

# DAWN RAIDS AND BEYOND: DOMESTIC & INTERNATIONAL COMPLIANCE AND ENFORCEMENT ISSUES

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# SPEAKER BIOS



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Mr. Hauberg concentrates his practice in antitrust, securities, False Claims Act and RICO litigation; money laundering, white collar crime; post-conviction clemency; congressional investigations; internal investigations including foreign corrupt practices, export controls, OFAC sanctions and price fixing; corporate compliance; and litigation for financial institutions, securities broker-dealers, health care and pharmaceutical providers, government contractors, and public officials.

Prior to private practice, Mr. Hauberg was a federal prosecutor as an Assistant U.S. Attorney in the District of Columbia, and as a senior official in the Antitrust Division and in the Criminal Division (Fraud Section) of the Department of Justice in Washington. He is a graduate of Yale Law School and chairs the Federal Bar Association Section on Antitrust and Trade Regulation.



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Todd Williams is Senior Counsel, Global Ethics & Compliance at Sylvamo. Sylvamo is a global uncoated papers company with more than 7,500 employees across its operations in Europe, Latin America and North America. In his role, Todd provides strategic legal advice and services on an enterprise-wide basis including all aspects of antitrust, anti-corruption and anti-bribery, trade controls, economic sanctions and third-party compliance.

Prior to joining Sylvamo, Todd worked for AutoZone where he served in various roles, including Managing Attorney, Policy and Compliance and Managing Attorney, Casualty Litigation. Todd began his legal career at Spicer Rudstrom, PLLC, practicing in multiple areas of civil litigation including business and commercial disputes, products liability, premises liability and personal injury.

Todd is a Member of the Society of Corporate Compliance and Ethics and is a graduate of the University of Memphis Cecil C. Humphreys School of Law.

# TODAY'S GLOBAL ECONOMY, SUPPLY CHAIN AND LABOR AND EMPLOYMENT IMPACT ON ANTITRUST

- Interconnectedness of industry, transportation, and technology have made purchasing experiences and the ability to obtain goods and services easier than ever before
- Experiencing an era of unprecedented employee mobility - nearly 50 million people voluntarily resigned from their jobs in 2021
- But...
  - ❖ Is this connectivity good for the consumer?
  - ❖ Has it increased or decreased competition among businesses and within industries?
  - ❖ Has employee mobility increased wages?
  - ❖ What has this done to the prices we pay for goods and services?
- These questions all have a connection with antitrust regulation and the antitrust enforcement landscape
- How many of you have had first-hand experience with supply chain issues? (Remember during the height of COVID when there was no toilet paper anywhere?)
  - ❖ Should two companies be able to agree that they will produce and sell no more than a certain amount of toilet paper to consumers?
- How many of you have ever had to negotiate your salary or been part of a salary negotiation?
  - ❖ Should two companies be allowed to agree that they will both only pay their employees a certain wage?
  - ❖ Should two companies be allowed to agree that they will not hire, solicit, or recruit each other's employees?



# Antitrust and Competition Laws – Key Principles

Antitrust laws promote fair and vigorous competition.

They generally prohibit:

