

## **ACC Article: Top Ten Action Steps When the Government Shows Up at Your Door**

Thursday, February 2, 2012



Justin Connor and I recently published an article for Association of Corporate Counsel:

### **Ten Action Steps When the Government Shows Up At Your Door**

<http://www.acc.com/legalresources/publications/topten/ttaswtgaayd.cfm>

Your company's worst nightmare is becoming more and more common – federal law enforcement officers show up at your business premises with a search warrant in hand. FBI agents enjoy showing up at the crack of dawn consistent with the more aggressive law enforcement tactics we see these days in white collar crime cases. EU officials have long conducted “dawn raids” of suspect companies.

When federal law enforcement agents arrive at your company's doorstep, the LAST thing you should do is step aside and wait for them to complete the search.

Every step in a government investigation should be seen as an opportunity for in-house counsel to learn about the investigation and the government's case – who is the government focused on? What conduct is under investigation? What type of evidence is the government looking for during the search? Who is the government interested in interviewing? What does the government already know?

The opportunity to talk with the lead agent is a significant source of potential information for you. You can ask questions – there is no penalty for doing so. The worst that can happen is the agent refuses to answer. But every human interaction involves communication and may offer you valuable clues. To maximize your potential for gathering intelligence about the government's case and minimize possible harm to your company, you should already have a plan in place for handling search warrants before the government arrives. Such a plan is not complex and does not require extensive company resources. It is a must that you have one, and your protocol should include the following ten steps.

#### **Step 1: Activate your crisis management team.**

As part of the planning process, a crisis management team should be identified with everyone's complete contact information. You must have a notification tree which must be followed as soon as the first person learns of the arrival of any federal agent on the company's premises. Each person in the tree should have a designated back up person. The call list must be accurate and always kept up

to date. The call list should never be dependent on access to a computer or email (because agents frequently immediately seize all computers upon entry as potential evidence).

The notification and crisis management team should include: the CEO; in-house counsel; CFO/treasurer/senior management; investor relations/corporate communications; disclosure committee/board members; security personnel; key outside counsel; key outside media relations consultants; auditors; IT specialists; and key HR/IT personnel.

## **Step 2: Follow your search warrant response plan.**

Key team members should be familiar with the company's search warrant response plan which should include all of the relevant issues which may arise during and after the execution of the search warrant. The response plan should address who is responsible to receive the search warrant; who should be notified upon receipt of a search warrant; how the relevant personnel are to examine and understand the search warrant; how company personnel should deal with federal agents; the applicable rights of the company and the employees during the process of the execution of a search warrant; how the relevant personnel are to handle any request for consent to search; how the relevant personnel are to handle privileged documents; how to monitor and document the company's search process; what steps should be taken to minimize disruption of the company's regular business; how to conduct post-search debriefing.

## **Step 3: Conduct training on an appropriate response to search warrants.**

As part of your response plan, you should conduct regular training of the key employees. There are a variety of scenarios which may arise and it is important to anticipate each of these potential scenarios and train the key employees how they should respond. Some of the more significant scenarios are described below – e.g. agent request to interview employee; agent request for consent to search an area not covered by the search warrant; or agent demand that employee let the agent into an unauthorized area.

## **Step 4: Send a prepared email and/or text to employees.**

In addition to the crisis management team, as soon as law enforcement agents show up, you should send a prepared email or text to employees. The email should notify employees of the presence of government agents and instruct them on the company's and their rights during the search and how to protect said rights. In addition the email should advise employees to avoid disrupting or obstructing the agents, and to communicate through designated key members of the team. You should also instruct any non-essential employees who have not yet arrived at the company to stay home.

## **Step 5: Identify lead and line agents and obtain contact information.**

Every search warrant team includes at least two responsible agents who are familiar with the case, the warrant and the scope of the investigation. Before they arrived at your company, the lead agents on the case briefed everyone on the nature of the investigation, the scope of the search, key individuals who may be present at the company, and the specific conduct under investigation and evidence sought. It is important to quickly identify the lead agents involved and the other law

enforcement agents present to assist in the search. Key investigation partners of the lead agency will often also send their agents to assist in the search – for example, the IRS, Secret Service and/or other Federal, state and/or local law enforcement officers (who have to be deputized) may also participate in the search and their presence may offer you clues as to the nature of the investigation and evidence sought. Contact information can facilitate future communications and negotiations over return of any property seized, asset forfeiture and other practical issues.

