



K&L GATES

Corporate Responses to Investigative Requests by the Federal Government

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INTRODUCTIONS

K&L Gates LLP

- ❖ Founded in Pittsburgh in 1946
- ❖ 47 Offices Across the Globe
- ❖ Full Complement of Practice Areas Covering Life Cycle of Government Enforcement Issues
 - Global due diligence capabilities
 - Compliance counseling
 - Enforcement defense involving local, state, federal, and international law enforcement

Fully Integrated Law Firm

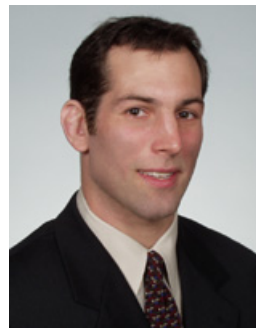


The Pittsburgh Government Enforcement Practice Group

- ❖ Mark Rush
 - <http://www.klgates.com/mark-a-rush/>
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 - <http://www.klgates.com/brian-f-saulnier/>
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 - <http://www.klgates.com/william-d-semins/>
- ❖ Thomas Ryan
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- ❖ Tremendous Associate and Support Staff Team



K&L GATES



PROGRAM OVERVIEW





PREPARATION



PREPARATION

Have a plan...

...Have a plan...



...HAVE A PLAN!

Hint: Not a Plan

PREPARATION

Key Features of a GIR Plan

❖ Clear Levels of Responsibility and Escalation

- Who is part of the cross-functional response team?
- When can a government inquiry be handled at the business unit level versus C-Suite involvement?

❖ Documentation

- Memorialize and record events to help “connect the dots” and ensure reporting requirements.
- Who issues the preservation notice and determines who receives it?



PREPARATION

Key Features of a GIR Plan

❖ Training

- Who needs to know how to respond?
- What must they know and how often should they be retrained?

❖ Record Location, Storage and Retention

- Where are your servers? Hard copies? Retention policy?
- How does your company maintain banking and financial records?
- What law governs? Who are your primary regulators?
- Sufficient legal and IT assets?



PREPARATION

Key Features of a GIR Plan

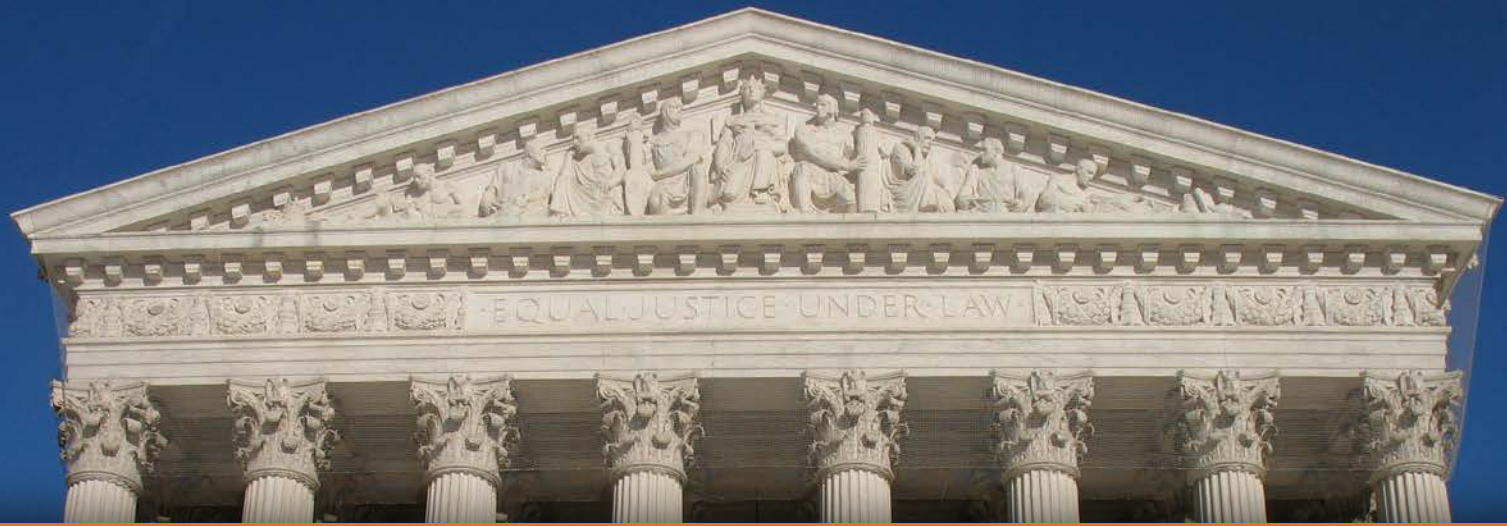
❖ Accurate and Current Business Unit Map

- Location, key personnel, critical customers and business partners

❖ Phone Tree and Decision Log

- Who must be notified?
- Who follows up with a call to a law enforcement agency?
- Who notifies the CEO and/or the Board?
- Who notifies the insurers?
- How is the record of contact and the action taken memorialized?