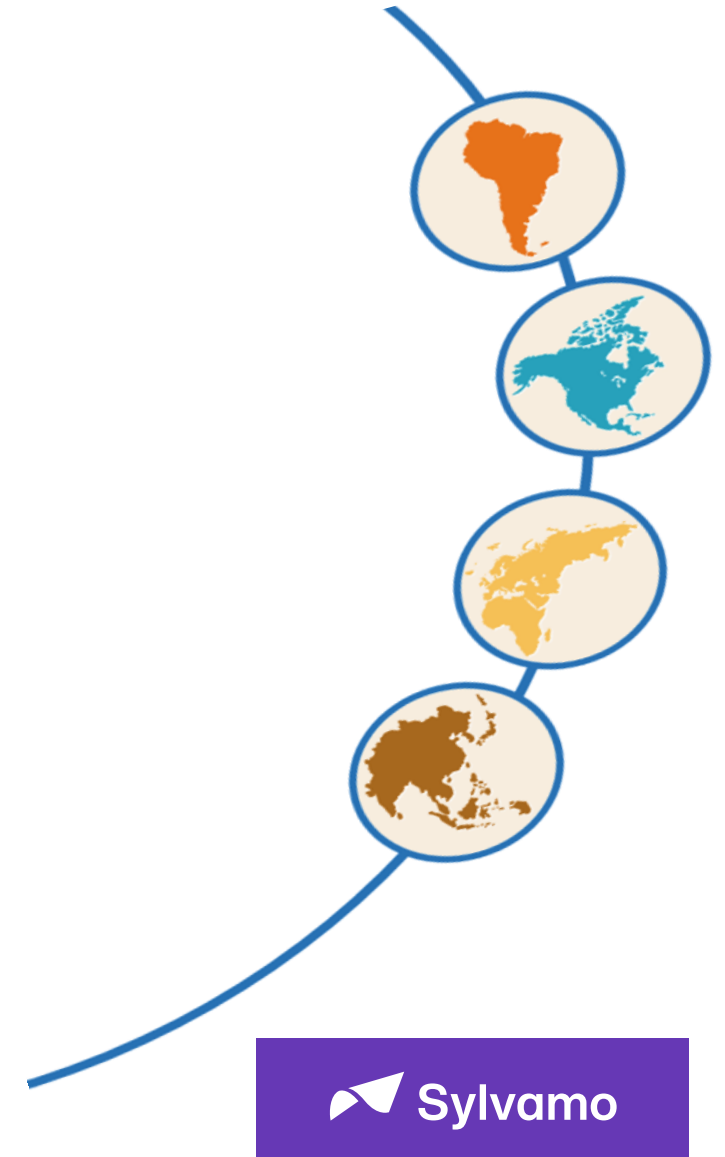
- Agreements that hurt competition or unreasonably restrain trade
- Monopolization and abuse of a dominant position

They examine conduct that has a negative effect on consumers:

- Higher prices, less variety, lower service, etc.
- Exclusive dealing
- Predatory pricing
- Information exchanges

Some conduct is **always** prohibited, including:

- Price fixing
- Bid rigging
- Agreeing with a competitor to restrict production



# Antitrust and Competition Laws – A Global Reach

<b>EMEA</b>	<ul style="list-style-type: none"><li>• Treaty on Functioning of the EU</li><li>• UK Competition Act</li><li>• Other Member States' and countries' laws</li></ul>
<b>RUSSIA</b>	<ul style="list-style-type: none"><li>• Law on the Protection of Competition</li></ul>
<b>ASIA</b>	<ul style="list-style-type: none"><li>• Competition Act (India)</li><li>• Anti-Monopoly Law (China)</li><li>• Trade Competition Act (Thailand)</li></ul>
<b>LATIN AMERICA</b>	<ul style="list-style-type: none"><li>• Competition laws in Mexico, Brazil, Argentina, Chile and others</li></ul>
<b>UNITED STATES</b>	<ul style="list-style-type: none"><li>• Sherman Act</li><li>• Clayton Act</li><li>• Robinson-Patman Act</li></ul>



# OVERVIEW OF BIDEN ADMINISTRATION APPROACH TO COMPETITION AND ENFORCEMENT

- Executive Order on Promoting Competition, July 9, 2021
  - Sectors with alleged competitive concerns
    - Agriculture
    - Information technology
    - Prescription drugs and healthcare services
    - Telecommunications
    - Financial services
    - Shipping

# OVERVIEW OF BIDEN ADMINISTRATION APPROACH TO COMPETITION AND ENFORCEMENT

- In light of concerns over consolidation, antitrust policy changes and enforcement will focus on
  - Serial mergers, including those consummated
  - Acquisitions of nascent competitors
  - Aggregation of data
  - Unfair competition in content markets, including advertising
  - Tracking/surveilling users of platforms
  - Network effects
  - Wage fixing/no poach, including information exchanges
  - Non-compete clauses
  - Patentholders breach of FRAND agreements
  - Pharmaceutical pay to delay agreements

