

KIRKLAND & ELLIS

A HOW-TO GUIDE FOR AN EFFECTIVE FBI SEARCH WARRANT RESPONSE PROGRAM

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A HOW TO GUIDE

FOR AN EFFECTIVE FBI

SEARCH WARRANT RESPONSE

PROGRAM

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A team of 20 or more agents from the Federal Bureau of Investigation and Department of Justice lawyers arrives suddenly and unannounced at your company's executive offices in the United States at 8 a.m. one Monday morning. The FBI agents produce a warrant to search the premises and to seize whatever evidence they find for use in an investigation into sketchily alleged criminal wrongdoing by your company and its employees. The agents start taking away your company's documents, information and other property — from desks, files, computers and other work or storage areas — including important, confidential, even proprietary information about the company's day-to-day activities and long-term business strategies. While the agents search and seize, they are also actively interviewing any company personnel they encounter, trying to pry out as much information as possible about the company.

Can they do this? What can you do?

Do you think this could *never* happen to your company, or to any other company operating a respectable business in America? ***Think again*** — because it already has happened to well-known, very successful companies such as Archer-Daniels-Midland and Northrup Grumman, both of which have been raided by FBI agents with search warrants. And this can and will happen to any business that gets caught within the wide net cast by government investigators fishing for evidence of "white collar" or other corporate crimes, including antitrust law violations.

Long gone are the days when search warrants were generally used only to investigate street crimes like drug rings, bank robberies and murders. Now, search warrants are routinely used to investigate *all* kinds of criminal activity involving businesses. Indeed, the U.S. Department of Justice's policy now *requires* prosecutors to use search warrants whenever they believe the availability of evidence is in jeopardy. The numbers bear this out. U.S. federal judges issued almost twice as many search warrants in 1997 as in 1994, and most think the numbers will continue to rise.

Is your company prepared to respond properly and effectively to a raid by federal agents armed with a search warrant?

In our experience, many companies are *not*, but all companies can and should be. The best time to prepare a search warrant response program is *now* — long before any government agents arrive with their search warrant. With that goal in mind, this guide begins with legal primer on search warrants. It next explains, step-by-step, what your company must do to establish a search warrant response program with a trained, ready-to-go response team. Then

it describes precisely what your response team should be doing before, during and after the search.

In short, by following this how-to guide, you can prepare your company and its employees for the unquestionably frightening experience of an FBI search — just in case government investigators target your company for their next raid.

A Search Warrant Primer

A search warrant is a written order issued by a federal judge directing a law enforcement officer, such as a FBI agent or other federal agent, to search specific premises for specific property. Search warrants are an attractive investigative tool because they enable the government to *immediately* seize and preserve evidence, give investigating agents an opportunity to talk with target-company employees and send a very public message that a criminal investigation is under way and the target company is somehow involved.

To obtain a search warrant, the government must convince a U.S. federal judge that there is probable cause that a crime has been committed and that evidence of the crime will be found at the site to be searched. This is legalese for persuading the judge that “a particular place contains evidence of a crime.” In practice, this is not a difficult showing for the government to make. Rare is the case in which the government tries, but fails, to convince a judge to issue a search warrant.

How does the process work? First, the prosecutor prepares the warrant itself, which must describe with particularity the place to be searched as well as the items to be seized. Next, the prosecutor prepares an affidavit to support the government’s application for the search warrant. Typically, the affidavit will be that of a government agent, often supported exclusively or principally by hearsay from anonymous sources. (Standard fare includes statements to the effect that “this affidavit is based on my own personal knowledge, as well as on the personal knowledge of other agents participating in the investigation” and “I have learned from a confidential source that”) In most cases, the prosecutor will also prepare a motion “to seal the affidavit” (thereby keeping it from becoming publicly available) on the ground that such secrecy is necessary to protect the identities of witnesses and confidential sources of information. Once these documents have been assembled, the prosecutor presents the search warrant application package to a federal judge for approval.