Investigation Process



INVESTIGATIVE PROCESS

Informal Contact

- ❖ Phone call
- ❖ Knock and talk
- ❖ Employee interview request
- ❖ Former employee interview “requests”



INVESTIGATIVE PROCESS

Informal Contact

- ❖ Control
 - Reaction time
- ❖ Element of Surprise
 - Often simultaneous interviews
- ❖ Secretive Nature of Investigation
 - Maintain confidentiality
 - Pre-grand jury



INVESTIGATIVE PROCESS

Informal Contact - Initial Response

- ❖ Trigger Phone Tree Contact
 - Employees trained to contact the proper person
- ❖ Execute GIR Plan
 - Ensure proper notifications
- ❖ Escalate Accordingly
 - Preliminary evaluation of significance and sensitivity



INVESTIGATIVE PROCESS

Document Request

- ❖ Informal (i.e., “Voluntary”)
- ❖ Administrative
- ❖ Civil Investigative Demand or Subpoena
- ❖ Grand Jury Subpoena

AO 116 (Rev. 05/09) Subpoena to Testify Before a Grand Jury

UNITED STATES DISTRICT COURT
for the
Western District of Washington

SUBPOENA TO TESTIFY BEFORE A GRAND JURY

To: Washington State Auditor's Office

YOU ARE COMMANDED to appear in this United States district court at the time, date, and place shown below to testify before the court's grand jury. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place: United States Courthouse
700 Stewart Street
Third Floor, Room 3210
Seattle, Washington 98101

Date and Time: March 19, 2015
9:00 a.m.

You must also bring with you the following documents, electronically stored information, or objects (blank if not applicable): Please see attachment.

CLERK OF COURT
William M. McCool
William M. McCool
Signature of Clerk or Deputy Clerk

Date: March 5, 2015

Issued in blank

The name, address, e-mail, and telephone number of the United States attorney, or assistant United States attorney, who requests this subpoena, are:
Arden R. Storm, AUSA
U.S. Attorney's Office
1201 Pacific Avenue, Suite 700
Tacoma, Washington 98402
Arden.Storm@usdoj.gov
253-428-3800

GJ 14-1
USAO #2012R01085
Subpoena No. 22274

INVESTIGATIVE PROCESS

Document Request

- ❖ ID Investigating Agency
- ❖ “Scope the Request”
- ❖ Document Preservation Notice and Decision on Recipients
- ❖ Memorialize Chain of Custody

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William M. McCool
Signature of Clerk or Deputy Clerk
William M. McCool
States attorney, or assistant United States attorney, who

Date: March 5, 2015

Issued in blank

The name, address, e-mail, and telephone number of the United States attorney, or assistant United States attorney, who requests this subpoena are:
Arlen R. Storn, AUSA
U.S. Attorney's Office
1201 Pacific Avenue, Suite 700
Tacoma, Washington 98402
Arlen.Storn@usdoj.gov
253-428-3800

GJ 14-1
USAO #2012R01085
Subpoena No. 22274

INVESTIGATIVE PROCESS

Document Request - Initial Response

- ❖ Trigger GIR Plan
- ❖ Initial Contact
 - Agent/AUSA?
- ❖ Engage Counsel?
 - Scope internal investigation?
- ❖ Evaluate Exposure
 - Knowledge is leverage

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Tacoma, Washington 98402
Arden.Storm@usdoj.gov
253-428-3800

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INVESTIGATIVE PROCESS

Document Request - Civil/Administrative Matters

- ❖ Administrative Subpoenas
 - Regulatory agencies involved
 - Significantly longer process

- ❖ Civil Investigative Demand (“CID”) or Subpoena
 - Typically healthcare related
 - Potentially related to False Claims Act investigation



INVESTIGATIVE PROCESS

Document Request - Civil/Administrative Matters

- ❖ Role of Company and Individuals
- ❖ **Timing** and **Scope** of Production
 - Negotiated search terms
 - Rolling production schedule
- ❖ Understand Government's Intent and Expectations



INVESTIGATIVE PROCESS

Document Request - Criminal Matters

❖ Grand Jury Subpoena

- Never forget ***criminal*** nature of proceeding
- AUSA has “opened a matter”
- Less negotiation room, but can create realistic expectations
- AUSA/Agent often unsophisticated in document collection, review and production