# Department of Justice Enforcement Policy

- On January 29, 2021, then acting Attorney General in the new Biden Administration rescinded the Trump Administrative directive on Prosecutorial Discretion, Charging, and Sentencing of May 10, 2017, and restored the guidance in the Holder memorandum of May 10, 2010, to emphasize that charging decisions, plea agreements, and sentencing advocacy are based on the merits of each case and “individualized assessment of relevant facts.” No longer are prosecutors bound to charge the most serious crime possible. Attorney General Merrick Garland has maintained this change in policy.
- Under the Trump Administration DAG Rosenstein issued a modified version of Obama Administration DAG Yates’ memo on corporate cooperation and identification of the most culpable individuals, which remained in effect for most of 2021.
  - On October 28, 2021, Deputy Attorney General Lisa Monaco announced that DOJ would restore prior guidance on cooperation credits and identifying responsible individuals.
  - Now companies must identify all individuals involved in misconduct to receive credit.
  - DOJ will also assess a company’s complete violation record – criminal, civil, regulatory – in resolving investigations.



# Department of Justice Enforcement Policy

- On September 15, 2022, DAG Monaco announced DOJ would allow companies voluntarily reporting misconduct and remediating to avoid guilty pleas and would focus on prosecuting executives, encourage company clawbacks of compensation, and incentivize effective compliance.
- Other Trump Administration DOJ policies remain.
  - Associate AG Brand memo on avoiding reliance on agency interpretations.
  - DAG Rosenstein no piling-on policy when multiple agencies investigate/resolve allegations.
  - Civil Division Fraud Director Granston memo on DOJ initiative to dismiss meritless qui tam False Claims Act cases.
  - Civil Division grant of credit for voluntary disclosure of False Claims Act violations.
  - DOJ questions to ask to evaluate credit for compliance programs, as revised in June 2020.
  - Antitrust Division credit in charging decisions and sentencing recommendations for “gold plated” compliance programs.
- COVID-era initiatives have been added.

# ENFORCEMENT BY DOJ ANTITRUST DIVISION/FTC



# BRIEF OVERVIEW OF U.S. ANTITRUST LAW

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- Sherman Act, 15 U.S.C. §1: horizontal agreement to restrain interstate or foreign trade (e.g., fixing prices, allocating customers/territories)
  - Criminal: with 5 years statute of limitations, felony up to 10 years for individuals, corporate fines up to \$100 million or twice gain/loss
  - Civil: with 4 years statute of limitations, liability for treble damages/potential debarment from federal contracts
- Sherman Act, 15 U.S.C. §2: monopolization or attempted monopolization
  - Criminal: same as Section 1 (last case was 1981)
  - Civil: same as Section 1 with added risk of breakup of company and conduct restrictions
- Clayton Act, 15 U.S.C. § 18 (Section 7): mergers or acquisitions that would substantially lessen competition or tend to create a monopoly
  - Civil: injunctive relief/divestitures
- Federal Trade Commission Act, 15 U.S.C. §45 (Section 5): unfair or deceptive methods of competition
  - Civil: injunctive relief/fines

# STEPS TO IMPLEMENT COMPETITION EXECUTIVE ORDER

- DOJ and FTC press previously filed cases against Big Tech: *Google* and *Facebook*
- October 28, 2021 DAG Monaco announces changes in prosecution policy
  - Restore guidance in Obama Administration “Yates Memo” requiring companies, in order to receive cooperation credit, to disclose all information (non-privileged) about persons involved in the misconduct
  - Require prosecutors to consider, in deciding what resolution is appropriate for a company, “the full criminal, civil, and regulatory records” of any company
  - Rescind any guidance that corporate monitorships are disfavored
  - Encourage companies to review compliance programs to ensure monitoring and remediating misconduct
- January 18, 2022 DOJ and FTC suspend merger guidelines pending further review to strengthen enforcement
- February 17, 2022 DOJ and FBI announce Supply Chain Initiative to prosecute companies and executives using supply chain disruptions as cover to collude on prices

