

Episode 6: Dawn Raids

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In this episode, we'll turn to the cartel context to talk about dawn raids. We'll explain what dawn raids are and how companies and their legal counsel can prepare for potential raids.

So, with us today is Jeffrey Amato, who is also a partner in the New York office of Winston & Strawn. Jeff has extensive experience representing companies across the globe in notable antitrust cartel litigations and government investigations. Jeff has also counseled clients regarding dawn raid issues by global enforcement authorities, and he joins us today to share his insights on how to best prepare for a potential dawn raid. So, Jeff, welcome to the podcast, and thank you so much for joining us.

Jeff Amato: Well, thanks for having me.

Of course. Well, let's first start with the basics. Tell us what a dawn raid is.

Jeff Amato: A dawn raid is a surprise on-site inspection of a company by law enforcement officials. It's a common tool that antitrust enforcement authorities use when investigating potential violations of the antitrust laws. And in the U.S., dawn raids are typically conducted by the Department of Justice and the Federal Bureau of Investigation.

Okay. And what generally happens during a dawn raid? One might imagine something very dramatic and chaotic. Is it really like that?

Jeff Amato: Well, typically, it begins very early in the morning when the government agents arrive at a company's offices with their guns drawn and SWAT teams ready to go. No, that's not how it goes. It's actually not so dramatic.

They arrive at the reception area with paperwork, announce the purpose of the visit to inspect the facilities, and ask permission to enter and conduct their search.

Once they have access, the agents search everything. The file cabinets, computer files, mobile devices, and even trash cans and shred boxes. If they find anything relevant, the agents may take it or make copies. The agents may also try to interview employees during the raid.

I did hear one story, and I admit I don't know if it's actually true, but I heard that an employee at some company learned somehow about a dawn raid in advance. And unfortunately, not only he started shredding things himself, but told all of his colleagues that they should start shredding too. Can that sort of thing really happen?

Jeff Amato: Unfortunately, that is a true story. And it is very unfortunate for that company and the employees that did engage in that conduct. Sometimes the government's intention to conduct a dawn raid gets leaked to business people in an industry. And rumors of a dawn raid can spread through other means.

So, when this happens, companies are very vulnerable to the risk that employees try to destroy evidence, such as in that case. So, that's why it's very important to have a preparation plan in place and make sure employees are aware of what dawn raids are and their consequences prior to any action taken by the government.

All right. Then, walk us through what a preparation plan should include. And for our listeners, remember that this will be relevant for businesses that operate not only in the United States, but also China, Japan, Europe, and any other jurisdictions where raids are permitted.

Jeff Amato: Sure. It's important for global companies to have these protocols because many jurisdictions, in the United States and overseas, can conduct these raids. And the protocol should contemplate what to do before, during, and after a dawn raid.

All right. So, let's start with the before.

Jeff Amato: So, beforehand, first, everybody should be aware of the potential for a dawn raid and what it is. And then, a dawn raid response team should be assembled, which would include people from the legal department, senior management, and IT. There should be somebody who can respond to media inquiries. There should be staff members to assist with the logistics of where files are and where things can be located. And there should be someone who can create a written record of the process, what was searched, who was interviewed, and what documents were taken.

Okay. And as part of the protocol, you should call outside counsel to assist, right?

Jeff Amato: Yes, most definitely. There should be a designated outside counsel in the local jurisdiction to react quickly in a dawn raid situation and give advice appropriately. Ideally, outside counsel would have criminal investigative experience, and you want to make sure that the dawn raid response team knows who has been designated as outside counsel, so they can consult with them.

Okay. So, companies that operate globally then, need designated outside counsel in each country where the company operates?

Jeff Amato: It depends on a number of specifics, but generally speaking, at least in the countries with active antitrust enforcement authorities that have the power to conduct raids, there should be a counsel in place.

Yeah, that makes sense. Alright. So, once the company has assembled its internal response team and its designated outside counsel, what else does it need to do to prepare for a raid?

Jeff Amato: The company should roll out a training program for employees, so they know what to expect and can respond accordingly. It should be done by the company's legal team and can be integrated into the company's regular antitrust compliance training. And at the least, the training should be given to the dawn raid response team and the in-house legal staff and senior management, and also the employees who are likely to be involved in a dawn raid, such as the receptionist, security staff, and IT department members.

There should be a checklist with reminders of what to do in the event of a dawn raid so that nobody has to memorize all of this. And importantly, the receptionist should receive a list of people who should be notified as soon as possible if the authorities arrive to conduct a dawn raid, which would include the response team leader, senior members of the legal department, and representatives from senior management.

Okay. And I think at the beginning of your list, you mentioned training. And the training should cover document destruction, right?

