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THE ONSET OF A GOVERNMENT INVESTIGATION: IS YOUR COMPANY PREPARED TO RESPOND?

A Memorandum from the White
Collar and Investigations Group
at Hogan & Hartson L.L.P.

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Government investigations begin in many different ways. Often a government investigator may quietly approach a company employee at his or her house to conduct an interview. The employer may not find out until well after the fact that such an encounter has taken place. At other times, a team of government agents may make a surprise visit, temporarily shutting down a company facility to conduct a search. Regardless of whether the government's initial tactics are subtle or strong-armed, they almost always signal more forthcoming invasive government activity that can place a company in significant legal jeopardy.

This memorandum discusses policies and procedures that a company might prepare in advance so that a prudent and swift response awaits any unanticipated government inquiries. The proper response to an investigation is often dictated by the investigative tactics being utilized by the government. Therefore, this document is organized around the three most common investigative techniques – informal employee interviews, execution of search warrants, and service of grand jury subpoenas.

Before addressing those three topics specifically, one general point is worth making at the outset. Regardless of what approach government investigators initially take toward a company or its employees, among the first steps taken by the company and/or its in-house or outside counsel should be to determine whether the company is a witness, a possible subject, or a direct target of the investigation. Knowing the posture of the government toward the company from the beginning can go a long way toward properly assessing the potential liability presented by an investigation. Outside counsel, with experience directly communicating with government prosecutors, can be a particularly valuable resource to a company in this particular aspect of its response.

Attached to this memorandum are several documents that a company may find useful in establishing policies and procedures to address criminal investigations, including step by step instructions for both in-house counsel and employees. While sound business policies, internal audits, and other measures designed to ensure compliance with applicable statutes and regulations will limit a company's exposure to criminal investigations, the discussion that follows and the attached documents will undoubtedly also be useful to any company faced with either the prospect or reality of unsolicited encounters with government officials. The attached documents are designed to be general guidelines, and we would be pleased to discuss the content of that material and to assist you in developing an appropriate policy or compliance program.

I. EX PARTE INTERVIEWS BY GOVERNMENT AGENTS

This section provides guidance on how a company should prepare and train its employees to respond if they are approached by the government for an informal interview. A sample employee briefing is provided (**Appendix 1**) that in-house counsel can use to react to a government attempt to informally interview company employees.

In the course of a criminal investigation, government agents often make unannounced home visits to employees seeking informal interviews. Because of the non-custodial setting, the agents often do not advise the employees that they have the right to decline to be interviewed or that things they say may later be used against them. As a result, unprepared employees will often feel compelled to consent to an interview without realizing that an innocent mistake in recollection or speculation can have harmful consequences to the employees and the company.

In the current investigation-prone climate, a company should consider providing employees with general training about their rights in the event they are contacted by the government for an interview. This training can be part of, or separate from, the search warrant training discussed below, but should include the same types of information.

General training aside, in-house counsel should be prepared to respond to situations where (a) an employee informs the company that agents have requested an interview before the interview has commenced; (b) the company learns that an employee was previously interviewed by the government; and (c) the company is aware that a government investigation is underway and suspects that particular employees will be approached for an interview. The following are some procedures for in-house counsel to consider when confronted with each situation.

A. *The Employee Informs the Company that Agents Are Presently Requesting an Interview*

If an employee has the foresight to call counsel before commencement of an interview, in-house or outside counsel should first inform the employee that he or she may elect or decline to submit to an interview and may have company lawyers, or their own lawyer (arranged by the company) present during the interview. Counsel should not direct or instruct the employee not to submit to the interview.

In-house and/or outside counsel should then speak to the agents who are requesting the interview. Counsel should ask the agents to identify themselves, explain the nature of investigation, and whether the interview relates to the company. Regardless of whether the employee would like counsel present, if the interview relates to the company, counsel should request that it not proceed unless the company is permitted to attend.¹

B. *The Company Learns of the Interview After-the-Fact*

If, as is often the case, the company learns after-the-fact that government agents interviewed an employee, in-house and/or outside counsel should debrief the employee as soon as possible. To whatever extent is achievable, debriefing should reconstruct the substance of the interview.

It is important that neither counsel nor other corporate management make the employee feel as if he or she is in any way reprimanded or chastised for having agreed to be interviewed by the government. Otherwise, the company might later be accused of retaliation in violation of one or more "whistleblower" statutes. Moreover, any negative treatment of the interviewed employee would likely chill other employees who were interviewed from coming forward. The employee should be informed, however, of his or her right to decline to be interviewed or have counsel present if approached again by the government in the future. Counsel should also request that the employee notify the company immediately if he or she is subsequently contacted by the government.

C. *Preparing Employees Who Will Likely Be Targeted for Government Interviews*

If the company suspects that particular employees or groups of employees may be approached for interviews, in-house and/or outside counsel should attempt to prepare these employees in advance. The following are a few guidelines on how counsel should proceed in such situations.

- **Who to Warn** – The company does not want to create an atmosphere of paranoia or undue alarm, and therefore may wish to notify only those employees the company believes may be contacted. The identity of these employees will depend on the circumstances.
- **What the Employees Should Be Told** – The company should inform the employees of their rights regarding government interviews. They should be advised that it is their choice whether or not to be interviewed and that the company can assist them in obtaining counsel should they decide to be interviewed.
- **How Employees Should Be Told** – This depends on the circumstances. As reflected below, in search warrant contexts, the company may provide employees a short and widely distributed memorandum. Ideally, however, in-house and outside counsel will meet with the targeted employees in person, alone or in a small group.
- **What Should Not Be Said** – Counsel should make sure that nothing the employees are told could be construed as directing or instructing them not to submit to government interviews. Such conduct may be construed as an obstruction of justice. Accordingly, the company should have outside counsel present during oral notifications and memorialize the notification in writing.

Attached at **Appendix 1** is an employee briefing that could be adapted to the circumstances and used as an oral advisory or memorandum to employees.