# STEPS TO IMPLEMENT COMPETITION EXECUTIVE ORDER (continued)

- March 3, 2022 AG Garland confirms that the Antitrust Division had 18 pending indictments against 10 companies and 42 individuals.
- April 2/4, 2022 AAG Kanter and DAAG Powers announce that, despite no cases since the 1970s, the Antitrust Division would use Section 2 to prosecute monopoly cases criminally.
- April 4, 2022 DOJ amends antitrust leniency policy to tighten requirements for avoiding prosecution as the first company or individual to self report wrongful conduct.
- April 28, 2022 AAG Kanter responds to recent no poach/wage fix trial losses (*Jindal, DaVita*) that “we’re not part of the chickenshit club...we’re going to stick with it.”
- July 13, 2022 DOJ Procurement Collusion Task Force continues string of prosecutions with Texas military contractor guilty plea for bid-rigging.
- July 25, 2022 Civil consent decrees ending wage suppression agreements among poultry processors.



# STEPS TO IMPLEMENT COMPETITION EXECUTIVE ORDER (continued)

- September 1, 2022 First no poach guilty plea (*Hee*, D. Nev).
- September 13, 2022 AAG Kantor in a speech emphasized enhanced merger guidelines enforcement against incipient harm to competition and boasted about more active cases than seen in recent years – 6 civil cases, 20 indicted cases, 146 grand jury investigations, 6 mergers abandoned

# ROLE AND BENEFITS OF SELF-REPORTING

- April 4, 2022 Revisions to the DOJ antitrust leniency policy
  - Applicants must promptly self report wrongdoing, with a broader group of employees (including compliance officer, board members, and legal counsel) as authorized representatives for doing so and starting the analysis of promptness
  - Remediation of the conduct must be undertaken
  - Parties must use best efforts to make restitution to injured parties
  - Individual applicants have broader possibilities to seek leniency
  - As a whole the changes diverge from other international leniency programs that do not have these requirements
- Other qualifications remain
  - Admit to violation and stop participating
  - Qualify as not the ringleader
  - Provide full cooperation: documents and employee witnesses
  - Be first in the door (“marker”)

# ROLE AND BENEFITS OF SELF-REPORTING (Continued)

- Benefits
  - No criminal prosecution for the company and its employees (with exceptions, based on cooperation)
  - In civil treble damage litigation, with cooperation company can limit liability to single damages
  - Type A leniency: total amnesty for disclosure prior to Division's beginning its own investigation
  - Type B leniency: partial amnesty (reduced fines) for disclosure of additional conduct by company (individuals now no longer have presumptive protection, subject to case-by-case factors: level of cooperation, duplicative nature of information supplied, extent of involvement in misconduct)
  - Amnesty Plus: leniency applicant too late can still, with cooperation and top grade compliance program, obtain deferred prosecution agreement

# DAWN RAIDS

- Concept originated in 1970's raids in New Zealand to seize illegal overstayers from Pacific Islands
- United States examples (pre-COVID)
  - 2017 raid in Michigan of Perrigo Company PLC, Irish generic drug manufacturer
  - 2017 meeting in San Francisco of container shipping operators
- United States examples (post-COVID)
  - Unlike EU, US DOJ does not report raids but disclosures may come from raided companies/local press
  - 2022 raid of Dicastal North America in Michigan, manufacturer of automotive aluminum alloy wheels