After the search warrant is issued by a judge, the government agents executing the warrant are required to do the following: (1) execute the search warrant within 10 days of its issuance; (2) execute the warrant during the day, unless the issuing court, “for reasonable cause shown,” has authorized otherwise; (3) announce their authority and purpose; (4) use force only when entry is denied; (5) provide a copy of the search warrant to the party to whom it is directed; (6) seize only those items identified in the warrant; (7) provide a written receipt for the items seized; and (8) provide a written inventory of what items are taken.

Notwithstanding these rules, the real-life experience of any company subjected to search warrant raid is hardly a pleasant one. Typically, the FBI agents will arrive very early in the morning, or at the end of the business day, with an army of intimidating agents who may

show little deference to corporate counsel, the attorney-client privilege and company trade secrets. The agents may also interpret the scope of the search warrant much more broadly than the company's counsel. Finally, the agents may leave the site with items that are crucial to the company's ongoing business operations and leave behind a real mess. To be sure, a government search of a company facility is always a highly undesirable situation. But it will be much, much worse if the company is unprepared.

A Search Warrant Contingency Plan

So, *be prepared*. Now, before any agents arrive at any company facility, your company can put in place a search warrant response program designed to (1) ensure compliance with the terms of the search warrant, (2) protect privileged materials and trade secrets, and (3) minimize disruption of the company's work environment and ongoing business. Here's what such a search warrant response program should include:

Before The Agents Arrive.

Long before any agents arrive, the company should form a search warrant response team and define the roles of each team member. Members of the response team should include:

- " *Receptionists and/or console operators* who will likely handle any initial invasion by the agents and/or act as a communications center until the entire search warrant response team is assembled.
- " *Inside counsel*, one of whom should serve as principal liaison with (i) the agents, until experienced outside counsel arrives, and (ii) internal business operations personnel throughout the search and its aftermath. We recommend an unflappable in-house attorney for this difficult role, as well as an equally unflappable understudy.
- " *Experienced outside counsel*, who should, upon arrival at the facility or perhaps even sooner, serve as principal liaison with the agents, prosecutor and issuing court. We recommend an outside counsel who has experience with search warrants, either as a former prosecutor or on the defense side.
- " *A small team of managers and support staff* who know the nature and location of the company's business records and property.
- " *Inside and, perhaps, outside security personnel*, who can assist in monitoring the search and in debriefing interviewed employees if necessary.

Once the search warrant response team has been selected and its members' roles defined, the team should be educated on the following search warrant response procedures:

When The Agents Arrive.

The government agents' first contact will likely be with a company receptionist or security officer who, as part of the search warrant response team, should be instructed to do the following:

- " *No Authority to Accept Process.* The receptionist or security officer should advise the agent serving the warrant that he or she does not have authority to accept legal process on behalf of the company and request that he or she be allowed to contact someone who *does* have such authority before the agents proceed further.
- " *Immediately Notify the Console Operator.* The receptionist or security officer should immediately notify the console operator or communications center that government agents have arrived to execute a search warrant and that the search warrant response team, starting with inside and outside counsel members, should be assembled immediately. The console operator or communications center will then contact the rest of the search warrant response team.
- " *Identify the lead agent and get business cards.* The receptionist or security officer should ask the lead agent to identify himself and ask for business cards from all of the agents. Alternatively, the receptionist or security officer should ask the agents to sign in their names and agency affiliations at the door per company procedure. (The specific agency affiliations of government agents can often provide important information about the specific nature of the government's investigation.)

Once inside and/or experienced outside counsel arrive, they should do as much of the following as possible, as circumstances permit:

- " *Keep the lead agent happy.* Remember, the goal is to avoid and resolve problems and make the best of a difficult situation. Accordingly, be firm, but also be polite and courteous. Give the lead agent an office or some work space.
- " *Obtain and read — very carefully — a copy of the search warrant.* As noted above, you have a right to see the warrant before the search begins. When you read it, identify (i) the premises to be searched, (ii) the items to be seized, (iii) the time limitations for the execution of the search, and (iv) the name of the issuing judge. Get a sense of the scope of the search. (Also try to get a copy of the warrant's supporting affidavit.) *Object, where possible.* If there is an obvious defect in the warrant — for example, if it contains the wrong business address — notify the lead agent and, if necessary, the prosecutor or the issuing judge. If the agents insist upon proceeding with the search before you are able to reach the

prosecutor or the court, “make your record” by stating your objection *but do not obstruct or interfere with the agents, physically or otherwise.*

