



# WHAT TO DO WHEN THE GOVERNMENT KNOCKS ON YOUR DOOR

April 2023



# What Triggers a Government Investigation?

Restatement of financial statements

Unusual drop in stock price

Shareholder litigation

Auditor withdrawal

Whistleblower complaint

Product contamination or malfunction

Media reports

## Outside Audits:

- IRS
- Customs
- DOD
- State regulatory agencies

Relationship with another target (e.g., money laundering, counterfeit goods)

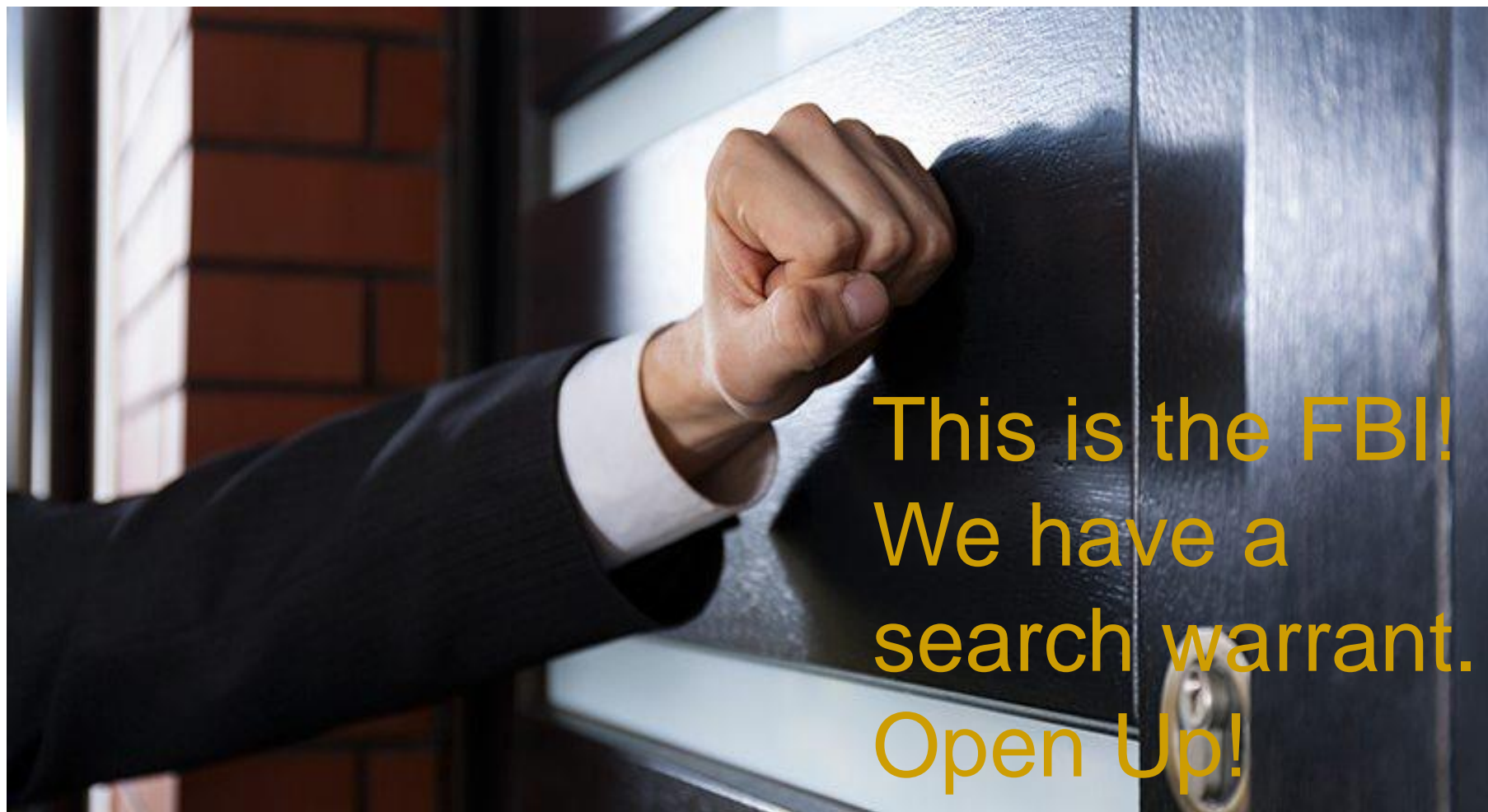
Competitor complaints (e.g., theft of trade secrets, antitrust)

Consumer Complaint

Accident

Employment issues (e.g., harassment, immigration, visa fraud)

Self-discovered crimes (e.g., victim of embezzlement, employee misconduct)



This is the FBI!  
We have a  
search warrant.  
Open Up!

