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DEALING WITH DAWN RAIDS – UNDERSTANDING RIGHTS AND OBLIGATIONS

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MINI-ROUNDTABLE

DEALING WITH DAWN RAIDS - UNDERSTANDING RIGHTS AND OBLIGATIONS



PANEL EXPERTS

**Ellen Zimiles**

Managing Director – Head of Financial Services Advisory and Compliance Segment
 Navigant Consulting, Inc.
 T: +1 (212) 554 2602
 E: ellen.zimiles@navigant.com

Ellen Zimiles is head of Navigant’s financial services advisory and compliance business segment and has more than 30 years of litigation and investigation experience, including 10 years as a federal prosecutor. Before coming to Navigant, she co-founded Daylight Forensic & Advisory, an international consulting firm. She is a leading authority on anti-money laundering programmes, corporate governance, foreign and domestic public corruption matters, regulatory and corporate compliance and fraud control.

**Joon H. Kim**

Partner
 Cleary Gottlieb Steen & Hamilton LLP
 T: +1 (212) 225 2950
 E: jkim@cgsh.com

Joon H. Kim is a partner at Cleary Gottlieb Steen & Hamilton LLP, focusing on white-collar criminal defence, internal investigations and regulatory enforcement, as well as complex commercial litigation and arbitration. From March 2017 to January 2018, he served as the acting US attorney for the Southern District of New York, and was previously deputy US attorney, chief of the criminal division, chief counsel and assistant US attorney. As a prosecutor and as defence counsel, he has worked on some of the most significant matters involving securities fraud, money laundering, cyber crime, international sanctions, corruption, as well as accounting and tax fraud.

**Claiborne W. Porter**

Managing Director and Head of Investigations
 Navigant Consulting, Inc.
 T: +1 (202) 973 7211
 E: claiborne.porter@navigant.com

Claiborne (Clay) W. Porter is head of investigations and a managing director in the global investigations & compliance practice at Navigant. Through his supervisory roles and as a trial attorney in the United States Department of Justice’s Money Laundering and Asset Recovery Section (MLARS), he gained extensive experience managing complex, international and domestic financial investigations in matters relating to money laundering, the Bank Secrecy Act (BSA)/ AML laws and regulations, US economic sanctions, and anti-corruption and anti-bribery laws.

CD: Prior to a dawn raid, what kind of plan should organisations have in place to ensure directors, managers and staff members know how to respond and avoid inadvertently causing obstruction or impediment?

Zimiles: When a company is the subject of a dawn raid, instead of receiving a grand jury subpoena for documents, the government has concluded that there is a significant risk of evidence spoliation or does not believe that the company is willing to cooperate. Consequently, the company's reaction to the dawn raid will be heavily scrutinised and law enforcement will develop a first impression of the company that will dictate the tone of the search. Dawn raids are also highly disruptive to business operations. For these reasons, companies, especially those in highly regulated industries or industries that have had historical criminal issues, should maintain a detailed corporate response plan and dedicate high-level employees to a dawn raid response team. A well-developed corporate response plan will help put the company in the best light with the government and illustrate to law enforcement that the company is organised and cooperative. It will also guide employees in the 'do's and do not's' during a dawn raid. A plan will also

preserve a company's rights and put it in the best position to challenge the search and minimise any disruption to business operations.

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*Ellen Zimiles,
Navigant Consulting, Inc.*

CD: What are the benefits of establishing a dedicated dawn raid team? How should companies go about assigning appropriate roles and responsibilities?

Porter: A dedicated dawn raid team will help a company weather a stressful, confusing and unusual event, and assist law enforcement in quickly completing its search so as to minimise employee interactions with law enforcement and business disruption. The team should consist of, at the very least, a team leader that is a point of contact, which typically is the general counsel, in-house counsel if

the general counsel is not appointed as team leader or point of contact, as well as the chief operating officer, heads of each line of business and a chief information technology (IT) officer or IT specialist. The designated team leader acts as the liaison between the company and the law enforcement agency during the entire search process. For large, multi-floor companies, consider having points of contact for each location that report to the team leader. A member of the company's IT department will play an integral role in responding to requests for data and will work with the team leader and in-house counsel to identify where records and other items responsive to the warrant are located, and how to best provide that information to law enforcement without damaging business operations. To be sure, the company and law enforcement want to avoid taking inadvertent files and records.

CD: In the event of a dawn raid, what immediate actions should a company take?

Porter: Employees should be instructed to contact the team leader when law enforcement first presents a warrant to the company. The team leader and employees will begin to execute the process outlined in the corporate response plan. The

corporate response plan will detail all immediate and long-term steps and should include protocols for obtaining a copy of the warrant – including all attachments – to understand the scope of the

“The corporate response plan will detail all immediate and long-term steps and should include protocols for obtaining a copy of the warrant to understand the scope of the warrant.”