- ” *Negotiate reasonable procedures with the lead agent.* Counsel for the company should discuss with the lead agent procedures to ensure that the search will proceed smoothly and, at the same time, minimize disruption of the business. The following are items counsel should address:
 - ” Counsel should inform the lead agent that the company intends to *monitor* and *videotape* the search. The agents may not like it, but so long as the monitoring and videotaping do not interfere with the agents’ search, they have no legitimate objection. As support for its position, counsel can point out that Rule 41 of the Federal Rules of Criminal Procedure expressly allows for an inventory to be prepared in the presence of the person whose premises is being searched. If the agents will not agree to reasonable monitoring and videotaping procedures, raise the matter with the prosecutor and, if necessary, the issuing judge.
 - ” Counsel should attempt to arrange to have *copies* made of all documents taken by the government *before* they leave the premises. Remember, the agents are entitled to the originals and might wish to do forensic tests, such as fingerprinting, that might alter or smudge the originals. For such documents, making copies could be important.
 - ” Counsel should ask for “*split samples*” whenever the agents intend to take test samples from the premises.
 - ” Counsel should determine whether the agents intend to search or seize *computer files*. If so, counsel should seek a delay of any such search until knowledgeable information systems employees can respond. Counsel should then negotiate procedures that will ensure that computer searches proceed smoothly with minimum disruption to the business and degradation of computer files. Counsel should be familiar with the Federal Guidelines for Searching and Seizing Computers.
 - ” Counsel should determine whether the agents intend to search lawyers’ offices or for any potentially *privileged documents or information*. If the agents’ answer is yes, counsel should ask whether the court was so apprised and examine the warrant carefully to determine whether such a search is authorized. If not, counsel should object and pursue the matter with the prosecutor and, if necessary, the issuing judge.

- " In *all* events, counsel should take steps to protect whatever privileged documents and information the company may have. If the agents persist in a search for potentially privileged materials, counsel should discuss procedures for the handling of such materials, such as (i) counsel first reviewing such materials and handing over only non-privileged materials to the agents (while perhaps keeping a log of privileged materials), or (ii) arranging to keep potentially privileged materials segregated and under seal until an "independent" government attorney, judge or special master can review them and resolve all privilege questions.
- " Counsel should also object to the seizure of *trade secrets*. If the agents persist in searching for and seizing such information, counsel should also discuss procedures to ensure the protection of such trade secrets. At a minimum, counsel can warn the agents that it is a crime to release trade secrets that have been seized pursuant to Justice Department activities. 18 U.S.C. § 1905.
- " Counsel should request that the agents refrain from *interviewing employees* outside of the presence of counsel or of counsel during the search. Counsel should note carefully any denial of this request.
- " *Get a hold of the prosecutor.* As soon as practicable, counsel should contact the lead prosecutor to (i) raise any defects in the warrant, (ii) negotiate, if possible, an alternative method of production that will assure that no evidence will be lost or destroyed, (iii) raise any important issues that have not been resolved with the lead agent, (iv) negotiate procedures that will minimize disruption of the business, and (v) obtain as much information as possible about the government's investigation. In many instances, the prosecutor may be more responsive than the agents to requests made by counsel. Further, counsel should inform the prosecutor if the agents insist upon searching the premises for items not described in the warrant or seizing privileged documents.
- " *Instruct the warrant response team.* Counsel should instruct those members of the warrant response team who will be monitoring the agents' search. If possible, monitors should be given a copy of the search warrant. Monitors should be instructed to carefully observe the agents' conduct, take notes regarding the places searched and items seized, noting the times involved for each part of the search, and keep as accurate an inventory of seized items as possible. Monitors should also keep notes of any conversations the agents might have with employees. Monitors should be instructed not to offer any assistance to the agents without first consulting with counsel. *Monitors should also be instructed not to obstruct or interfere with the search in any way.*