1. Depending on the jurisdiction, ethics rules may preclude or limit the government's interviews of certain company employees unless company counsel is present. See, e.g. *United States ex rel. Mueller v. Eckerd Corp.*, 35 F. Supp. 2d 896 (M.D. Fla. 1999).

II. EXECUTION OF A SEARCH WARRANT

A government search, often undertaken with the assistance of the Federal Bureau of Investigation and other governmental agencies, is intrusive and chaotic. However, it is not undertaken without limits. And employees who have never encountered this type of search will likely not know what constitutional limits exist. Fortunately, the company can train individuals to take important steps before, during, and after the search process to protect its rights and recover from the loss of valuable business property.

A. *Overview of a Criminal Search Warrant and Rule 41*

A criminal search warrant is perhaps the most powerful and intrusive weapon in the government's fact-gathering arsenal. At the outset, it is somewhat more cumbersome for the government to obtain a search warrant than simply to issue a subpoena. Unlike subpoenas, before a warrant can be issued, the government must prove to a neutral and detached judicial officer that there is probable cause to believe that evidence of a crime exists in a specified place. However, the issuance of a warrant is an *ex parte* proceeding in which the target of the warrant is not present and receives no notice. And as a practical matter, once the authorities decide to seek a search warrant, they usually have little difficulty obtaining one.

Most criminal warrants executed against companies are governed by Rule 41 of the Federal Rules of Criminal Procedure. Under Rule 41, the government must establish probable cause for a warrant through an affidavit reciting, under oath, the facts giving rise to probable cause. Unlike a subpoena, a warrant must define narrowly the places to be searched and the persons or things to be seized.²

Upon issuance, the warrant must be executed within ten days and served during the "daytime," which is liberally defined to mean between the hours of 6:00 a.m. to 10:00 p.m.³ Rule 41 requires that the agency executing the warrant provide the company a copy of the warrant. Moreover, the government must make and provide the company an inventory of the property taken under the warrant.⁴

Although more difficult to obtain than a subpoena, the government will go to the trouble of obtaining and executing a criminal search warrant where it suspects that documents have been or would be lost or destroyed if it afforded the target time to respond. A further advantage for the government is that the agents executing a warrant leave the premises with the documents and information in hard copy or electronically stored form, rather than having to wait for the company to respond to a subpoena. Because in all likelihood counsel will not be present or be permitted to participate during the entire search (or at all), the documents will not have been reviewed for privilege or otherwise filtered and narrowed by the company's counsel when the agents remove them. In addition, the agents likely will catch the company by surprise and may be able to gather further information about the company and the alleged crimes by talking to employees in the course of the search. A company can mitigate this disruption and intrusion by taking important steps before, during, and after the search.

B. *The Problem of Warrantless Searches*

In some highly regulated industries, the presence of government inspectors in the workplace is not an uncommon occurrence. Federal statutes provide government agencies with authority to enter and inspect corporate premises regarding certain regulated activities.⁵ The regularity of such government interaction can create a comfort level that comes with the matter-of-course occurrence of inspections. Because an agency may be allowed to inspect unannounced if it chooses and the scope of an inspection is considerably broad, even upper management will be accustomed to providing government inspectors considerable leeway in walking through offices, inspecting records and files, and making inquiries. Thus, employees faced with a search warrant for the first time, may treat the search as they would a routine inspection. This can often cause considerable problems for the company.

2. See Fed. R. Crim. P. 41(c).

3. See Fed. R. Crim. P. 41(c), (h).

4. See Fed. R. Crim. P. 41(d).

5. One example of such authorization is in the healthcare industry pursuant to the Food, Drug, and Cosmetic Act. 21 U.S.C. §374.

A company may benefit by adopting separate policy and procedures to address search warrants so that employees can draw important distinctions between routine inspections and searches undertaken in accordance with a warrant. While employees will not be able to stop and should not attempt to obstruct an impending criminal search warrant, by law, warrants are not unlimited and governmental agencies must abide by the scope of the warrant. As explained below, properly trained employees can take certain affirmative steps to protect the privileged nature of certain documents and to record as accurately as possible the items removed from the premises. A properly drafted policy can help to ensure employees take appropriate action.

C. Preparing for a Government Search

1. The Warrant Team

When agents arrive at a facility with a warrant, they usually attempt to overwhelm a company and create an atmosphere of chaos. They may or may not act in a belligerent fashion, but they always attempt to exert total control over the scene. For example, the agents often gather all employees present into one area and require them to remain in that area. The agents will be able in large measure to achieve their goal of obtaining control regardless of what the company does. Still, a company can, and should, take steps to control as much of the process as possible, preserve its rights and objections to the search, and limit the agents' extracurricular fact-gathering.

First and foremost, the company should assemble a small team of employees, the "Warrant Team," to coordinate a response to a surprise government search. The company should designate a trusted senior-level employee from each facility (and for each shift) as the Warrant Team Leader and a second employee as his or her backup. The Team should include enough people, spread across facilities and work areas, to cover any area of the company the government might search. The Team should be trained, in one or more training sessions, to perform a number of important functions.

a. Pre-search Procedures

Under any warrant-response protocol, the designated Team Leader on duty at the time of the search should be trained to perform a number of functions upon notice that agents are on-site with a warrant.

Contact In-House and Outside Counsel. First, and most important, upon notice that agents are on the premises, the Team Leader should contact both in-house and pre-selected outside counsel immediately. All members of the Team should have and carry a current list of the office, home, pager and cell phone numbers for the members of the Team, in-house counsel, and outside counsel. Employees, receptionists, and security personnel from each facility (and for each shift) should be trained that any contact with or service of documents from the government should be directed to the Team Leader.

Make First Request to Delay Search Until Counsel Arrives. The Team Leader should meet with the agents to obtain identification and make the first request that the search be delayed until counsel has arrived. The Team Leader should demand, politely, to see official identification. FBI agents are required by their internal regulations to present identification in the form of a badge and a credential. Other agencies may not necessarily present identification. The Team Leader should also ask for an official business card from each agent present.