# DAWN RAIDS

## (Continued)

- EU recent examples (since June 2021), including UK and member states
  - Over 20 conducted, usually regarding cartels and dominance
  - 2021 raids on homes of employees in food retail sector in France
  - 2021 EU and Greece non-cartel raids in animal health sector in Belgium and pharmaceutical products in Greece
  - 2022 raids on car manufacturers re collection and recycling of scrapped cars and vans
  - 2022 raid on Gazprom German facility re withheld gas production
  - 2022 raid on individual home of company employee
  - 2022 raid on companies in fashion sector
  - 2022 raid in water infrastructure sector
  - 2022 raid in online food delivery sector
  - Proposed expansion to companies receiving illegal public support from non-EU countries



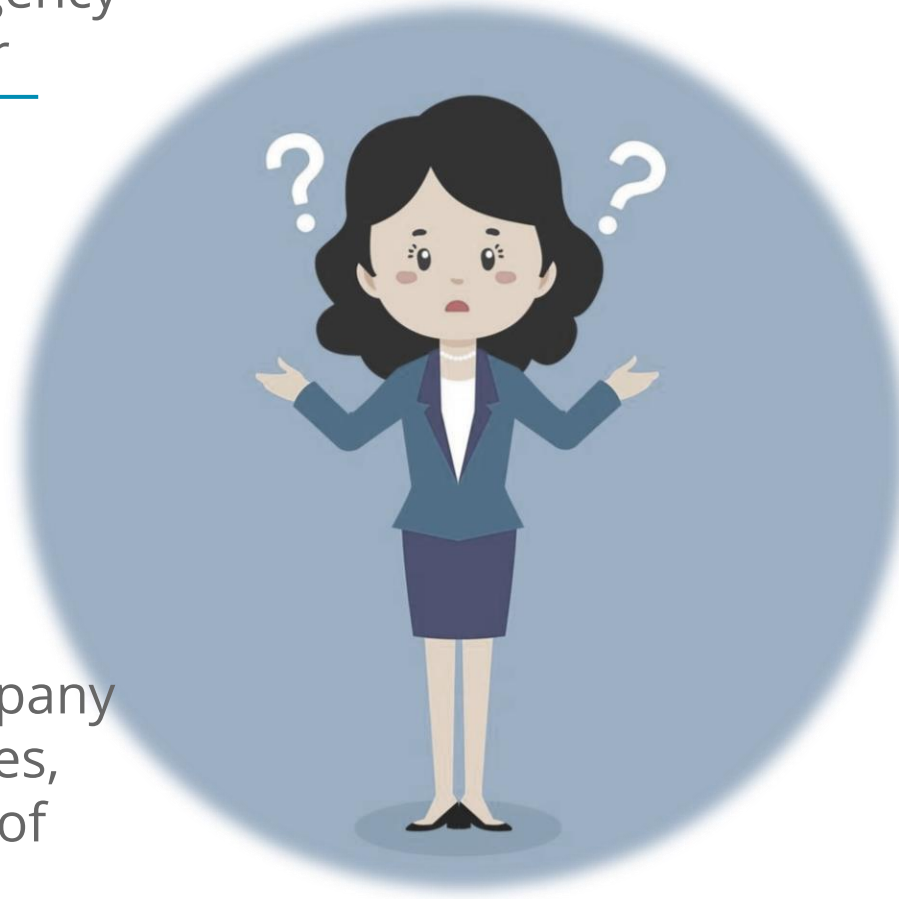


# What do you do if...

An official from a regulatory authority or federal agency visits your company or client's offices?

The official wants to make copies of company documents?

The official asks to access company computers and copy certain files, and/or wants to obtain a copy of mailboxes and folders?

