

# Crisis Handbook

A Desktop Survival Guide  
For In-House Counsel

crowell  moring

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## When Crisis Strikes

You are a busy member of your company's in-house legal department. What starts off as just another day at the office suddenly gets very complicated. You learn that the company has had an unexpected contact with law enforcement or other regulatory agents. The crisis can hit in many forms, sometimes with two or more occurring simultaneously:

- Law enforcement agents in raid jackets burst into your company's offices, brandishing weapons and a search warrant.
- A process server shows up with a subpoena for documents, to be produced within days to the U.S. Attorney, the SEC, or other law enforcement or regulatory agency.
- Two FBI agents arrive unexpectedly and ask to speak to the company controller.
- Your VP of Investor Relations gets an ominous telephone call from the SEC's Enforcement Division. Simultaneously, a "Document Preservation" notice from the SEC is delivered to your office.
- A news reporter calls with a few questions about certain payments made by a company sales representative to a foreign government official.
- You learn that an employee has just been seriously injured or killed in a work-related accident.
- You learn that a current employee has become a "whistleblower" and has provided confidential information and documents to government agents.

You start getting panicked phone calls and emails from top management, seeking your guidance. Something must be done *quickly*. You don't have time to wait for qualified outside counsel to arrive.

The following guide is intended to assist those who find themselves in such an unhappy situation. It will provide guidance about what to do and, of equal importance, what *not* to do, in the early minutes and hours of the crisis.

## The Search Warrant Checklist

### **YES**

- Identify and meet with the lead agent. Learn the identity of the supervising prosecutor.
- Ask for a copy of the warrant and review it carefully.
- Determine whether agents are detaining employees.
- Advise employees of their rights – including the right to counsel. (See attached sample “Notice to Employees.”)
- Consider sending employees home.
- Object to the seizure of privileged documents.
- Make a record of events as they unfold.
- Ask to be present when agents make an inventory of seized materials.
- Make your own inventory of seized materials.
- Ask for copies of seized computer files.
- Ask for split samples.
- Advise the lead agent of any classified documents that are seized.

### **NO**

- Do not interfere with the search.
- Do not allow anyone to alter, hide or destroy documents.
- Do not consent to the search of any area or seizure of any materials.
- Do not volunteer substantive information.
- Do not instruct or encourage anyone not to speak with the agents.

SEE DETAILED GUIDANCE FOR SEARCH WARRANTS ON PAGE 7.

## The Government Subpoena Checklist

### **YES**

- Promptly notify officers and employees who may possess the documents listed in the subpoena and detail what is to be produced; do not circulate copies of the subpoena itself.
- Issue a preliminary document “Hold Order” to all relevant personnel. (See attached sample “Preservation Memo/Hold Order.”)
- To the extent the subpoena calls for electronically stored information, such as computer files and emails, promptly notify your IT personnel and involve them in the compliance efforts.
- Suspend any scheduled document destruction or deletion protocols. Turn off any “auto-delete” programs.
- Strictly prohibit any destruction, “loss,” or alteration of any documents that arguably fall within the scope of the subpoena.
- For an SEC or CFTC subpoena, obtain a copy of the Formal Order of Investigation.

### **NO**

- Do not allow employees to destroy, hide, or manipulate documents.
- Do not immediately start rummaging through files and physically removing documents described in the subpoena. Instead, wait until qualified counsel and their paralegals, and perhaps document collection and reproduction experts, get involved.

SEE DETAILED GUIDANCE FOR SUBPOENAS ON PAGE 10.

## Guidance For Other Potential Crises

### A. “Informal” Visits by Law Enforcement Agents

Sometimes, the initial contact with law enforcement is a visit or phone call by an agent or officer who has no search warrant or subpoena, but wishes to talk to you or your company’s employees. Although cooperation with law enforcement can often yield benefits, companies nevertheless should proceed with caution. You should attempt to determine the subject of the inquiry and then politely delay the interview(s), so that you may **contact qualified outside counsel immediately**. Outside counsel can make contact with the agent, and advise you on how best to proceed. It may be determined that any such interviews should not proceed without the presence of an attorney, or should not take place at all.

