

Get Smart: Is Your Company Prepared For A Visit From Agent 99?

Just as you are preparing to tee off for a pre-work, early-morning round, your cell phone rings. Your vice president of finance is on the phone. She sounds frantic. A team of FBI agents has unexpectedly shown up at the office. They are rifling through file cabinets looking for evidence of a price fixing conspiracy. They are hauling away computers. They are interviewing employees. She wants to know what to do.

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Later that evening, as your CEO finishes dinner at home with his family, there is a knock at his door. Two FBI agents ask him if they can come in. They have a few questions about his most recent trip to a meeting of your industry's trade association. Hoping to get them out of his house quickly, your CEO agrees to talk for a few minutes. Two hours later, the questioning continues. Your CEO eventually excuses himself for a moment and, while out of the agents' earshot, calls you. He wants the agents to leave but does not wish to appear uncooperative. He wants to know what to do.

As in-house counsel, would you know how to respond to these calls? If not, would you have access to someone who would? Are you confident that person would be readily accessible to provide immediate advice?

Government agencies like the Securities and Exchange Commission and the Antitrust Division of the Department of Justice are increasingly using FBI raids as key investigative tools. In the past, the government tended to issue search warrants through the company's counsel and schedule interviews with company personnel in advance. Not anymore. Now, the government often dispatches FBI agents to personally execute search warrants, unannounced. In addition, agents frequently seek impromptu interviews of company executives – often at the executive's home. Why the growing reliance on the element of surprise? Because it works. Unsuspecting employees – including executives – who are unsure of their rights and obligations are more likely to provide incriminating statements about their company's anticompetitive activities. As a result, in-house lawyers need to:

(1) know how to effectively respond when government investigators unexpectedly appear at the company's doorstep; and (2) train their company to do likewise.

Increased Enforcement

The government is conducting raids more often than ever. The Department of Justice's Antitrust Division, in particular, has recently ramped up its enforcement efforts, including in coordinated actions with its counterpart in the European Union. For example, in May 2007, federal agents simultaneously executed search warrants throughout the United States in connection with an investigation of bid rigging and price fixing in the marine hose industry. In March 2008, federal agents raided a packaged-ice producer's office in connection with an antitrust investigation. The next month, federal agents raided the corporate headquarters of a large shipping and logistics company as part of an investigation of pricing practices of ocean carriers.

Due to these increased enforcement efforts, the Antitrust Division's Criminal Enforcement Program experienced a record year in 2007. Defendants prosecuted by the Antitrust Division were sentenced to 31,391 jail days – more than doubling the previous high. As enforcement continues to increase, more and more companies will find FBI agents knocking on their doors.

Advance Preparation is Critical

The arrival of antitrust enforcement agents will cause your company and its employees tremendous stress. Often, company personnel will need to make critical decisions quickly without access to legal counsel. Your employees' spur-of-the-moment decisions could have serious consequences for the company and its employees. Accordingly, prior preparation is essential.

As an initial step, in addition to your standard antitrust compliance program, your company should consider drafting a written policy and recommended procedures for direct inquiries from government agents. In regards to the execution of a search warrant, the company's policy should, at a minimum, advise executives of the following:

- A single point person should represent the company during the execution of the warrant. If possible, communications between the company and the FBI should take place exclusively between the company's point person and the lead agent.
- The point person should call designated counsel as soon as possible and carefully review the scope of the government's subpoena.
- Company representatives should observe the agents as they execute the warrant and keep a list of the items seized.
- The agents' search should not be obstructed in any way, including – perhaps most importantly – by the destruction of documents. Those who do so could be subject to a separate prosecution for contempt of court.
- Aside from the employees monitoring the agents, all other employees should be sent home.
- As soon as possible after the search, the company should debrief all employees involved in the search. Outside counsel should be consulted. In addition, the company should evaluate whether it is obligated to publically disclose the search and/or investigation.

In regards to requests for informal interviews, the company's policy should further advise executives of the following:

- Government agents can pursue informal interviews almost anywhere and at any time, including by approaching your executives outside the office.
- The executive has the right to decide whether he or she wants to participate in the interview. The government cannot force the executive to participate in an informal interview. Nor can you as counsel direct the executive to refuse an interview request if she has told you she wants to be interviewed.
- Information conveyed during the interview can be used against both the company and the executive at trial. Statements made during the interview are never "off the record."
- Government investigative agents do not have the authority to make binding agreements and cannot grant immunity. Immunity must be sought by a government lawyer.
- The atmosphere during an informal interview will

often be intimidating. The agents are likely to use this to their advantage.

- It is almost always in the executive's best interest to obtain counsel's advice before agreeing to participate in an informal interview.

Training for Surprise "Visits" is Advisable

Not surprisingly, a written policy and recommended procedure may not be too useful to the executive standing face-to-face with antitrust enforcement agents. The executive may not have ever read the company's policy, or at least not for quite some time. And, the executive is unlikely to ask the agents to wait a moment while the policy is consulted. Therefore, an interactive educational program is recommended. The program should provide the appropriate employees with the facts they will need to effectively handle a subsequent investigation. The program should include practice sessions and mock interviews to acquaint the employees with the process and their rights. Some companies have even staged surprise "mock raids" to enhance their preparedness.

Dealing with government agents is undeniably stressful. Advance planning, however, can significantly reduce employee anxiety while simultaneously informing your employees of their rights and obligations. Armed with this knowledge, your company will be better suited to protect its interests. Although advance preparation will certainly not eliminate stressful calls from your executives if your company is raided, hopefully, the calls will be slightly less frantic. If not, at least you will have planned for the situation. More importantly, your preparation will enable you to provide your executives with the critical advice they need to protect the company.

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