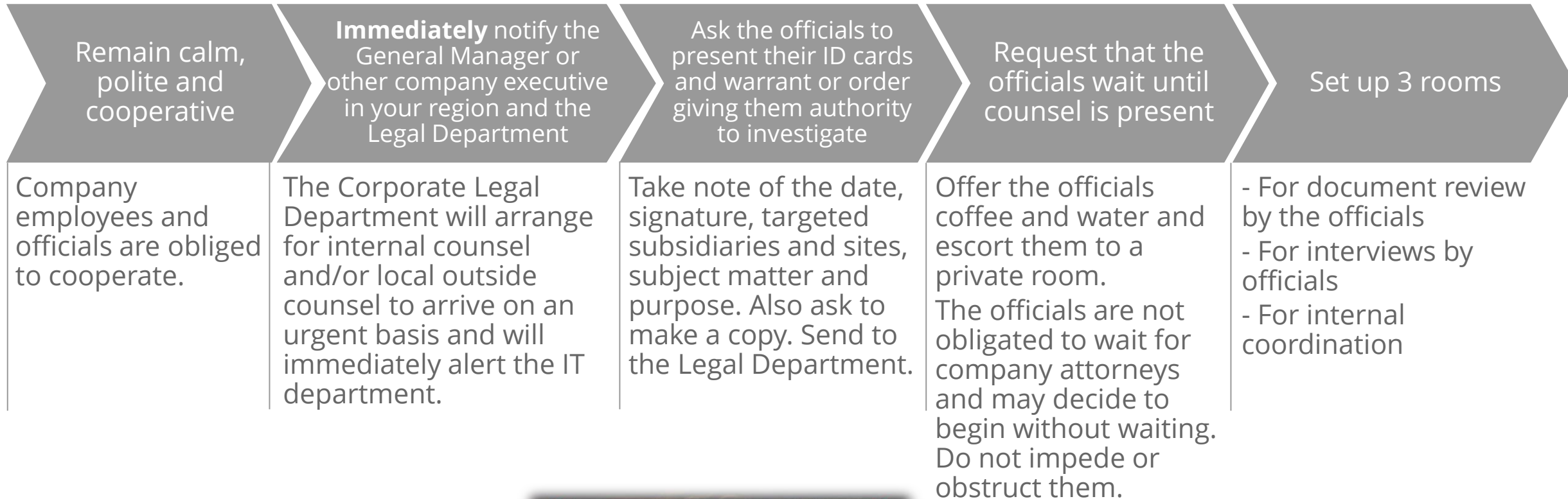


The official insists on starting the dawn raid, while neither an attorney nor a member of management is present?

