

SUGGESTIONS FOR DEALING WITH AGENCY INVESTIGATIONS

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Of particular concern is the growing use of federal and state criminal laws for environmental enforcement, the desire to protect the company from criminal enforcement, and the need to protect the rights of individual employees.

I. The Federal and the State Agencies Operate Under Different Sets of Rules.

- A. It is imperative that management know whether they are dealing with state (including local) enforcement or with federal enforcement. Federal enforcement can indicate a greater likelihood of more severe enforcement, including criminal enforcement. Also, federal agencies tend to be more formal regarding their investigative powers and responsibilities.

II. Federal Agency Investigations.

- A. Most of the federal agencies, such as EPA and OSHA, will not perform an on-site inspection or investigation of a company's property without the company's permission, except pursuant to a warrant or administrative order. The agency's internal policies generally require warrants or orders for investigations without the consent of the owner. However, the statutes appear to give EPA and other agencies the right to enter and investigate without a warrant. Thus, the agencies could change these internal policies and begin to insist on entry without a warrant or order.
- B. If a federal agency appears with a warrant or order, the company may limit the scope of the investigation to the warrant or order.
 - 1. Read the document carefully and understand it. Contact legal counsel if at all possible.
 - 2. Know what documents they take (offer to copy them) and record the investigation, on video-tape, if possible.
 - 3. If the investigation is pursuant to a warrant, the lead responsibility will generally be with the local United States Attorney's office. The company, in general, should try to identify the Assistant U.S. Attorney in charge of the investigation to resolve any questions and to establish a working relationship. See, USAM 5-11 (Environmental Crimes, August 23, 1994 Revision).
- C. If the company agrees to allow an investigation without a warrant or beyond the scope of the warrant, this is a voluntary submission to the investigation and it can

be used for all purposes, criminal or civil.

- D. Federal agencies tend to have more criminal experience and tend to coordinate investigations with criminal investigators, such as the FBI. It is not unusual for an investigative team to include agents from the regulatory agency and the FBI.

III. Investigations by State Agencies.

- A. In general, the state agencies, Railroad Commission, and the TCEQ, have statutory authority to inspect your property without an order or warrant.
- B. The powers to inspect are broadly defined and are, in general, limited only by:
 - 1. The entry must be at a reasonable time;
 - 2. The agency must give notice to management; and
 - 3. Agency representatives must obey the facility's safety rules.

TEX. HEALTH & SAFETY CODE ANN. §§ 361.032 and 382.015; TEX. WATER CODE ANN. §§ 12.017 and 26.014. Local governmental agencies have the same statutory authorization: TEX. HEALTH & SAFETY CODE ANN. § 382.111; TEX. WATER CODE ANN. § 26.173.

- C. State criminal authority has recently been expanded to include the possibility of serious criminal charges, including felonies, against companies and individuals.
- D. The Texas courts have not considered the relationship between the statutory authority of agencies to enter without warrants and the new environmental criminal laws. Should the State of Texas bring criminal charges based on an investigation that was not pursuant to an administrative order or a warrant, it is unclear what effect these investigations may have. In general, corporations do not have Fifth Amendment rights against self-incrimination, although individuals do have them. *George Campbell Painting Corp. v. Reid*, 392 U.S. 286 (1968). *Super X Drugs of Texas, Inc. v. State*, 505 S.W.2d 333 (Tex. Civ. App.--Houston [14th Dist.] 1974, no writ). Therefore, the effect of these investigations and searches may be different for criminal action against a corporation than for criminal action against an individual.

IV. Suggestions For Dealing With Federal Investigations.

- A. In the typical, nonconfrontational investigation, it is usually best not to insist on a warrant or an order and to cooperate with the investigation.
 - 1. Companies do not want to get on the "bad list" of the agency or the individual agency representatives.
 - 2. Even in these nonconfrontational investigations, the company's employees and the investigators should reach an agreement regarding the bounds of

the investigations. This should be done at a brief meeting before the investigation.

3. If possible, have the bounds of the investigation set out in writing.
4. Do not assume that investigator comments represent agency position.
5. Make sure that employees refrain from guesswork, speculation, or “off-the-record” comment during the investigations.
6. Insist that the investigator, like any other visitor, comply with all safety rules.
7. In a CERCLA case, EPA issued an administrative order requiring a site operator to give access for remedial/removal action. Company stated in writing, that it would comply with the Order, but it would not sign a separate “unconditional access” agreement. EPA brought suit, claiming refusal was a violation of CERCLA. District court agreed with EPA, appellate court reversed. *U.S. v. Omega Chemical Corp.*, 156 F.3d 994 (9th Cir. 1998)

B. For more serious matters, it may be appropriate to insist on a warrant or an administrative order.

1. Limit the investigation to the warrant or order.
2. Take alternative or split samples. Often, federal investigators will not agree to split samples. However, this should not prevent the taking of an alternative sample that is as close as possible to the sample taken by the investigator.
3. Try to videotape the investigation, to the extent possible. The investigator may complain that this obstructs their investigation, but be firm and videotape to the extent possible, without any actual obstruction. This will help keep the investigators in line with the warrant.
4. Have employees prepared for investigations of this type. Make sure they know their rights and responsibilities.
5. However, EPA and DOJ generally believe that insistence on a warrant or administrative order is a form of non-cooperation for purposes of enforcement discretion, plea bargaining, and application of the sentencing guidelines.