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Navigant Consulting, Inc.*

warrant. The attachments to the warrant are highly important because they describe the items that the court has authorised law enforcement to search for and seize. The team leader should understand the scope of the warrant, which would include where law enforcement has authority to search and what they are authorised to seize, and ensure that privileged documents are marked and protected. For example, the warrant may give authorisation to search suites A, B, and C of the company but not suites D and E. By knowing those details upfront, the team leader will be able to better guide the law enforcement personnel and protect the company's rights.

CD: What key rights and obligations do companies have during, and after, a dawn raid takes place?

Kim: Your corporate response plan should ideally include protocols for whether to consent to the search – even with a warrant the company can decide not to consent, which might help its chances in court if it litigates the warrant. The plan should also include contact information for counsel, examination of the warrant, identifying privileged documents, employee rights and whether to send employees home or have ‘rally rooms’ for employees and how to handle media inquiries. Members of the company’s dawn raid response team should be instructed to immediately reach out to counsel and also monitor the law enforcement agents in a cooperative and helpful manner. Employees should be informed that they are under no obligation to answer law enforcement questions and the company should consider instructing employees to direct all questions to counsel.

CD: In your experience, do companies often lack awareness of their rights and obligations in this scenario, leading to missteps? What potential consequences might arise?

Kim: These raids are unquestionably stressful situations, so if employees are not properly trained or instructed beforehand, a dawn raid could result in avoidable missteps for a company. For nearly everyone it will be the only time they will experience such an event. It is important to ensure that they remain calm and do not act rashly or without proper advice or counsel. Employees will begin to think about their own personal documents or devices and might be tempted to hide them under the rationale that those objects have nothing to do with a search warrant related to the company. Such actions could become problematic for both the employees and the company if authorities suspect that relevant

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evidence was destroyed or altered. On the other hand, some employees might feel the urge to share and volunteer information that they do not need to and are not qualified to provide, without

understanding the scope of the warrant, their rights or the ramifications of their statements. That is why it is important to instruct employees to immediately alert counsel and follow their advice if there is a raid.

CD: What is your advice to companies on interacting with and responding to the authorities in the context of a dawn raid?

Zimiles: All company employees should be polite, cooperative and direct all questions to the team leader. Law enforcement will photograph and videotape the entire office space, both before initiating the actual search and after completing the search and seizure of all relevant items. They may also photograph the location of certain items. Employees should avoid being photographed or videotaped. The team leader and other points of contact should only answer basic questions to assist in locating documents that are responsive to the warrant. They should avoid answering other types of questions unless a representative from the company's legal department is present. IT specialists should know how the company's network is set up and the location of servers and electronic storage. Law enforcement computer specialists will need to inspect and access servers and storage to determine how to download relevant information and approximately how long that process should take. Employees should not argue with law enforcement about what they feel is relevant or responsive to

the warrants and investigation. If an employee is concerned about law enforcement actions during the search, or about anything searched and seized, they should pass their concerns to the team leader, who will forward them to the company's legal representatives.

CD: Following a dawn raid, what steps should a company take to assess the situation, investigate the surrounding issues, and prepare a strategy to move forward?

Porter: A corporate response plan should include detailed steps and enumerate responsible persons for immediate action items after the search and seizure. The company must understand what has been seized and work with business operations to get the company back to business as usual. Company counsel should immediately contact the prosecutor who is leading the investigation and obtain as much information as possible about the investigation and explain that the company has retained counsel and investigators to conduct an internal investigation. The company must also determine if the government seized privileged documents. If so, work with the prosecutor to segregate those documents to protect them from disclosure. The prosecutor is unlikely to share much information with defence counsel, so in instances where there is no internal investigation

already underway, review the search warrant and its attachments and understand the nature of the search and begin to craft an internal investigation plan. It is important to understand the content of what the government has seized – if the government made images and copies, then immediately set up a review team to understand what is in the documents. If the government did not make images or copies, then ask for immediate delivery of images and copies.

CD: Could you provide an insight into the additional challenges that a company is likely to encounter if authorities conduct dawn raids simultaneously across multiple jurisdictions? How should they address this complexity in advance?

Zimiles: The most significant challenges stem from a lack of preparation, data privacy and conflicts of law. A multijurisdictional dawn raid also increases the complexity of the corporate response plan

and places an added burden on the primary team leader. Given time differences, differences in law and the sheer complexity of an international dawn raid, it is important to have developed a detailed and thoughtful corporate response plan that addresses the unique challenges of each jurisdiction the company operates in, including data privacy laws and a lack of rights similar to those included in US Constitution's Fifth and Sixth Amendments. If simultaneous raids occur across multiple jurisdictions, in-house counsel and the primary team leader should convene a brief meeting of all members of the dawn raid response team to ensure a coordinated approach and provide immediate legal guidance. Each jurisdiction should have a team leader who should be in constant communication with the primary team leader regarding law enforcement actions, seized items and business operations. Companies should consider a tabletop exercise to test the company's corporate response plan before it is needed. **CD**