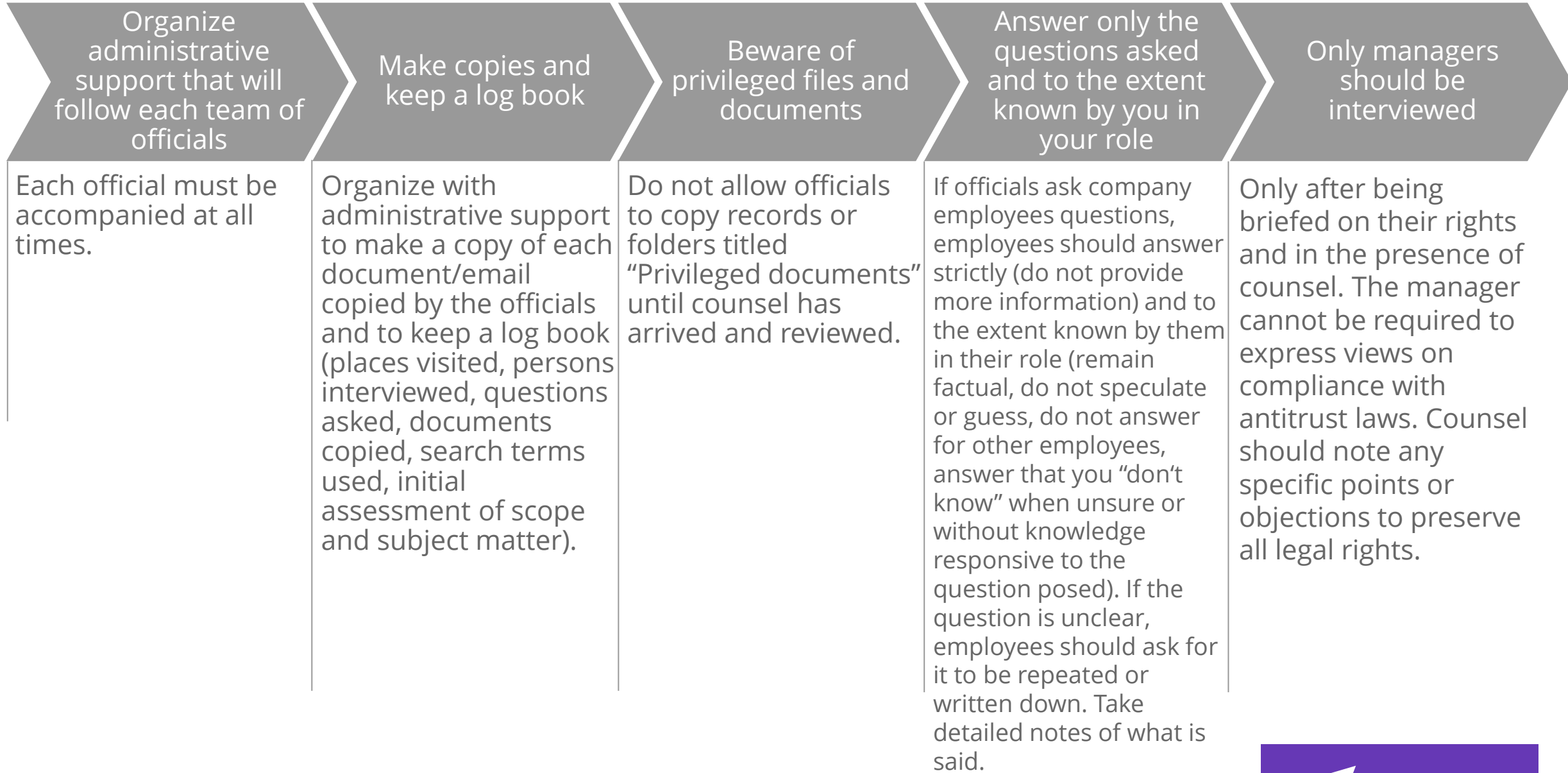
The official wants to interview company employees?

Image copied from <https://www.vecteezy.com/>

# Corporate best practices in the event of a dawn raid:



# Corporate best practices in the event of a dawn raid (continued)



# In the event of a dawn raid, **do not:**

- ✗ **Do not** obstruct the investigation.
- ✗ **Do not** engage in conversation with officials if it is not requested.
- ✗ **Do not** provide false or misleading information.
- ✗ **Do not** attempt to remove or destroy any document in any form, including emails and texts on electronic messaging services.
- ✗ **Do not** volunteer to produce any documents not specifically requested by the officials.
- ✗ **Do not** discuss or make telephone calls concerning any business matter in the presence of the officials. Do not report any potential concern in writing (emails), but call internal/outside counsel instead.
- ✗ **Do not** be afraid to ask internal/outside counsel for guidance and do not hide any information from them.
- ✗ **Do not** speak about the investigation or matters relating to it with anyone who is not directly involved in the process (especially not with competitors).
- ✗ **Do not** try to unblock access to company accounts/drives or individual e-mail addresses if they have been blocked by IT pursuant to the scope of the search.
- ✗ **Do not** touch any of the seals applied by officials, including in individual offices and on individual materials or file folders.



# DEVELOPING AND IMPLEMENTING AN EFFECTIVE COMPLIANCE PROGRAM

*“We recognize that each company’s risk profile and solutions to reduce its risks warrant particularized evaluation. Accordingly, we make a reasonable, individualized determination in each case that considers various factors including, but not limited to, the company’s size, industry, geographic footprint, regulatory landscape, and other factors, both internal and external to the company’s operations, that might impact its compliance program. There are however, common questions that we may ask in the course of making an individualized determination...*

*Three ‘fundamental questions’:*

- 1) Is the corporation’s compliance program well designed?*
- 2) Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively?*
- 3) Does the corporation’s compliance program work in practice?”*

U.S. Department of Justice Criminal Division  
Evaluation of Corporate Compliance Programs  
(Updated June 2020)