Review Warrant & Affidavit. The Team Leader should then ask for an opportunity to review the warrant and, if the agents provide it, the affidavit. Federal Rule of Criminal Procedure 41(d) requires the agents to provide a copy of the warrant. The same is not true for the affidavit, but the Team Leader should ask for it and ask that the search not begin until the agents provide a copy. The agents are likely to resist or refuse this request, and they will not be able to provide a copy if the affidavit was filed under seal. Regardless, the request should be made in order to preserve certain challenges that can be made at a later date. The affidavit is an important document. It contains all of the factual allegations on which the government and the issuing court based their theory of probable cause. The affidavit also helps to define more precisely the exact permissible scope of the search and seizure.

The Team Leader should look for any obvious defects in the warrant, such as a failure to describe the premises to be searched or the things to be seized or the lack of a signature by a federal magistrate judge

or state judge. The Team Leader should also ask the agents for an opportunity to confer with counsel prior to the commencement of the search to determine whether there are any other defects in the warrant. If the Team Leader finds any defects, he or she should point them out to the agents and object to the search. The agents may continue anyway, but taking these steps will preserve the company's objections. Whether or not the Team Leader has an opportunity to review these documents or to confer with counsel, he or she should communicate their contents to counsel by telephone and send copies to counsel by fax at the earliest possible opportunity.

Make Second Request to Delay Search Until Counsel Arrives. If counsel has not already arrived at the scene, the Team Leader should request that the agents wait until counsel arrives before commencing the search. If the agents proceed with the search, which will likely be the case, the Team Leader should advise the agents that the company objects to the search.

After reviewing the warrant, the Team Leader should attempt to negotiate an agreement with the agents about the scope of the search. The Fourth Amendment requires the warrant to describe the places to be searched and the things to be seized with particularity. If the warrant is drafted in a narrow or specific fashion, counsel or the Team Leader may be able to limit the search to areas where the enumerated items are located. If, however, the warrant is drafted broadly, it may not be possible to draw meaningful lines of demarcation. The Team Leader should control as much as possible the areas to be searched and instruct other employees to document carefully the agents' activity.

Finally, before the search begins, the Team Leader should ask the agents to provide the company with copies of all materials they seize.

b. Procedures During the Search

Once the search begins, the Team Leader (or counsel if present) should have several objectives: (1) advising company employees of their rights; (2) protecting privileged information; (3) monitoring the search; and (4) obtaining copies of any documents or computer data seized.

Advise Company Employees of their Rights. The Team Leader should first advise the agents to communicate with the company and employees through the Team Leader or counsel. Depending on the circumstances, employees may in some circumstances be sent home. In the alternative, employees should be informed – if possible, through a previously prepared memo (in multiple languages depending on the facilities) – of their rights regarding interviews with the government. As discussed below, advance employee training may help minimize employee anxiety over the search and will provide them with important information regarding their rights with respect to speaking to agents.

Protect Privileged Information. The Team and employees should cooperate with the agents as much as possible. However, whenever they can, without interfering with the agents' execution of the search warrant, they should limit the areas the agents search. If at all possible, the Team Leader should know in advance where any privileged documents are kept, advise the agents (if they search that area) that the materials are privileged, and attempt to negotiate an agreement to exclude these materials from the search. One option is to suggest that either the area be secured or the items at issue sealed until either counsel arrives or the issue may be raised with a court.

Monitor the Search. The Team should monitor and record the agents' activities throughout the search. The Team should take thorough notes and document the areas searched, the materials seized, the agents involved, the date and time, and any other observations of the agents' actions. The Team also should endeavor to record as much of the search as possible by videotape, audiotape, and/or photograph. The agents are likely to object to video cameras, still cameras, or tape recorders and may accuse Team members of impeding the search or obstructing justice if they use them. If the agents object, the Team should ask the agents to state their objections formally to counsel or the Team Leader, who then should make a judgment about whether to continue based on the fervor of the agents' objection. The company has the right to record the search by whatever means it likes so long as doing so does not interfere with the agents' duties, and there is no reason why unobtrusive videotaping, audiotaping, or photography should interfere. Nevertheless, the execution of a search warrant can create an intense, adrenaline-filled atmosphere, and the Team should err on the side of caution if common sense tells them it is better not to

press the point. **Under no circumstances should any employee or counsel put himself or herself at risk of being arrested by a law enforcement officer for obstructing the search.**

Obtain Copies of Any Documents or Computer Data Seized. Finally, the Team Leader should request that the agents make copies of any electronically stored materials rather than removing computer hard-drives, magnetic tapes, floppy disks, and other storage media from the site. Law enforcement agents are increasingly seeking and obtaining warrants for the seizure of electronically stored materials. The loss of this information can be crippling to a company's ability to operate its business. Search teams often include agents who have the technical expertise and equipment to make electronic copies of a company's network and e-mail servers. If a search team does not have such equipment, whenever possible, the Team Leader should request that the agents take backup copies of the electronically stored materials or, where backups do not exist, they should request the opportunity to make (or ask the agents to make) copies of the electronically stored material, permitting the agents to retain the original. Because the wholesale duplication of electronic materials often includes privileged materials, the Team Leader should make clear that the request for a copy of the electronically stored material does not give the company's consent to review privileged materials.

The Team Leader should again request copies of the materials seized and demand a copy of the agents' search inventory. As the agents complete the search, the Team Leader should reiterate the company's earlier request for copies of the materials seized. This is particularly important if the agents seize documents that the company will need in order to carry on its business. The agents are unlikely to honor this request or to make any promises that the government will honor it later, but making the request preserves the company's objections and strengthens any efforts the company may make later to obtain copies through a court order. In addition, the government is required to provide the company with an inventory of the materials it has seized before the agents leave the premises. Counsel or the Team Leader should demand that the lead agent indicate the time of the search and sign the inventory with his or her full name, title, address and telephone number. This inventory is likely to be more general than useful and, therefore, cannot be a substitute for careful documentation of the search by the Team.

c. After the Search

After the search is completed, the company should immediately consult with outside counsel experienced in criminal matters. Outside counsel can help determine how to proceed under the circumstances. In some instances, counsel may have the employees who observed the search prepare memoranda memorializing what they observed. In other instances, this may not be advisable. Additionally, outside counsel can help the company and Team Leader obtain information in a privileged manner. Until in-house and outside counsel are involved, the Team Leader and employees should be instructed not to discuss the search with one another and not to conduct any meetings.