INVESTIGATIVE PROCESS

Document “Request” - Criminal Matters

❖ Search Warrant

- Unannounced
- Established probable cause
- Seizure of evidence and/or assets
- Coupled with simultaneous interviews



INVESTIGATIVE PROCESS

Criminal Matters – Special Considerations

- ❖ Imminent Danger of Harm?
- ❖ Ongoing Conduct?
- ❖ Company Status
 - Target, subject, witness or potentially a victim?
- ❖ Individual Employee Status



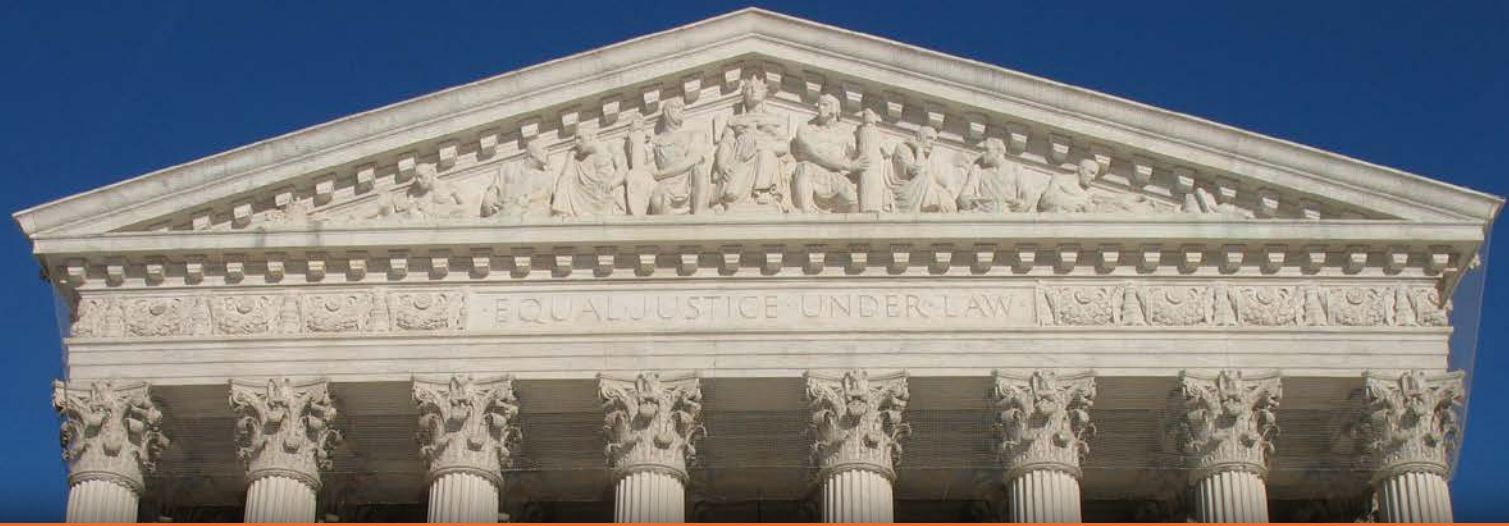
INVESTIGATIVE PROCESS

Witness Testimony

- ❖ Civil Deposition
 - Sworn testimony

- ❖ Grand Jury Appearance
 - Sworn testimony
 - Closed door
 - Counsel not present
 - “In lieu” interview





INTERNAL INVESTIGATION



INTERNAL INVESTIGATION

Key Considerations

- ❖ Who Should Conduct It?
- ❖ How Involved Should Legal a/o Compliance Functions Be?
- ❖ Is “Independence” Relative?
- ❖ Reporting Hierarchy?
- ❖ Written Report?

Early Threshold Decisions Matter



INTERNAL INVESTIGATION

Key Considerations

❖ Whistleblower

❖ Whistleblower

❖ *Whistleblower!*



INTERNAL INVESTIGATION

Key Considerations (Concerns?)

- ❖ Privilege and Privacy Issues
- ❖ Trade Secret and Proprietary Information
- ❖ External Communications
- ❖ Yates Memo Considerations



Attorney General Loretta Lynch



INTERNAL INVESTIGATION

Internal Investigation – Privilege and Privacy Issues

- ❖ Who Owns The Privilege?
Who Can Waive?
- ❖ *Upjohn* Warnings Required?
Is That Enough?
- ❖ Disclosure of Employee and
Client Data/Information



INTERNAL INVESTIGATION

Internal Investigation - Trade Secret & Proprietary Info

- ❖ How do you protect company's trade secrets?
 - Negotiating scope and use limit agreements
 - Protective orders
 - Invocation of 6(e)
 - FOIA exemption request



INTERNAL INVESTIGATION

External Communications

- ❖ External Media Statements
 - Interview requests
- ❖ Internal Talking Points
 - Control “messaging”
- ❖ Securities Filing Disclosure
 - Do you have to report the government contact in your next 10-Q and, if so, how much detail must you provide?