### B. “There’s a Reporter on the Phone”

Sometimes, a telephone call or visit from a reporter is the first sign of a burgeoning problem. Employees should be instructed to refer press inquiries to either the appropriate public affairs professional or in-house counsel. If a press inquiry is expected due to a public incident, whether a company-related accident or some type of law enforcement activity, the company should reiterate and re-emphasize the policy of passing press inquiries on to the appropriate company representative. Generally, any initial response to media inquiries should be brief, non-specific, and provided in writing; it is not wise to engage in a free-ranging conversation with reporters prior to learning all the facts. If possible, you should **involve qualified outside counsel immediately**, prior to responding to any media inquiry.

### C. “An Employee has been Seriously Injured” (or Worse)

In addition to the tragedy of injuries to or the death of an employee, a serious accident can also present serious legal challenges to a company on whose premises the accident occurs. These include not only personal injury suits but also inquiries from state and federal regulators, such as OSHA. Further, an accident causing serious injury or death may attract press attention. If regulatory agents, such as OSHA investigators, arrive to investigate the incident, you should immediately contact qualified counsel. In the meantime, you should not attempt to impede or otherwise interfere with the agents or inspectors. If they wish to interview employees, you should generally respond as you would in the context of such requests during a search or informal contact, as discussed above. It is often critical that any such **interviews be conducted in the presence of qualified counsel**, if at all.

### D. “We’ve Got a Whistleblower”

A “whistleblower” is a person (often an insider) who raises an allegation of wrongdoing within the company. Whistleblowers may make their allegations internally (for example, to other people within the company) or externally (to government agencies, the media, or both). Certain federal and state statutes enable whistleblowers to initiate lawsuits targeting allegedly unlawful or fraudulent business practices. These statutes offer the lure of huge monetary rewards for the whistleblower, and some reward whistleblowers just for reporting information, without filing a lawsuit. While once largely limited to instances of fraud by government contractors, these statutory schemes are now being more broadly applied to other scenarios, including alleged securities fraud and bribery of foreign officials.

Perhaps the most important initial consideration, upon learning of the existence of a possible employee-whistleblower, is to avoid taking any swift action that may appear retaliatory. Unless otherwise required by government contract or regulation, resist the urge to immediately confront the suspected whistleblower, and do not summarily impose disciplinary action, such as suspension or termination. Instead, **contact qualified counsel immediately**.

## Detailed Guidance on Responding to a Search Warrant

- *Do not attempt to prevent the search from taking place* or obstruct the agents executing the warrant. Employees should be instructed likewise. Such actions can result in criminal sanctions. In addition, agents executing a search warrant are authorized to use force.
- *Identify and meet with the lead agent as soon as possible.* It is also helpful to obtain the business cards, or at least the names and affiliations, of the agents involved in the search, as well as the name and contact information of the prosecutor responsible for execution of the warrant.<sup>1</sup> At this point, you should, if possible, immediately contact outside white collar counsel. Many of the steps described below are best conducted by such outside counsel. Meanwhile, however, you should ask the lead agent for information concerning the status of the company (e.g., target or subject of the investigation, or neither) and the nature of the allegations being investigated. The agent may tell you little or nothing; sometimes, however, agents may provide useful information. You should also ask whether any employees have been or are being interviewed, and, if so, request that legal counsel be present at any such interviews.<sup>2</sup> And you should *not* engage in a dialog or debate with the agents regarding the factual basis of the investigation.<sup>3</sup>
- *Obtain and review the search warrant.* The agents are required to provide a copy of the warrant. If they do not, request a copy. Review the warrant as soon as possible to gauge whether the search is limited to the physical areas and items specified in the warrant. General searches and “exploratory rummaging” are prohibited. Do not obstruct the agents if you feel the search is outside the scope of the warrant. Instead, if possible, make the agents aware of your concerns and document your observations and objections.
- *Determine whether agents are detaining employees.* Persons in the area to be searched can be temporarily detained, and others outside the search area may be barred from entering it, to allow the search to proceed expeditiously and without interference. Individuals who are not identified in the warrant itself may not be searched except where the agents have at least an “articulable and individualized” suspicion of wrongdoing on their part. However, under the pretense of securing the premises, agents may attempt to confine personnel to certain areas, to limit use of telephones, and to pat down individuals and search their personal effects. Asking agents whether individuals are under arrest will usually prompt them to desist from unreasonably restricting movement or telephone use.
- *Advise employees of their rights.* As mentioned, it is common for agents to attempt to question employees, including meeting with them individually in an office on the searched premises. It is important, therefore, that all employees understand their rights. Be very careful not to give advice to employees that could be construed as an instruction not to cooperate with the agents. Such actions can lead to charges of criminal obstruction. It is generally permissible, however, to advise employees that (1) they may, but are not required to answer agents’ questions, and whether to do so is entirely up to them; (2) if they do choose to speak to agents they (a) must tell the truth and could be subject to criminal prosecution for any false statements, and (b) can set conditions, such as having company counsel present for any questioning. You should not suggest that a decision