## **Step 6: Obtain a copy of the search warrant.**

Your company is entitled to receive a copy of the search warrant under Federal Rule of Criminal Procedure 41(f)(1)(c). Make sure you receive a copy before the search starts. It should be the first step you take. Once you obtain a copy of the search warrant, carefully examine the warrant to make sure at a minimum it: describes the proper address, and description and location of the property; is signed by a judge or magistrate; adequately describes the items that can be lawfully searched and seized pursuant to the warrant.

## **Step 7: Discuss the mechanics of search with lead agent(s).**

As soon as possible, you should seek to establish a good working relationship with the lead agent(s) so that you can discuss and resolve issues as they arise. Be firm but reasonable. Do not let the agent(s) just rush off and search without establishing some ground rules for the search. You need to stress the need to minimize the disruption to the business. Assign specific employees to deal with specific agents in particular places to be searched. This will help facilitate the search going quickly and smoothly and help to preserve your company's rights during the search.

## **Step 8: Advise agents of the procedure to conduct employee interviews.**

Ideally before the search starts (or as soon as possible after it begins), you should advise agents that each employee is represented by company lawyers and that no employee is to be interviewed without counsel present. Have a form acknowledging this right to counsel prepared for this situation and advise the agent as such and ask him/her to sign it. They are unlikely to do so, however you should document your request and the agent's failure to sign.

Employees should be aware in advance of their rights with respect to law enforcement interviews. You should cover this in pre-warrant training and repeat the advice in your prepared email to all employees notifying them of the agents' presence at the company. You should inform employees that if an agent asks to interview them, they are not required to speak to the agent. Of course, they are free to do so if they choose. The notice should include the company's offer to provide the employee with in-house counsel representing the interests of the company, or even separate outside counsel, if appropriate, who should collaborate closely with in-house counsel. Employees should be advised that counsel, whether in-house or external, retained by the company represents the interest of the company. In-house and outside counsel should both be present and available in the same location, in the event that an employee requests representation during an interview.

## **Step 9: Monitor the search, document the execution of the search and assert all of the company's rights/preserve all lawful objections during the search.**

It is important to carefully document the actual execution of the search warrant. There are three issues you need to closely monitor: physical and substantive scope; privileged and trade secret information, and employee interviews (already discussed above in Step 8).

The physical scope of the search must be clearly described in the search warrant. If the description does not include a given area which is a part of the company premises (e.g. garage, driveway, detached buildings, other buildings/offices) do not let the search team search that area and do not consent to any search of any unspecified area not appearing in the warrant. If the agent does not comply with your instruction, make sure you object and document your objection and the agent's response.

The substantive scope of the search lists the specific types of items which may be seized – e.g. documents, papers, computers. The areas that the agent(s) are authorized to search are only those where the specified items may reasonably be located. For example, federal agents cannot search above ceiling boards to look for computers or even documents since those items would not reasonably be located in those areas. If the agent(s) search areas that you believe are outside the authorized scope, you should object and document your objection.

You also need to make sure that you and other team members identify any and all documents or information which may be privileged or may contain trade secrets. If possible, you should work with the lead agent to establish a procedure to identify such documents or information. If the agent agrees to work with you on this issue, you should liberally designate documents and information. If the agent refuses to allow you to identify such documents or information, then note your objection and document as carefully as possible which documents you believe may be legally privileged or contain trade secrets.

## **Step 10: Conduct post-search debriefings.**

At end of search, agents are required to provide an inventory of the specific items which they seized. Do not sign any document presented to you by the agent(s) concerning the inventory list or any other aspect of the search. It is important that you preserve all of the company's rights to object to and challenge any aspect of the conduct of the search.

Once the search is completed, all employees who were present should be debriefed about the search, the agents' conduct, statements made by the agents and other employees, and documents and information seized. This debrief will likely contain important information for you that may prove critical if the company chooses to challenge any aspect of the search warrant and the items which were seized.

---

The information in this document is intended for public discussion and educational purposes only. It does not constitute legal advice and the use of this blog and any information contained in it does not create an attorney-client relationship.