INTERNAL INVESTIGATION

Yates Memo Considerations

- ❖ Does your *Upjohn* warning change?
- ❖ Is responding to document requests enough?
 - Must you find the “smoking gun?” Then what?
- ❖ Has the bar been raised to get cooperation credit?

New DOJ Guidance Sharpens the Focus on Prosecuting and Suing Individuals in Corporate Criminal Investigations

By: Michael D. Ricciuti, Mark A. Rush, Thomas C. Ryan, Patrick C. McCooe

On September 9, 2015, the U.S. Department of Justice (“DOJ” or the “Department”) issued a memorandum to its staff revising the principles guiding criminal and, indeed, civil enforcement in corporate criminal investigations and emphasizing its focus on targeting individuals. Many of the concepts in the memo are familiar, but one new theme is the message that DOJ should use both criminal and civil tools — not just criminal indictments, but lawsuits against individuals DOJ believes are responsible for corporate misdeeds, even if the individual has an inability to pay — to drive the deterrence message home. Thus, the message is clear: DOJ’s focus is now laser-like on individuals in corporate criminal cases.



RESOLUTION



RESOLUTION

Considerations on Sharing of Information

- ❖ Form of Communication
 - Do you use oral presentations (reverse proffer) or written correspondence?
- ❖ Deliverer of Communication
 - Direct client involvement?
- ❖ Scope of Communication
 - Do you provide documentary support?
- ❖ Substance of Communication
 - Advise the company to waive privilege?
 - Admissions of wrongdoing/liability/culpability?
 - The “hold backs”?



RESOLUTION

Cooperation v. Confrontation

POTENTIAL RESOLUTIONS	POINTS FOR CONSIDERATION
Declination	<ul style="list-style-type: none"> Government closes criminal case without further action
Civil Referral	<ul style="list-style-type: none"> Deferral to civil/administrative regulators to pursue fines, penalties and remedial action
Non-Prosecution Agreement	<ul style="list-style-type: none"> Private agreement between Gov't and Company (made public) Requires admission of guilt No prosecution subject to conditions (fine and monitor) Violation results in charge filed and guilty plea
Deferred Prosecution Agreement	<ul style="list-style-type: none"> Public agreement between Gov't and Company Actual charge filed, but prosecution "deferred" subject to conditions Supervised by court (monitor answers to Judge not Gov't) Violation results in guilty plea
Plea Agreement	<ul style="list-style-type: none"> Charge filed Admission of guilt and sentenced
Indictment	<ul style="list-style-type: none"> Charged and proceed to trial

RESOLUTION

Consideration on Sharing of Information

❖ Collateral Consequences

- Regulatory disclosures
- “Follow on” enforcement actions
- Multijurisdictional issues
- Shareholder or derivative actions
- Unwanted media attention

❖ Principles of Prosecution Governing Cooperation

❖ The DOJ’s Pilot Program

- The new cross-agency model to encourage cooperation?



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The First 90 Days Of DOJ's FCPA Pilot Program

Law360, New York (July 11, 2016, 11:26 AM EDT) -- On April 5, 2016, the U.S. Department of Justice introduced a yearlong “pilot program” to guide the conduct of investigations and prosecutions pursuant to the Foreign Corrupt Practices Act. Announced by Assistant Attorney General Leslie Caldwell, the pilot program seeks to bring “transparency” to FCPA investigations and “accountability” to the subjects of those investigations.[1]

In the weeks following the announcement, commentators questioned whether the pilot program could satisfy its dual objectives. The DOJ then issued two declination letters pursuant to the pilot program, demonstrating, for the first time, the tangible benefits available through compliance with its provisions.[2]

Looking back at the first 90 days of this initiative, we revisit the concerns initially raised in response to the pilot program and weigh the significance of the declination letters, which appear to represent the DOJ's attempts to address those concerns. Although uncertainties remain that may prevent the pilot program from meaningfully influencing corporate decision-making in the short term, initial observations demonstrate a real commitment to decreasing the length and burden of FCPA investigations and equipping corporate boards with a road map for efficient FCPA compliance programs.



QUESTIONS



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