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1 Government attorneys typically do not accompany the agents to the search. However, they will often be available by telephone.

2 Keep in mind that search warrants typically do not authorize agents to conduct interviews on the company’s premises. You and your employees are not required to consent to such interviews or to permit company property to be used for law enforcement purposes.

3 If in-house counsel is concerned that he or she is or may become a target of the investigation, counsel should avoid substantive discussion with the agents or prosecutor regarding the apparent subject matter of the investigation. It is best if outside counsel or conflict-free, in-house counsel take the lead in representing the company’s interests in those hopefully rare situations.

to speak with agents will be viewed unfavorably by the company. It is best to provide such advice in writing in order to avoid subsequent disputes regarding what employees were advised to do. A sample of such a “Notice to Employees” is included at the end of this handbook. It can also be found at <http://www.crowell.com/PDF/Sample-Notice-to-Employees.pdf>

- *Do not remove or destroy documents to prevent their seizure.* This may seem obvious, but it is advisable to remind employees that removing, concealing, altering, destroying or deleting documents is strictly prohibited and could lead to criminal prosecution.
- *Consider sending employees home.* Because the search is likely to substantially disrupt work, it may be best to send non-essential personnel in affected areas of the facility home for the day. This will also reduce the likelihood that agents will attempt to interview employees before the employees are advised of their rights and options.
- *Do not consent* or otherwise give your permission to search any area or to seize any property. In the event of any question concerning the warrant’s coverage, or if the agents believe that a broader search is necessary or that an item not identified in the warrant itself, such as a laptop computer, should be searched, they may seek your consent to search beyond what is authorized in the warrant. *Do not* give it. Be very clear that you will not consent to a warrantless search, at least until you have an opportunity to consult with outside counsel.
- *Do not volunteer substantive information.* A search warrant does not require you or any other employee to provide directions or guidance to the agents. You are not required to show them the location of documents or other property, or otherwise assist in the search. However, good judgment suggests that some assistance can be provided as a simple courtesy when the answer is obvious or to prevent unnecessary disruption by the agents in locating their objective.
- *Object to any review or seizure of privileged documents*, including legal communications. If the agents insist on seizing legally privileged documents despite your objections, immediately contact the responsible Assistant United States Attorney. If the seizure goes forward, propose that you gather the documents under the agents’ supervision and seal them so that they cannot be opened without breaking the seal.<sup>4</sup> You can thus prevent government review of privileged documents until the privilege issue is resolved.
- *Make a record of events as they unfold.* It is helpful to keep detailed notes during the search (to the extent possible) to support a possible challenge to the legality of the search, and generally to collect information concerning the scope and nature of the investigation. Depending on the number of agents involved, additional attorneys and/or paralegals may be required to properly monitor all of the agents’ activities.
- *Ask to be present when the agents make an inventory* of the property to be seized. You are entitled to a receipt for the property before the agents leave. Typically, the agents will provide you with a copy of their inventory as the “receipt.”
- *Make your own inventory* of the seized property, including photographs if possible. Agents’ “inventories” often can be sparse and unhelpful.