Interview Members of the Team. In-house and/or outside counsel should interview the members of the Team and all employees who were physically present during the search. The interviews should focus primarily on the search itself, i.e., what the agents said, what they took, whether they asked questions, how the employees reacted and responded, and whether the government contacted the employees before or after the search. To the extent that these employees include people that counsel have not already interviewed in connection with a prior internal investigation, these interviews may also cover more general topics, particularly if the government has contacted that person outside of the search. The company should also consider distributing a memorandum briefly informing all personnel of what took place, and instructing them that they should not dispose of any company documents or computer data. The company should also consider attempting to obtain a copy of the affidavit supporting the warrant from the court.

Additionally, the company should discuss with outside counsel a number of other issues, including press relations, whether to conduct an internal investigation, and whether to file a motion to suppress or motion for the return of seized materials.

2. Employee Training in Advance of a Search

A search warrant is an unsettling event for anyone or any company. Even if the agents conduct themselves politely and with minimum fanfare – which is often not the case – the presence of federal or state officers with

court orders authorizing them to seize documents almost always upsets employees and disrupts the workplace. Moreover, while the agents know that the warrant only specifically authorizes the defined search and seizure, they invariably try to take advantage of the chaos and uncertainty surrounding the search.

A company can, and should, seek to minimize the element of surprise of a government search through notice and education. Employees who may come in contact with agents during a search warrant should know in advance through a general training program that a search is possible – not inevitable or certain, but possible – and that the company likely will not receive advance notice of the search. All training in this regard should emphasize the company's intention to cooperate with the government. Training need not create panic or overwhelm employees with detailed instructions, but employees should come away with a few key pieces of information:

- **What a Search Warrant Is** – Training should provide employees a general idea of what a search warrant is and that the agents executing a warrant will usually have broad authority to search the facilities. Employees should know that the warrant might authorize agents to look through their files, desks, and personal workspaces.
- **Identity of the Warrant Team** – Training should inform employees that the company will cooperate fully with any search, as it does with all other requests by the government, and has formed a response team that will coordinate the company's response. Training should identify the Warrant Team; leaders and the employees in each department or subdivision on the Warrant Team; and should make clear that employees are to follow the Team's instructions.
- **Monitoring Agents** – Training should advise that during a search employees may be asked to keep track of any activity they observe on the part of the agents and to report their observations to the Team.
- **Do Not Impede Search or Conceal Documents** – Training should advise employees that in the event of a search they should in no way impede the search and that any attempt to remove, discard, or hide objects after receiving notice of a search can have devastating consequences.
- **Rights Regarding Government Interviews** – Training should advise that a search warrant authorizes searches and seizures, but not questioning and interviews. Training should inform employees of their rights with respect to submitting to government interviews during a search. As explained in Part I above, the company should be careful that it not instruct employees not to talk to the agents – employees have the right to talk with agents if they wish and the government may claim that the company is obstructing justice if it overtly discourages or forbids employees from talking. But employees should know that they are not obligated to talk to agents. Training should inform employees that agents may contact them before or after the search, possibly at home, and that they have the right to decline to be interviewed. Employees also should know that they can ask the agents to come to their workplace, that they can have counsel present during any questioning, and that the company will provide counsel for anyone who wishes. Training should advise that many people believe that it is in their own personal interest to have counsel present when interviewed by the government.

D. Sample Warrant Team Policy & Corporate Counsel Checklist

Attached at **Appendix 2** are sample Policy & Procedures for Responding to Search Warrants. Before the company adopts a policy, however, it should consult with outside criminal counsel to ensure that any policy is appropriately adapted and properly implemented in accordance with the company's particular needs. Attached at **Appendix 3** is a sample In-House Counsel Search Warrant Response Checklist that an in-house legal department can adapt to its needs as guidance in the event the company is served a search warrant. Again, before adopting any specific response procedures, the company should consult with outside criminal counsel.

III. GRAND JURY AND ADMINISTRATIVE SUBPOENAS

Corporate management may also be familiar with a seemingly less intrusive means of gathering information during a criminal investigation, namely, grand jury subpoenas or administrative subpoenas. While the issuance of a

subpoena may on the surface appear less intrusive to the day-to-day operations of a company, depending on the actual terms of the request outlined in the subpoena, it may in fact be far more invasive to a company's intellectual capital than a one-time government search. Unlike a search warrant, no probable cause requirement exists for the issuance of a grand jury (or an administrative) subpoena. Therefore, such requests are presumed to be reasonable. However, they are often extremely broad. In theory, a subpoena can be quashed if compliance would be unreasonable or oppressive, but such efforts to quash succeed infrequently in the criminal context.

Grand jury subpoenas are issued either to collect documents (a *subpoena duces tecum*) or to compel testimony of company employees. Such a document production or testimony request provides the company with the opportunity to prepare its responses or witnesses in advance, and to protect documents that are privileged and confidential from discovery. The grand jury process provides plenty of notice that an investigation is about to commence and, therefore, sufficient time usually exists for consultation with in-house counsel and outside criminal counsel.

A. Subpoena to Produce Documents

In-house counsel may be accustomed to receiving civil discovery requests as a routine aspect of their representation of the company. However, upon receipt of a grand jury subpoena, the company's response to the government should be immediately distinguishable from the often non-cooperative posture adopted by companies engaged in civil litigation. Failing to promptly and forthrightly address a subpoena risks at a minimum the issuance of a search warrant and at the extreme may provide the basis for obstruction of justice charges against the company.