# Notate ID of every agent



Lead agent will provide search warrant, business card (affidavit will likely be sealed)



Carefully read search warrant noting all areas to be searched and what they are looking for



Check if prosecutor is in your judicial district

**OBJECT TO THE SEARCH.  
DO NOT CONSENT.**



CALL counsel and ask agents to wait



Dismiss employees for the day (retrieve any ID taken from them by agents)



Demand any interviews of employees cease until counsel is available and assert privileges



Monitor each agent and notate what they are taking and from where. If agents exceed search warrant limits, call the duty Magistrate-Judge.



Ask for “split sample” and for computer imaging



Get an inventory from agents



Draft memo to counsel of what transpired and any questions asked by agents

# Instruct Employees on their rights regarding interviews



Their choice



Cannot be compelled



Right to counsel



Right to terminate

# Upon Receiving Notice of a Corporate Emergency:

**Convene an Emergency Response Team composed of:**

CEO

CFO

General Counsel

Human Resources

Systems

Public Relations

Security

Outside Counsel

Governmental  
Affairs

Investor Relations

Insurance Broker



## Operations VP (depending on type of emergency)

- Contract Officer
- Safety Officer
- VP Manufacturing
- Quality Control
- Marketing
- Distribution
- Compliance

# Design and Execute a Plan

Determine if you need to make disclosures

- SEC, DOD, CERCLA, OSHA, FDA

Determine scope of problem

- Isolate those employees/divisions

Security needs to secure work areas



***DO NOT USE EMAILS TO  
DISCUSS THE INVESTIGATION!***

# Systems

Do NOT have your own IT department image and retrieve documents and emails

- ❖ Hire forensic recovery company to image everything from relevant custodians
- ❖ Document Preservation order to all relevant employees
- ❖ Secure ALL devices for “off-channel” communications
- ❖ Disable any automatic deletion defaults

# Board Resolutions

- 
- Full cooperation with Government
  - Authorize Outside Counsel
  - Notify Relevant Employees
  - Indemnification Policy and Procedures
  - Review Existing Employment Contracts
  - Set Consistent Policy for Indemnification Claims
  - Direct Reporting to Board



# Focus on the Big Picture

What's the worst thing that could happen?

- Criminal Indictment?
- Civil Exposure?
- Administrative Sanctions? (debarment, loss of license)

Essential to coordinate

(e.g., asserting 5<sup>th</sup> Amendment is admissible in federal civil cases)

# Communications to Outsiders



# Internal Investigation – Should You Do One?

- DOJ Voluntary Self-Disclosure programs – DOJ will reduce corporate penalties and recommend against appointment of monitor if company:
  - Voluntarily self-discloses before government is alerted
  - Fully cooperates
  - Timely and appropriately remediates
  - Has implemented an effective compliance program
- Entity also credited if it cooperates with an ongoing investigation
- DOJ Monaco Memo - priority is to hold individuals accountable and reward companies who come forward and cooperate
- DOJ seeks timely disclosure of relevant, **non-privileged** facts about individual misconduct
- Investigations should be done by **independent** outside counsel
- Careful preparation of Report



# Employee Representation

Interview former  
employees  
immediately

Instruct employees  
(Upjohn warning)

Evaluate conflicts  
and hire counsel for  
employee if  
necessary

Do not terminate any  
employee without  
thorough legal  
analysis

Whistleblower  
protection is broad  
(government  
contracts,  
healthcare, SOX)