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<sup>4</sup> Prosecutors and experienced agents will generally consent to such arrangements because they do not want their cases tainted by exposure to privileged materials. In addition, the DOJ Manual states that “a search warrant should normally not be used to obtain [attorney-client privileged or attorney work product] materials.” *U.S. Attorney’s Manual* § § 9-13.420 and 9-19.220.

- *Ask for copies of seized electronic media.* Computer searches are generally executed either by making electronic copies of files on-site, creating mirror images of entire hard drives, or simply seizing the computers and reviewing their contents off-site.<sup>5</sup> Typically, the search warrant itself will specifically address the procedures the agents are required to follow. The agents may not be required to provide you with electronic copies of seized computer files, but it generally doesn't hurt to ask. If necessary, arrangements can usually be made to obtain electronic copies on an expedited basis after the search, in order to minimize the adverse impact on the company's operations.
- *Ask for split samples* when agents seize samples, such as in environmental investigations. If a split sample is refused, take your own parallel sample (which you will probably wish to do under monitored circumstances once the agents have left the premises).
- *Advise the lead agent of any classified documents that are seized.* Classified documents are not exempt from search and seizure, but the agents should be advised of the status of such documents if the company has an obligation to protect classified information. If classified documents are seized, the agency with jurisdiction over the information should be notified immediately.<sup>6</sup>
- *Advise employees not to discuss the search* with others, except legal counsel.

## Be Prepared for a Search

No company expects to be the subject of an unannounced search by armed federal agents. Nonetheless, it is best to prepare for the worst. Advisable steps include:

- Clearly mark privileged documents and maintain them separately from non-privileged material;
- Maintain copies of essential business records (including records stored on personal computers) off premises;
- Ensure that at least one lawyer at each company facility has been trained regarding the proper response to a search warrant. Management at facilities where there is no lawyer should know whom to call in the event of a search;
- Identify outside counsel experienced in criminal law before the need arises, and have counsel's contact information readily available and distributed to key personnel; and
- Develop a plan for closing the facility in case of such a search.

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<sup>5</sup> The law regarding searches of computers and other electronic media is in flux. Searches (and the return) of seized computer hardware often takes weeks or months, although some courts are mandating shorter and more reasonable search periods.

<sup>6</sup> Similarly, the agents should be advised if they confiscate any proprietary or trade secret information.

## Detailed Guidance on Responding to a Subpoena, a Document Preservation Notice, or Other Government Process

A government-issued subpoena for documents, a document preservation notice, or other similar investigative demands, can raise a host of thorny issues, particularly for large or widespread companies which may possess huge amounts of documentary material, including electronically stored information (“ESI”).

Companies have an affirmative duty to identify, locate, and maintain all information relevant to any known or foreseeable investigation and, later, to produce all non-privileged documents, including ESI, which are responsive to the subpoena or other form of process. It is critical to avoid the potential pitfalls in achieving compliance and, perhaps most importantly, to remain free of charges of obstruction.

- *The Duty to Preserve.* The duty to preserve may arise even before the arrival of a subpoena or other process. The duty arises whenever a government investigation is threatened or pending, or can be reasonably anticipated. The obstruction-of-justice provisions enacted as part of Sarbanes-Oxley make clear that a government investigation need not have commenced and a subpoena need not have been issued for the duty to preserve to arise: “Whoever knowingly alters, destroys... [or] falsifies... any... document... with the intent to impede, obstruct, or influence the investigation... of any matter within the jurisdiction of any department or agency of the United States... or in relation to or *contemplation of* any such matter or case, shall be fined... [or] imprisoned not more than 20 years, or both.” 18 U.S.C. § 1519 (emphasis added).
- *Preservation – Hold Orders.* Once the duty to preserve arises, company counsel must move quickly to implement a “Hold Order” that tracks the government’s information request (if available) to ensure that employees are on notice of the categories of information that must be held and preserved. The Hold Order should be drafted and issued as soon as possible. The potential consequences flowing from a post-duty loss or destruction of potential evidentiary material are too serious to sanction delay. The parameters of a Hold Order can always be expanded or modified as you learn more.