The first step that must be undertaken upon receipt of a subpoena (if it has not been done already) is to send out immediately a communication to all employees who may have documents covered by the terms of the subpoena.⁶ The employees should be informed that such documents, whether in electronic or hard-copy form, must be retained indefinitely, regardless of other corporate document retention policies that may be in existence. Such a communication should spell out explicitly that no document should be destroyed, shredded, removed, or altered in any manner until counsel for the company authorizes the resumption of standard retention practices, and that any violation of this directive will incur disciplinary action, up to and including termination. Because many companies have automatic deletion policies for e-mails and other electronic documents, the company must ensure that such policies are suspended. In addition, because many electronic documents may exist only on back-up tapes that are routinely reused and overwritten, the company must take steps to take existing backup tapes out of service and preserve them in a secure location.

A thorough collection and production process under the direction of outside counsel should follow quickly after a document retention communication has been sent out. A fair and reasonable interpretation of the text of the subpoena should be made so that potential sources of responsive documents can be identified and searched. Again, the company should generally resist the temptation to provide overly technical interpretations to subpoena language as might be done with a civil discovery request. Outside counsel will be able to help in this process by directly negotiating with the government regarding the scope of the subpoena and the date when such documents will be produced, as well as clearing up any potential confusion created by the drafting of the subpoena.

The production process should include the copying and Bates numbering of all documents, including electronic records, as well as a substantive review of the content of the produced documents so that the company and outside counsel can assess the potential areas of investigation and exposure to the company. During the collection process, privileged documents should be separated out and a log explaining the basis of the privilege being asserted should be drafted and provided to the government. Failure to properly identify and segregate privileged documents can lead to unintentional production of such materials. Inadvertent production can have drastic consequences including possibly preventing the company from asserting privilege for any document that relates to the subject matter of the improperly produced document.

6. The government may also take the position that the company is under an obligation to take affirmative steps to preserve documents even prior to the issuance of a grand jury subpoena or other official government request for documents. Under the Sarbanes-Oxley Act, a company may not destroy or alter documents with the intent of impeding or influencing an investigation or any other matter within the jurisdiction of a federal agency or department. See 18 U.S.C. §§ 1519, 1520.

B. Subpoena to and Individual to Testify Before a Grand Jury

If an employee receives a subpoena to provide testimony about the company before a grand jury, and he reports the receipt of the subpoena to the company, the company can offer to provide an outside attorney to represent the employee. The company should not directly or indirectly ask an employee to testify in a certain way, nor interact with the employee in a way that might create the impression that an employee is being pressured to give specific testimony. Because the conflict rules in criminal cases are more stringent than in civil cases, the company should retain an outside attorney from a separate law firm than company counsel to represent the employee and help assess any potential personal criminal liability that might exist. Ideally, whenever counsel must be hired for such individuals, the process is best coordinated by outside company counsel handling the investigation who will look for attorneys experienced in criminal law capable of independently representing their client while still cooperating, to the extent permissible, with the company. In some cases, an employee may have to consider asserting his or her 5th Amendment right not to incriminate him or herself before the grand jury. Further, the attorney for an affected individual will be able to discuss with the government the possibility of immunizing the employee in exchange for testimony. Generally, the company will control a large amount of the background information that is relevant to the investigation and therefore potentially useful to the employee in preparing to testify. That reality often provides a sufficient basis for the employee's outside counsel and the company to cooperate, allowing the company to remain both involved in the preparation of the employee and aware of the ultimate content of the testimony. Often, one attorney can represent several employees as long as the employees are not subjects or targets. Advancing legal fees for individuals is not mandatory, but is often advisable. Indemnification rights of employees, officers and directors are governed by state law and may be addressed in the company by-laws. Certain procedural requirements typically apply to the process of advancing fees to and/or indemnifying individuals. It is therefore advisable to seek guidance from experienced counsel before making those decisions or taking such action.

CONCLUSION

Criminal investigations are understandably unnerving for a company's management, particularly for in-house counsel who is often on the frontlines of the company's response to the government. Members of Hogan & Hartson's White Collar and Investigations Group routinely guide clients through the many decisions that a company faces while enduring either a federal or state investigation. Several members of the Group have onsite experience directing a company response to a search, raid and/or arrest situation. Many of the attorneys in the Group have extensive experience on "the other side" – having worked in the Department of Justice or in other prosecutorial or investigative agencies – and therefore bring a sharpened perspective to the defense of clients. Every step of the defense is important preparation for the possibility of a trial and/or for the successful negotiation of a desirable result with the government. Complex criminal trial experience of the type represented within Hogan & Hartson's Group is as essential at the commencement of an investigation as it is at the end. Please do not hesitate to contact us if our experience may be useful to your organization.

APPENDIX 1

[SAMPLE]

EMPLOYEE BRIEFING

The government is conducting an investigation of our _____ relating to _____. The investigation is being conducted by the [government agencies].

The company is cooperating with the government. We believe that ultimately this investigation will conclude that we have done nothing wrong. However, we must take care that the government not receive incorrect or incomplete information.

It is common in investigations of this nature for the government to try to talk to employees of the company being investigated. Sometimes, government agents try to contact employees outside the workplace, even in their homes. We have no reason to believe that any individual employee is a target of the investigation at this time.

You have the right to decline to talk to government agents if you wish. Perhaps more importantly, you have the right to consult with a lawyer before deciding whether to talk to government agents. Investigations like this are not run-of-the-mill legal matters. Therefore, you will be best served if any lawyer who you might retain has experience in matters of this nature. We have a list of qualified attorneys and will provide you with the name of one if you wish. If you meet with a lawyer and you feel uncomfortable, for any reason, let us know and we will give you the name of another lawyer. In most instances, the company will pay for your counsel. Please be assured that this lawyer will be acting for you and not the company. The discussions that you have with your lawyer will remain between you and your lawyer unless you tell your lawyer that it is all right to share information with others. These lawyers will put your personal interests before the interests of the company.

It is imperative that whatever the government might be told, it must be truthful and accurate. Lying to government agents is a crime and can be harmful to the company as well as to the individual who lies. Similarly, information that may be inaccurate because it is based on speculation or rumor could have unintended harmful consequences.

