above, is believed to conceal *(Identify the person or describe the property to be seized):*

I find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or property.

YOU ARE COMMANDED to execute this warrant on or before _____
(not to exceed 14 days)

in the daytime 6:00 a.m. to 10 p.m. at any time in the day or night as I find reasonable cause has been established.

Unless delayed notice is authorized below, you must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the place where the property was taken.

The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an inventory as required by law and promptly return this warrant and inventory to United States Magistrate Judge

(name)

I find that immediate notification may have an adverse result listed in 18 U.S.C. § 2705 (except for delay of trial), and authorize the officer executing this warrant to delay notice to the person who, or whose property, will be searched or seized *(check the appropriate box)* for _____ days *(not to exceed 30)*.
 until, the facts justifying, the later specific date of _____.

Date and time issued: _____
Judge's signature

City and state: _____
Printed name and title

BE PREPARED

Practical Tips – Search Warrant

- Do not consent to any search – you may waive the company’s right to contest the legal validity of the search in court. The company should consider whether the circumstances justify the company stating their objection to the search at its outset.
- Ask for a complete copy of any document the government agent relies upon, to include **subpoenas**, **search warrants**, and **affidavits** supporting any warrant (usually agent will NOT provide affidavit).
- When executing a search warrant, agents may temporarily detain employees to conduct a security sweep of the search area. Politely object if this detention persists beyond a few minutes, extends beyond the search area, or is unduly coercive.

BE PREPARED

Practical Tips – Search Warrant

- Take detailed notes of the visit during the visit or as soon as the agents leave. Notes should be labeled attorney client privileged - prepared at the direction of counsel. Also, preserve any security video of the visit.
- Monitor any search carefully, keeping notes that include: the time the search started and was completed; the number of government agents involved, and, if possible, the rooms, areas and documents examined by each.
- Request copies, or a complete list of, everything removed from the premises by the government agents.

SAMPLE GJ SUBPOENA

AO 110 (Rev. 1982) Subpoena to Testify Before Grand Jury

United States District Court

SOUTHERN DISTRICT OF TEXAS

TO: **SUBPOENA TO TESTIFY
BEFORE GRAND JURY**

SUBPOENA FOR:
 PERSON DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

PLACE U.S. Federal Building and Courthouse 515 Rusk Avenue Houston, Texas 77002	COURTROOM Grand Jury Room, 3rd Floor, Ste. 3000
DATE AND TIME 2008 9:30 AM	

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s)*

Please see attachment

Please see additional information on reverse
This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

CLERK MICHAEL N. MILBY, CLERK OF THE COURT <small>(By) Deputy Clerk</small> 	DATE
---	-------------

<small>This subpoena is issued on application of the United States of America</small> DONALD J. DeGARRIELLE, JR. UNITED STATES ATTORNEY	<small>NAME, ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEY</small> Assistant U.S. Attorney U.S. Attorney's Office • (282) 348-0351 P.O. Box 61129 5-1129 (713) 269-4898
--	--

*If not applicable enter "none."

BE PREPARED

Practical Tips – Subpoena

- The manner in which a company responds to a subpoena for documents can have a significant impact on the way in which an agent views the company and the case he may be developing.
- Immediately safeguard all records arguably related to the subject of the subpoena. Take affirmative steps to ensure that computer records, including emails, are protected from inadvertent or routine, scheduled deletion. The Litigation Hold - educate beforehand regarding the document retention policy.
- Full and complete compliance with a subpoena is essential; any omission in responding to the subpoena may result in charges of obstruction of justice and could cause the agent to conclude the company is hiding something (which likely would result in the prompt execution of a search warrant)
- Judicial, grand jury, and administrative subpoenas may require the production of documents that arguably relate to the area of inquiry. Let counsel decide which documents must be produced.

SUMMARY

You receive a call from a field office telling you that government agents have arrived. What do you do?

- **Determine who is at your office:** 1) What agency?; 2) Names and contact information of agents; 3) Name and contact information of prosecutor.
- **Determine the purpose of the visit:** 1) regulatory inspection; 2) search warrant execution; 3) serving a subpoena; 4) request for consensual search.
- **If agents have warrant:** Obtain copy of warrant; request copy of supporting affidavit; respectfully comply; make notes of what agents take from your office.
- **If agents have subpoena:** Tell agents you will review the subpoena with your attorney. Do not comply without consulting attorney.
- **If agents request consent to search:** Politely decline consent and explain that your legal counsel will contact the agent and prosecutor.
- **In all cases:** Consult with an attorney who has criminal defense experience as soon as possible.

This presentation is provided for informational purposes only and should not be considered specific legal advice on any subject matter. You should contact your attorney to obtain advice with respect to any particular issue or problem. The content of this presentation contains general information and may not reflect current legal developments, verdicts or settlements. Use of and access to this presentation does not create an attorney-client relationship between you and Bracewell.

QUESTIONS?



JEFF VADEN

Partner, Houston

T: +1.713.221.1501

E: jeff.vaden@Bracewell.com