A sample of a preliminary “Preservation Memo /Hold Order” is included at the end of this handbook. It can also be found at: <http://www.crowell.com/PDF/Sample-Preservation-Memo-Hold-Order.pdf>

- *Involve Outside Counsel as Soon as Possible.* As soon as possible, consult and coordinate with outside counsel in connection with the investigation that gave rise to the subpoena or document preservation notice.

## Subpoenas for Testimony

If a company employee is served with a subpoena or other such notice to provide oral testimony (as opposed to merely directing the production of documents) in connection with a government investigation, you should immediately contact qualified counsel and fax or email a copy of the subpoena to that counsel. The identity of the prosecutor or enforcement attorney handling the matter can often be determined from the face of the subpoena. In many cases, outside counsel can contact the prosecutor informally and obtain information regarding the subject matter of the proceedings and of the testimony and evidence being sought, and can advise accordingly.

## About Crowell & Moring

Crowell & Moring has a large number of highly-experienced white collar attorneys. Among them, they have successfully dealt with innumerable “crisis” situations such as those described above, as well as the investigations that may flow from them.

For more than twenty-five years, Crowell & Moring’s White Collar & Regulatory Enforcement team has successfully defended and counseled companies, partnerships, boards of directors, elected officials, members of management and other individual clients in connection with all manner of government investigations, criminal trials, regulatory enforcement actions, inquiries, exams and internal investigations.

Our team has a wide-reaching international practice, including highly experienced attorneys in the firm’s London, Los Angeles, Orange County, New York, and Washington, D.C. offices. We bring to bear on our clients’ representations the rare blend of insight, experience and judgment that can only be gleaned from a team that includes lifelong defense lawyers, including former Assistant Federal Defenders, as well as former prosecutors and enforcement attorneys from the Department of Justice, the Office of Independent Counsel, United States Attorney’s Offices, and the Securities and Exchange Commission. Our team also includes a former Chief Legal Officer and Chief Compliance Officer whose experience provides useful insight to the underlying challenges and concerns that companies face, both in balancing regulatory compliance with other business imperatives, and in responding to government investigations while continuing to operate a business.

Our experience includes proactive counseling on regulatory compliance issues, with the recognition that many issues can be managed in a way that reduces risk without impacting the bottom line. We have a depth of experience defending investigations by grand juries, the Department of Justice, FBI, SEC, CFTC, IRS, FINRA, congressional committees, independent and special counsels, federal agency inspectors general, and state attorneys general, as well as the Financial Services Authority and Crown Prosecution Service in the United Kingdom. We also are adept at handling parallel multi-national investigations involving the FCPA and export controls, where the credentials and bona fides of the former government officials from both sides of the Atlantic among our ranks facilitate the necessary coordination with authorities and local counsel in other countries.

Our goal is to resolve government investigations as quickly and favorably as possible; we do, however, also have the depth and experience to take any case to trial. Our team has handled over 240 jury trials, and our success in the courtroom provides meaningful leverage in resolving cases favorably. When we do go to trial, we have an enviable record of success and an equally strong appellate track record.

Finally, we understand the business imperatives of our clients. We place a premium on balancing the need for excellent and thorough service with the equally vital need to maintain an appropriate sense of proportion and efficiency. In the end, we understand that for a business to remain compliant, it must remain in business, and we conduct internal investigations and defend government investigations with each of these concepts imbedded in both our philosophy and our practices.