All this being said, you remain free to talk to the government if you wish. We have asked the government lawyers to tell us the names of employees with whom they wish to speak. However, they are under no obligation to do so. If you are contacted by the government, please inform [insert the name of inside and/or outside counsel] regardless of whether you decide to talk to them.

APPENDIX 2

[SAMPLE]

POLICY & PROCEDURES FOR RESPONDING TO SEARCH WARRANTS

INTRODUCTION

Companies increasingly are being served with search warrants that authorize governmental agencies to enter the premises and review company records and computer files. A search warrant is simply one of several ways the government gathers information in connection with an investigation. The recipient of the warrant may simply be a witness to the investigation at hand and not necessarily the focus of the government's inquiry. In other words, being served with a search warrant does not mean that the company or any of its employees is the focus of the investigation or has violated the law. Regardless, the execution of a warrant is a serious matter that should not be taken lightly.

Government agents often execute warrants without any prior warning at any time of the day. As few as 5 and as many as 50 or more agents may participate in a search, depending on the circumstances. It is important that these procedures be followed to minimize any confusion and disruption in the workplace.

Do not be confused or lulled into a false sense of security by the nature of a warrant. Some search warrants are "administrative" while others may be "criminal"; all should be treated as very important. Do not let the authorities persuade you from immediately contacting counsel and following the steps outlined below.

While the company policy is to cooperate with all investigations, it is important in responding to a search warrant that you do not relinquish any legal rights that may protect the company as well as individual employees, directors, officers or agents. To accomplish that, **IT IS IMPORTANT THAT YOU FOLLOW ALL OF THE FOLLOWING PROCEDURES CAREFULLY AND CLOSELY.**

STEP 1. IMMEDIATELY CONTACT COUNSEL

a. SERVED WITH WARRANT AND ALONE

If you are alone and served with the warrant, inform the government agents that you want to contact counsel. If the agents refuse to wait for counsel to arrive, do not let that dissuade you from calling counsel. If you need to leave the agents to make your call, do so. **MAKE THE CALL!** Attached is a list of counsel that **MUST** be contacted and the order in which they should be contacted.

b. SERVED WITH WARRANT AND NOT ALONE

If you are not alone, immediately instruct an employee in the office to contact counsel while you or the senior employee/manager on-site stays with and attempts to monitor the agents' activities. Attached is a list of counsel that **MUST** be contacted and the order in which they should be contacted.

c. INSTRUCTIONS FOR CALLING

Call each of the individuals identified on the attached list until you reach someone. Tell them that you have been served with a search warrant.

- If you reach in-house counsel's voice mail, leave an urgent message and then call the next attorney listed. If neither attorney is in the office, ask the receptionist to speak to the first available attorney.
- Repeat the process for the company's outside attorneys.
- If you are unable to reach any in-house or outside attorneys at their offices, call the attorneys using their home numbers.

STEP 2. POLITELY REQUEST THE GOVERNMENT AGENTS TO WAIT UNTIL COUNSEL ARRIVES ON-SITE BEFORE EXECUTING THE WARRANT

Ask the government agents to please wait until counsel arrives on-site. Please Note: **The agents have no obligation to delay their search and will likely refuse your request.** If the agents insist on proceeding, please provide them ATTACHMENT #1.

Thereafter, use your best efforts to follow the remaining steps detailed below. *Make sure* that counsel will be able to enter the premises if they are able to arrive before the search is over.

STEP 3. ASK THE AGENTS FOR IDENTIFICATION

You should ask the agents to identify themselves and show you government identification. Seek out the agent in charge and request his/her business card. He/she will most likely be the one to give you a copy of the warrant. Additionally, ask for the business cards of as many of the other agents as you can.

Persons dealing with the agents should be courteous and professional, and should not attempt in any way to obstruct, physically restrain, or interfere with the agents serving the warrant or performing the search. However, it is imperative that you *do not sign* any forms consenting to the search and that you *do not* orally consent to a search. (See step #6).

STEP 4. ASK FOR A COPY OF THE WARRANT

Ask for a copy of the warrant and the affidavit. If a copy of the warrant is not available, ask to make a photocopy of it. The agents are generally required to give you a copy of the warrant, but not the affidavit. Ask for both.

STEP 5. FAX THE WARRANT TO COMPANY COUNSEL

Immediately fax a copy of the search warrant to all in-house and outside attorneys. Attached is a fax coversheet (already prepared with names and numbers) that can be used.

STEP 6. DO NOT "CONSENT" TO THE SEARCH

Cooperation does *not* mean "consenting" to the search. (See step #3 above.). If the agents ask you to *consent* to the search and to sign a form acknowledging your consent, tell them firmly, but politely, that you **DO NOT CONSENT TO THE SEARCH!** Also, inform them that no employee has authority to consent to any search of company facilities. Giving consent may likely prejudice the rights of the company at a later date.

STEP 7. COPY & HAND OUT ATTACHMENT #2 TO MAKE SURE EMPLOYEES & INDEPENDENT CONTRACTORS UNDERSTAND THEIR RIGHTS WITH REGARD TO BEING INTERVIEWED

Instruct the agents that all contact with employees should go through you. **DISTRIBUTE ATTACHMENT #2** to ensure that our employees and independent contractors understand their rights with regard to being interviewed in connection with the search. **YOU WILL NEED TO MAKE COPIES OF THIS HANDOUT.**

If possible, instruct all employees and independent contractors in the area covered by the search to vacate the area during the search. You may also want to consider whether employees and independent contractors should be sent home for the duration of the search.

STEP 8. REVIEW WARRANT AND ATTEMPT TO NEGOTIATE TERMS OF THE SEARCH

Review the warrant to determine the area designated to be searched, exactly what is designated to be seized, who issued the warrant, and any time limitations specified in the warrant. Attempt to direct the location of the search in accordance with the parameters of the warrant. If the search is underway, negotiate the narrowing of the areas being searched if outside the scope of the warrant.

STEP 9. DO NOT REMOVE, DISCARD, OR HIDE ANY OBJECTS THAT MIGHT BE THE SUBJECT OF THE SEARCH WARRANT

You must not attempt to evade the effect of the warrant by removing, hiding, or discarding anything that might be called for by the warrant. You should allow the agents access and not obstruct their search.