- " To the extent it can be determined, exclude from the warrant response team any person who may have been involved in matters under investigation.
- " *Inform and instruct company personnel.* Company personnel should be informed and instructed as follows:
 - " Notify relevant employees that a search warrant is being executed.
 - " Instruct all non-essential employees to leave the premises. The government agents cannot force people to stay or go (without arresting them and taking them into custody, which is very unusual in the context of a search). Thus, retain only those people needed to monitor the search.
 - " Instruct all employees regarding their rights in connection with both the search and the government's investigation. Counsel should have an *employee advice form* ready for distribution to Company employees that covers at least the following points: (i) an employee is not obligated to speak with any government agent or attorney and is generally well advised not to do so before consulting with counsel; (ii) an employee has the right to have counsel present during any interview with a government agent or attorney (the Company may want to offer to furnish such counsel to employees upon request); and (iii) the Company requests that employees notify Company counsel before participating in such an interview so that Company counsel can be present.
 - " Instruct all employees that they should not interfere with the government's search in any way.
- " *Notify the public relations department.* Searches often generate press attention. Generally, a "no comment" or "no confirmation" response is appropriate, especially while the search is proceeding. It may be advisable to prepare a statement for release *after* the search is completed — when you can respond more intelligently.

As the Agents Search

The above procedures should serve you well as the agents search. But it bears emphasizing that, during the search, counsel should take steps to ensure that the following occurs:

- " *Monitor and make a good record of the search.* The goal is to keep track of everything the agents do — where they search, what they seize, who they talk to, and what they say.

- " *Do not obstruct or hinder the search.* When appropriate, counsel should inform the agents, prosecutor and, if necessary, the issuing judge that the government is seizing privileged material or items beyond those identified in the warrant. But neither counsel nor any company employees should interfere in any way with the search.
- " *Identify and segregate privileged files.* Again, if agents insist on taking privileged documents, try to negotiate a procedure pursuant to which the privileged materials are kept separate and under seal until all privilege disputes can be resolved.
- " Copy essential business files and computer information before they leave the premises.

After the Search

Once the search is over, the company should consult with experienced counsel about taking the following steps:

- " *Be prepared with a media response.* The search will become public. Generally, "No comment" is the safest course. An alternative: "Agents of the [agency] today conducted a search for documents at the company's offices in [location]. The company cooperated with the agency's search for documents. We have no details regarding the reason for the government's investigation, and we are not currently aware of any misconduct or wrongdoing on the part of any company employees.
- " *Debrief the search warrant response team and any employees who spoke with government agents or attorneys.* In doing so, make crystal clear that counsel for the company is just that — counsel for the company and not for any individuals.
- " *Send out a "freeze letter" covering document and information related to the search and the government's investigation.* The company's normal document destruction or non-retention practices should be suspended. All personnel who may have documents or information that may be pertinent to the subject matter of the government's investigation should be instructed to preserve such materials. Steps must also be taken to gather and safeguard such materials for the company's use in defending against the investigation.
- " *Retain outside counsel to conduct an internal investigation.* A search warrant is a serious wake-up call to a company. It likely means that the company is the subject of a criminal investigation that has been ongoing for some time, perhaps months, and that events are unfolding rapidly that may have grave implications for the company and its employees. The company should take advantage of the government's wake-up call and all

information obtained as a result of it. Many things can be done to determine and or improve the company's position with the government. The starting point is a thorough internal investigation conducted by experienced outside counsel. Outside counsel are uniquely suited to conduct the internal investigation because they (i) will understand the legal implications of the criminal and civil issues that are involved, (ii) can maintain confidentiality for the company and preserve its privileges and (iii) will have the requisite independence and objectivity to advise the company as to how to handle a situation that threatens to seriously disrupt the company's business and perhaps even its very existence.

IN SUM, be prepared with an effective search warrant response program to protect your company's interests.

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