C. When an investigator wishes to interview employees.

1. To the extent possible, involve management in any request or attempt to interview employees.
2. Assess the seriousness of the investigation and, if appropriate, make sure

that employees know that they are under no obligation to agree to an interview.

3. In particularly sensitive matters, it may be appropriate to discourage employees from participating in the interviews, especially without prior review by counsel for the company and/or for the employee, although the company should never prevent the employee from submitting to an interview, nor should they threaten or impose any sanction for not submitting.
4. Employees should know that, when they voluntarily submit to these interviews, anything they say can be used against them and Miranda rights do not apply. Moreover, it is a crime to make a false statement to a federal investigator and the otherwise unsupported testimony of the investigator regarding what was said in the interview is sufficient to sustain a conviction.
5. Apprizing employees of these considerations can help in convincing them to be cautious regarding agreeing to interviews with federal investigators. Moreover, companies often agree to provide counsel to the employee, at no cost to the employee, when the employees are a part of or the subjects of a criminal investigation, generally on the following basis:
 - a. The investigation is related to company business;
 - b. The employee's actions were a good-faith attempt to comply with what that employee understood as company policy;
 - c. The employee informed management prior to agreeing to an interview, so that counsel can be obtained and issues can be clarified prior to the interview.
6. Any employee is free, upon receiving a request for an interview, to decline and to offer to reschedule at a later time.
7. In general, the company should be cooperative in helping investigators to interview employees in an orderly manner with access to documents and counsel. Companies are often faced with a conflict between maintaining order and appearing uncooperative. For example, some lawyers recommend that companies send employees home during investigations. This may be viewed as a failure to cooperate.
8. Issue of cooperation may arise in the context of providing counsel to employees involved with or subject to an investigation. The "Thompson Memo" states that advancing legal fees or other support to defend "culpable employees or agents" could be a factor used by the government to determine that the corporation had not fully or adequately cooperated with the government. At least one court has held that the policy stated in the Thompson memo is unconstitutional. *U.S. v. Stein*, 435 F. Supp.2d 330 (S.D. N.Y. 2006).

D. State Agency Investigations.

1. If a state agency is conducting a particularly sensitive investigation, the company may wish to insist on an order or a warrant when the state agency is unwilling to comply with this request. In this situation, a company should not interfere with a lawful investigation, although it may need to insist that it is not agreeing to or authorizing the investigation.
2. The Texas Attorney General's Office has filed suit against companies for allegedly interfering with agency investigations that were not conducted with a warrant or order.
3. Some companies, in sensitive state agency investigations, will state "XYZ company does not consent to this investigation; however, neither XYZ nor any of its employees will prevent the investigators from performing their lawful duties."
4. Even without a warrant or an order, agency employees must still comply with the reasonableness, notice, and safety requirements.

V. **Special Criminal Law Considerations.**

- A. Prior to an arrest, investigators need not give Miranda warnings.
- B. Statements by the investigator like "you are not a target" or "you will probably not be prosecuted if you cooperate" have no effect prior to arrest. Statements by an employee made in this context can be used against the employee and against the company.
- C. Individuals have a right against self-incrimination, even though the corporation does not. Often, this leads to difficulties when an investigation has a potential of criminal action against both the corporation and the employees.
- D. Important Statutory Provisions
 1. State
 - a. "A person commits an offense if, with intent deceive, he knowingly makes a false statement that is material to a criminal investigation and makes the statement to 1) a police officer conducting the investigation, or 2) any employee of a law enforcement agency that is authorized by the agency to conduct the investigation and that the actor knows is conducting the investigation." TEX. PEN. CODE ANN. § 37.08 (a) (Vernon's 2003).
 - b. "A person commits an offense if , knowing that an investigation or official proceeding is pending or in progress, he 1) alters, destroys, or conceals any record, document, or thing with intent to impair its

verity, legibility, or availability as evidence in the investigation or official proceeding, or 2) makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent to affect the course or outcome of the investigation or official proceeding.” TEX. PEN. CODE ANN. § 37.09 (a) (Vernon’s 2003).

- c. “A person commits an offense if he (1) knowingly makes a false entry in, or false alteration of, a governmental record; (2) makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent that it be taken as a genuine governmental record; (3) intentionally destroys, conceals, removes, or otherwise impairs the verity, legibility, or availability of a governmental record; (4) possesses, sells, or offers to sell a governmental record or a blank governmental record form with intent that it be used unlawfully; (5) makes, presents, or uses a governmental record with knowledge of its falsity; or (6) possesses, sells, or offers to sell a governmental record or a blank governmental record form with knowledge that it was obtained unlawfully.” TEX. PEN. CODE ANN. § 37.10 (a) (Vernon’s 2005).

2. Federal

- a. “Except as otherwise provided in this section, whoever, in any manner within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years, or both.” 18 U.S.C. § 1001 (a) (2004).
- b. “Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress shall be fined under this title or imprisoned not more than five

years, or both.” 18 U.S.C. § 1505 (a) (2004).

E. New Considerations in the Electronic Age

1. Easy to destroy evidence
2. Evidence can last
3. Evidence can be in hard-to-get electronic places.
4. Courts are not clear as to what constitutes “notice” that an investigation is pending and what can constitute evidence of the required mental state for criminal liability.