STEP 10. CAREFULLY MONITOR ANY SEARCH MADE

If the search proceeds without the company's counsel present, you do not have the right to stop or prevent the agents from seizing items listed in the warrant, but you do have the right to observe them conduct the search, and document everything they do and look at. To the extent possible, *the agents should be observed at all times and not left unattended while they are on-site*. The goal here is not to engage in conversations with the agents, but rather to simply try to observe the search as it is conducted.

Whoever is observing the search should attempt to carefully record the conduct, statements, and questions posed by the agents. The employee should note the items searched, the agent searching the item, and the time of the search. Upon the arrival of the company's counsel, counsel will debrief the observers.

STEP 11. ASK THE AGENTS TO PERMIT YOU TO PHOTOCOPY ANY ORIGINAL DOCUMENTS TAKEN IN THE SEARCH

Ask the agents for permission to copy any documents before they are removed from the premises. If the agents appear to be removing computers or computer data, request that the agents make copies of the data rather than remove the computers. At a minimum, request that the company be permitted to make backup copies of this data. *Please Note:* The agents are under no obligation to grant your request.

STEP 12. OBTAIN A RECEIPT FOR ANY FILES OR PROPERTY

Agents are usually required by law to provide a receipt or inventory for any property taken pursuant to a warrant. Be sure to request a receipt. If possible, before the conclusion of the search, have someone supplement this inventory of property with as many details about the nature and prior location of the documents or materials as possible.

STEP 13. AWAIT COUNSEL AND ADVISE EMPLOYEES

After the agents leave, do not leave the facilities. Instruct other employees who observed the search to likewise await word before leaving. When counsel arrives, he or she will provide instructions. Until then, do not conduct any meetings with employees until counsel is present. Rather, instruct employees who directly monitored the search or had any contact with agents to remain on-site and to resist the temptation to discuss the search with one another.

COUNSEL TO BE CONTACTED IN THE EVENT OF A SEARCH

In-House Company Counsel

	Office Phone	Pager	Office Fax	Home Phone
1. [NAME]				
2.				
3.				

Outside Company Counsel

1. [NAME]
- 2.
- 3.

[COMPANY FAX COVER SHEET ALREADY FILLED IN WITH NAMES AND NUMBERS AND A MESSAGE THAT FAX IS URGENT AND SHOULD BE DELIVERED IMMEDIATELY]

ATTACHMENT 1

NOTICE OF OBJECTION

TO: Government Agent(s) Or Other Person(s)
Seeking to Review the Company's Files

FROM:

We have been advised by legal counsel to inform you, in the event you insist on going forward with the execution of a search without awaiting the arrival and presence of the company's legal counsel, that, on behalf of the company and its employees, we object to this search for the following reasons, amongst others.

First, the company has at all times been prepared to cooperate with the government in any investigation and remains ready and willing to comply with any legitimate request for information or evidence. There is absolutely no justification for proceeding by way of a search warrant in this fashion.

Second, if you proceed with this search at this point, you will likely be violating the company's and its employees' constitutional rights.

Third, to the extent this search includes the company's law department or files containing communications with legal counsel or the work-product of legal counsel, we remind you that, such files, communications, and materials are privileged. A search and seizure which, by its nature, necessarily invades the sanctity of such privileged files, documents, and materials is prohibited by the Fifth and Sixth Amendments to the Constitution and the well-established attorney-client privilege and attorney work-product doctrine. Accordingly, the company requests that you do not review or confiscate any files containing confidential and/or privileged documents until the company's counsel is present to address these issues with you.

Further, you should be aware that once you have violated any constitutional rights as a result of your search or violated the attorney-client privilege or the attorney work-product doctrine, you will irreparably taint your investigation, and the only appropriate sanction is dismissal of any charges as to matters flowing from evidence encompassed within these rights and privileges.

Finally, be advised that absent an express written agreement from the company stating otherwise, no company employee has the authority to consent to any search.

ATTACHMENT 2

YOUR RIGHTS

During the course of a search warrant executed by administrative or law enforcement personnel on company premises, you may be approached and asked to be interviewed. You should know that you have the absolute right not to be interviewed, although you should provide your name and any other personal identification requested. You also have the right to agree to an interview if you so choose. The choice is yours. The purpose of this hand-out is not to ask that you agree or not agree to such an interview but, rather, simply to ensure that you know your rights.

If you choose to be interviewed, many people feel it is desirable and in their interest to have an attorney present during the interview. Accordingly, for any employee wishing to discuss this matter with an attorney or to have an attorney present with them at an interview with investigators, the company will provide one at no cost to the employee.

APPENDIX 3

[SAMPLE]

IN-HOUSE COUNSEL SEARCH WARRANT RESPONSE CHECKLIST

STEP 1. GO TO THE SCENE IMMEDIATELY

If you cannot be at the scene immediately, speak with the agent in charge by telephone and request that the search not begin until you arrive.

STEP 2. CONTACT EXPERIENCED PRE-SELECTED OUTSIDE CRIMINAL COUNSEL

Immediately contact pre-selected outside counsel experienced in white collar criminal matters. Have them available for consultation by telephone and available for the company's post-search response (discussed below).

STEP 3. ONCE AT THE SCENE, LOCATE WARRANT TEAM LEADER

Once at the scene, do not wait for outside counsel. Instead, attempt to locate the Warrant Team Leader or the most senior official at the scene. Quickly obtain a briefing on the agents' activities to that point.

STEP 4. APPROACH THE LEAD AGENT

As soon as possible, determine who the agent in charge of the search is. Introduce yourself and politely request the agent's identification and provide the agent your business card.

Tell the agent that you intend to observe the search in a non-intrusive manner to help ensure that the scope of the search warrant is not exceeded and to identify areas where privileged documents are maintained.

While you should be firm and attempt to protect the company's interests, from this point forward it is important that you be cautious that nothing you say or do can be construed as impeding the search.