# Is the corporation's compliance program well designed?

*“The critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct.” – JM 9-28.800*

## Key elements of an effective corporate compliance program:

- Risk Assessment
- Policies and Procedures
- Training and Communications
- Confidential Reporting Structure and Investigation Process
- Third Party Management
- M&A Due diligence and Integration

# TRAINING AND COMMUNICATIONS

- One size does not fit all
- Identify employees/groups with high antitrust risk based on role and function
  - ❖ Which employees interact with competitors? Customers? Suppliers? Distributors?
  - ❖ Who sets/establishes prices?
  - ❖ Who has access to competitively sensitive information?
  - ❖ Who attends trade shows/industry events?
- Training should be:
  - ❖ Risk based
  - ❖ Tailored to the audience
    - Consider: size, sophistication, subject matter expertise, form, language, lessons learned from prior incidents
  - ❖ Periodic, tracked and auditable
  - ❖ Cascaded, in-person
- Educate on proper communications practices to avoid antitrust concerns
- Communicate expectations regularly, and from the top down

# Is the program being applied earnestly and in good faith? Is the program adequately resourced and empowered to function effectively?

*Prosecutors are instructed to probe specifically whether a compliance program is a 'paper program' or one "implemented, reviewed, and revised, as appropriate, in an effective manner."*

*Prosecutors should determine "whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts."*

*Prosecutors should also determine "whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it." - JM 9-28.800*

- Commitment by Senior and Middle Management
  - ❖ "Tone at the top" – board and management promote a culture of compliance; demonstrate commitment through words and actions
  - ❖ Incorporate compliance into business operations to increase effectiveness
  - ❖ Importance of supervisors conveying ethical values to direct reports throughout the organization
  - ❖ Demonstrate a shared commitment: Employees are more invested when their immediate supervisors care
- Autonomy and Resources
  - ❖ Chief Compliance Officer with board access and real authority
  - ❖ Sufficient staffing to perform necessary compliance functions
- Incentives and Disciplinary Measures
  - ❖ Appropriate corrective/disciplinary action where warranted
  - ❖ Consistent application across the organization

# Does the corporation's compliance program work in practice?

- Continuous Improvement, Periodic Testing, and Review
  - ❖ Compliance programs evolve; cannot stagnate
  - ❖ Perform periodic risk assessments and audits, and corresponding risk-based program adjustments
  - ❖ Partner with Internal Audit, Audit Committee, Legal
  - ❖ Consider quarterly certifications and sub-certifications
  - ❖ Reviews should be documented
- Investigation of Misconduct
  - ❖ Timely and thorough
  - ❖ Established and consistent processes
- Analysis and Remediation of Any Underlying Misconduct
  - ❖ Conduct root cause analysis of any misconduct
  - ❖ Findings with remediation plans and follow up



# ROLES OF FORENSIC ACCOUNTANTS

Dilbert by Scott Adams

June 9, 2021



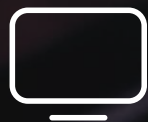
# KEY TAKEAWAYS

- Antitrust enforcement is increasing globally and not just at offices or corporate campuses. Searches of private residences of key employees and executives are increasing as well. Advise your clients accordingly.
- Think broadly about retention of documents and advise accordingly. Seizure can extend to individual documents including all digital devices (even personal cell phones).
- The utility and effectiveness of your compliance program has yet to be decided.
  - ❖ A “gold standard compliance program” could take many forms, and the DOJ and other enforcement agencies evaluate compliance programs individually based on a multitude of factors. Now, more than ever, a strong antitrust training and compliance program is critical for corporations of all sizes in all sectors.
  - ❖ Robust antitrust policies and procedures not only help a corporation prevent and detect criminal activity, they also help it spring to action if any misconduct surfaces. After the DOJ amended their leniency policy in April, that could mean the difference between avoiding prosecution and facing indictment.

# Q&A DISCUSSION

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