Jeff Amato: That is very important. Employees should be instructed to not destroy documents because it's obstruction of justice, and they should not obstruct the law enforcement officers in their conduct of the dawn raid in any way. It's important that employees understand that they shouldn't hide documents, and they shouldn't falsify documents.

In fact, the company's legal department should prepare an internal email alert, which can be circulated in the event of a dawn raid, that reminds employees not to hide, destroy, or falsify any documents during the raid, because sometimes that's just the natural reaction of people, to take that action.

Right. And just to highlight this a little more, and in case people don't know, destruction of potential evidence can carry criminal penalties in the United States, even if the destruction takes place outside the U.S. As part of the DOJ's investigation into the auto parts industry, now several years ago, I remember there was one foreign company that pled guilty to obstruction because a company executive overseas had directed employees to destroy documents after he learned of a raid at one of the company's U.S. locations. And that executive himself was indicted also. So, as you're saying, it is a serious issue in and of itself, apart from the underlying antitrust violation.

Jeff Amato: Most certainly. That's why the company should make sure that their executives and employees fully understand the importance of not interfering with a dawn raid or destroying evidence.

Okay. So, I'm moving on a little bit. We've been talking about what to do to prepare in advance of a raid, but now let's turn to the dawn raid itself. What should the company do, or not do, once the authorities arrive and announce this is a dawn raid?

Jeff Amato: Well, this is when all the planning comes into action. The response team should be alerted. Same for local counsel, who should come right away. A copy of the search warrant and any other documents authorizing the dawn raid should be requested from the law enforcement officers. Local counsel should check those documents carefully to ascertain the subject matter and scope of the investigation.

If possible, the agents' identifications should be checked to make sure they are actually law enforcement officers. And an internal alert should be sent to on-site employees telling them that a raid is in progress and that nobody should be destroying any documents or other information.

Okay. And then, should the company just wait, essentially, while the inspection takes place?

Jeff Amato: We don't want to tamper or interfere with the investigation, but there should be monitoring of the agents and a detailed record of what they are inspecting—what was searched, what was taken, et cetera. This will all help later the lawyers to investigate what is actually being investigated and what should be done.

Now, the law enforcement officers may not allow shadowing of the agents, and you should respect that. If the agents have any questions or requests, it's best for counsel to handle them. That's a very important part. Everything should be done by counsel. Counsel should also speak up if any relevant materials contain privileged or confidential information. And how you would deal with that would vary by jurisdiction. But if applicable, the company counsel should provide information substantiating a privilege claim—who wrote and received the document, what the purpose of the document was, how it was prepared. And if there's a disagreement about the privilege, counsel should try to ask the agents with the document to place it in a sealed envelope.

Okay. That's good advice. Anything else that employees ought to be proactive about during the inspection itself?

Jeff Amato: Well, on the subject of obstruction, employees should not speak to each other about the investigation or with individuals outside of the company about the raid. It's in the company's best interests to limit employees' knowledge of the investigation so no one learns details that they did not know already. Even internal discussions could give the appearance of coordination to obstruct justice, which employees should avoid.

Okay. You mentioned earlier that the authorities sometimes conduct dawn raids at multiple company locations simultaneously if possible. And if that's true, is it important to communicate with other offices during those raids as they're ongoing?

Jeff Amato: Yeah. So, oftentimes, there is a global coordinated raid on companies that operate in different jurisdictions. So, it's a good idea to determine whether other locations are being raided, to give notice to the other ones—maybe where it's still during the nighttime and they should expect something in the morning—so that there's a coordinated response to the dawn raid.

Okay. So, let's move on to what to do after the raid is finished. Do you have any advice for us at that stage?

Jeff Amato: Well, you would notify the employees that the raid is over. The response team should then gather any notes from the inspection and arrange a debrief meeting with outside counsel, discuss the application of privilege to any documents that were seized, and identify any potentially relevant documents that the authorities may have missed or did not find.

Okay. And how about next steps after the debrief? What should the company think about going forward?

Jeff Amato: Well, first, the company should cease all contact with competitor companies. They should then talk to their outside counsel about document preservation. Think about the obligation to report the dawn raid to insurers, auditors, regulators, and any appropriate media response that may be necessary. And then an internal investigation should be started by outside counsel. And depending on what's uncovered in the investigation, the company will have a lot of potentially difficult choices to make about what next to do.

Okay. Well, that's probably a whole other podcast episode, but this has been a good one. And to follow up, there is a copy of a dawn raid preparation and response checklist on our website at Winston & Strawn.

Jeff Amato: So, let me also note that for purposes of today's podcast, we've been discussing dawn raids on a very general level, and there may be nuances in particular jurisdictions that we were unable to cover. If you have any questions about a particular jurisdiction and what you can or cannot expect there, or what your rights may be with respect to dawn raids, feel free to contact Molly or me at Winston & Strawn.

Speaker

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