STEP 5. ASK FOR A COPY OF THE WARRANT

Ask for a copy of the warrant and the affidavit. You are entitled under the Federal Rules of Criminal Procedure to a copy of the warrant but not the affidavit. Ask for the affidavit anyway. Direct someone to fax these documents to outside counsel.

STEP 6. DO NOT "CONSENT" TO THE SEARCH OR ANY EXPANSION OF AREAS DESIGNATED TO BE SEARCHED

STEP 7. HAVE ATTACHMENT #2 COPIED AND PROVIDED TO EMPLOYEES

Instruct the agents that all contact with employees should go through you. If possible, have the Warrant Team Leader or other senior management instruct all employees and independent contractors in the area covered by the search to vacate the area during the search. Consider whether employees and independent contractors should be sent home for the duration of the search. In either case, have ATTACHMENT #2 copied and provided to employees.

STEP 8. REVIEW WARRANT AND ATTEMPT TO NEGOTIATE TERMS OF THE SEARCH

Review the warrant to determine the area designated to be searched, exactly what is designated to be seized, who issued the warrant, and any time limitations specified in the warrant. Attempt to direct the location of the search in accordance with the parameters of the warrant. If the search is underway, negotiate the narrowing of the areas being searched if outside the scope of the warrant.

STEP 9. ASK THE AGENTS TO PERMIT YOU TO PHOTOCOPY ANY ORIGINAL DOCUMENTS OR MAKE COPIES OF COMPUTER DATA TAKEN IN THE SEARCH

Ask the agents for permission to copy any documents before the documents are removed from the premises. If the agents plan on removing computers or computer data, request that the agents make copies of the data rather than remove the computers. At a minimum, request to make backup copies of this data. *Note:* The agents are under no obligation to grant your request.

STEP 10. ASSIGN EMPLOYEES TO CAREFULLY MONITOR THE SEARCH

If possible, assign one group of employees to monitor the search with a video camera or by taking photographs. Assign another group of employees to take detailed notes of the search. To the extent possible, *the agents should be observed at all times and not left unattended while they are on-site.* Inform the employees that the goal is not to engage in conversations with the agents or in any way impede the search, but rather to simply try to observe the search as it is conducted.

STEP 11. PROTECT CONFIDENTIAL ATTORNEY-CLIENT INFORMATION

Many government agencies have internal guidelines stating that a search warrant should normally not be used to obtain attorney-client materials. Object if the search extends to law department files or other attorney-client privileged materials.

If the agents continue to search these areas, attempt to contact the prosecutor's office handling the case or the magistrate that issued the warrant. The warrant may contain the prosecutor's or magistrate's name or the agent in charge will likely provide you with that information. If you cannot reach the prosecutor, ask that the area where the privileged information is maintained be secured or materials be placed under seal pending review by a court. If that does not work, provide the agent in charge a copy of ATTACHMENT #1.

STEP 12. OBTAIN AN INVENTORY AND COPIES OF DOCUMENTS AND MATERIALS

Agents are usually required by law to provide a receipt or inventory for any property taken pursuant to a warrant. Request the inventory. If possible, before the conclusion of the search have someone supplement this inventory of property with as many details about the nature and prior location of the documents or materials as possible.

STEP 13. CONDUCT POST-SEARCH MEMORIALIZATION, EMPLOYEE DEBRIEFING, PRESS RELATIONS

After the search, instruct all those who monitored the search and any employees who observed the search or had any contact with agents to immediately and carefully memorialize their observations. These employees should be instructed to list all the offices and other areas searched and identify what was taken from each. List the people who work in each area and interview each person about the items taken. **Instruct them to mark these documents with the notation "Privileged and Confidential, Prepared at the Direction of Counsel."** Also, determine whether any employees spoke with agents, and debrief these employees as soon as possible. Meet with your public relations employees to determine the appropriate response to media inquires about the search or the government's investigation. Unless the company was aware of the investigation and already began the preparation of its defense, many activities, such as conducting an internal investigation, should be completed as soon as possible.

The company should also send a memorandum to all employees at the facilities searched, which provides a brief summary of what occurred, instructions not to tamper or destroy documents and computer data, and their legal rights if approached for an interview by the government. The memorandum should be worded carefully and drafted with the assistance of counsel experienced in white collar matters.

ATTACHMENT 1

PRESERVING CONFIDENTIAL, PRIVILEGED COMMUNICATIONS

TO: Government Agent(s) Or Other Person(s)
Seeking to Review the Company's Files

FROM:

The company's files commonly contain confidential communications to and from legal counsel, which are protected by the attorney-client privilege, work-product doctrine, as well as other privileges. It is the intent of the company to assert those privileges and to protect the confidentiality of all privileged communications. The company requests that you do not review or confiscate any files containing confidential and/or privileged documents.

Moreover, the company has objected to your search of the _____ areas of its facilities because of the confidential information known to be maintained in these areas. The company requests that it be afforded the opportunity to review the materials in these areas for privilege before the materials are confiscated. At a minimum, the files in these areas should be secured and/or materials sealed until a court of law has the opportunity to address this issue.

To the extent you continue your search of the _____ areas -- or otherwise confiscate files containing confidential and/or privileged documents -- you should be aware that you will have irreparably tainted your investigation, and the only appropriate sanction is dismissal of any charges as to matters flowing from evidence encompassed within these rights and privileges.

ATTACHMENT 2

YOUR RIGHTS

During the course of a search warrant executed by administrative or law enforcement personnel on company premises, you may be approached and asked to be interviewed. You should know that you have the absolute right not to be interviewed, although you should provide your name and any other personal identification requested. You also have the right to agree to an interview if you so choose. The choice is yours. The purpose of this hand-out is not to ask that you agree or not agree to such an interview but, rather, simply to ensure that you know your rights.

If you choose to be interviewed, many people feel it is desirable and in their interest to have an attorney present during the interview. Accordingly, for any employee wishing to discuss this matter with an attorney or to have an attorney present with them at an interview with investigators, the company will provide one at no cost to the employee.