# What you should do before the knock comes

# Establishing an Effective Compliance and Ethics Program US Sentencing Commission Guidelines

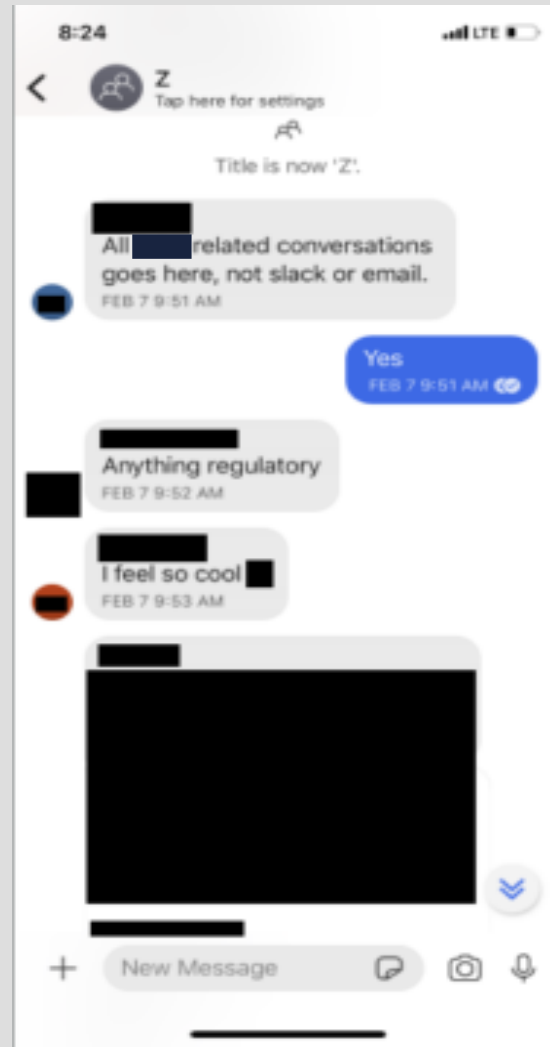
- Taking responsible steps to –
  - Ensure the program is being followed
  - Evaluate periodically the effectiveness of the program
  - Ensure that employees know that their reports are anonymous or confidential
  - No retaliation
  - Do exit interviews
  - Hot-line
- Monaco Memo – favors policies that reward ethical conduct and sanction unethical behavior through compensation plans, e.g., clawback
- Must have support of, and oversight by, upper management
- Direct pipeline for serious reports to the Board

# Compliance – personal devices and third-party messaging

Monaco Memo: emphasis on personal devices and third-party messaging.  
Consider:

- Implementing policies governing use
- Ensuring business related electronic data is preserved
- Providing training
- Company has policies to ensure collection of non-privileged responsive information from texts/ emessages/ chats/ data on phones, tablets or other devices

Recent SEC enforcement action – 16 Wall Street Firms re Widespread Recordkeeping Failures -- over \$1.1 Billion in fines



# WHAT IF YOU DISCOVER CRIMINAL BEHAVIOR?

- Duty to Report?

# WHAT IF YOUR COMPANY IS THE VICTIM?

## Pursuing prosecution vs. Self-help

- |                          |                                |
|--------------------------|--------------------------------|
| ▪ clean hands            | ▪ control                      |
| ▪ res judicata           | ▪ defendant liquidity          |
| ▪ collection of judgment | ▪ not creating more plaintiffs |

# The Basics of Restitution

- A defendant convicted of a crime (or enters a plea agreement) must fully reimburse the victim
- Purpose is to make the victim reasonably whole
- Corporations can be victims
- May be mandatory or permissive, if mandatory, court cannot consider defendants' ability to pay
- Defendants can be held jointly and severally liable for entire restitution amount
- Plea agreements and grants of probation may be conditioned on the payment of loss



# Recoverable Economic Losses

## Types of Economic Losses:

Full or partial payment for value of stolen or damaged property

Lost profits, including market decline, caused by injury

Wages or profits lost due to time spent as witnesses or in assisting the police or prosecution

Investigation fees

Attorney's fees and other costs incurred during government investigations and proceedings

Tax consequences to victim

Pre-judgment interest

Loss of trade secrets

Remediation costs to sell assets

# Actual Recovery of Funds



Prosecutors recover over \$1 billion yearly in restitution; however, far less is actually paid due to defendant inability




Victim likely has no rights to appeal amount of judgment



Restitution is not dischargeable in bankruptcy



Defendant may not fraudulently transfer assets to avoid payment



Certain assets, like pensions and 401Ks, which are not touchable to satisfy liabilities, may be available for criminal restitution

# Thank you

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