**Learn more about Crowell & Moring at [www.crowell.com](http://www.crowell.com)**

## APPENDICES & LINKS TO IMPORTANT “CRISIS” MATERIALS

### Advice to Employees

Sample “Notice to Employees”

<http://www.crowell.com/PDF/Sample-Notice-to-Employees.pdf>

### Document Preservation

Sample “Preservation Memo/Hold Order”

<http://www.crowell.com/PDF/Sample-Preservation-Memo-Hold-Order.pdf>

### Document Collection

Link to “E-Discovery in the Criminal Context”

<http://www.crowell.com/documents/E-Discovery-in-the-Criminal-Context.pdf>

### Fact-Finding

Link to “Corporate Internal Investigations: Some Basic Considerations”

<http://www.crowell.com/documents/corporate-internal-investigations-some-basic-considerations.pdf>

Link to “Upjohn Warning: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees”

<http://www.crowell.com/pdf/abaupjohntaskforcereport.pdf>

## Sample Notice to Employees

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### CONFIDENTIAL

TO: All Employees

FROM: [Legal Counsel]

DATE:

As you may know, government agents have executed a search warrant on the company's premises, and apparently are conducting an ongoing investigation that involves the company. The company intends to cooperate in that investigation. However, since these are complicated matters involving important legal issues, we are distributing this notice to provide you with specific guidance regarding this situation.

First, it is important that no one remove or destroy any documents, papers, computer files, etc., while this investigation is pending. We do not want any innocent or routine destruction of documents to be misinterpreted. We are distributing a separate notice with specific instructions regarding document preservation. If you have any questions, please contact [legal counsel] at [phone number].

Second, any requests by government agents for additional documents should be reported immediately to [legal counsel] at the above phone number and will be handled with counsel. Similarly, any requests for information or documents by news media should also be reported immediately to [legal counsel], who will handle such matters.

Finally, be aware that government agents may attempt to contact you at your office or home, and request to interview you. You are free to talk to them, but you are not required to submit to an interview. You do have the right to say you want to confer with an attorney first, and to insist on scheduling any interview at a time and place that is convenient. An attorney can meet with you in advance and advise you. Also, by being present at any interview, an attorney can try to avoid any confusion you may have regarding the government agents' questions, and by taking notes the attorney can minimize any misquoting of what you say. The company will arrange for an attorney to talk to you if that becomes necessary and you so desire. If you are contacted by government agents, please let [legal counsel] know.

We know these matters are a distraction and regret any concern this may cause. We appreciate your patience and cooperation.

## Sample Preservation Memo/Hold Order

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### CONFIDENTIAL

TO: [All Employees] [or Specified Employees]

FROM: [Legal Counsel]

DATE:

The company has received a subpoena from [government agency] which will require the collection and production of certain company documents in connection with an investigation of [subject matter]. We intend to comply fully with the subpoena and to cooperate with the [government agency's] investigation. A description of the documents covered by the subpoena is attached.

In order to fully comply with the [government agency] subpoena, it is vital that all documents described in the attachment (including hard copy documents as well as electronic data and documents) be preserved, and all routine destruction or discarding of any such documents or data, whether pursuant to formal company policies or otherwise, be suspended until further notice. This includes turning off any "auto-delete" functions, and insuring that all back-up tapes are preserved and not overwritten or deleted. If you have a question about whether or not something needs to be preserved, err on the side of preserving it until advised otherwise by legal counsel.

This policy applies to all such documents, whether kept at the office, at off-site storage facilities, or at your home. It includes not only formal company documents but also materials such as handwritten notes, drafts, calendars and the like.

In addition, if anyone under your supervision has custody or control of such documents or data and is not listed as a recipient of this memorandum, please forward it to them immediately. If you know of others who should receive this memorandum, or if you know of documents beyond your control that should be preserved, please notify [legal counsel] immediately.

Detailed instructions regarding the procedures for collection of documents will follow shortly, and will be designed to minimize disruption of your daily business activities. Until such instructions are provided, all documents and files should be maintained as they are kept in the ordinary course of business.

The subpoena should not be discussed outside of any discussions necessary for document preservation and compliance, or in communications with company counsel. There should be no discussions with third parties.

If you have any questions concerning this matter, please contact [legal counsel].

Thank you for your assistance.

