

The logo consists of a solid orange square with the text "K&L GATES" in white, uppercase, sans-serif font centered within it.

K&L GATES

Corporate Responses to Investigative Requests by the Federal Government

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INTRODUCTION

In this new era of aggressive corporate investigations—from health care fraud to accounting scandals to other corporate compliance issues—all businesses must prepare for the reality of federal agents or other law enforcement officers appearing at their reception desks, asking questions, requesting documents, and even presenting search warrants. Companies should train their employees and have a plan in place so that any contact with law enforcement is handled professionally, does not violate any individual privacy rights, and does not waive any privileges. Having sound policies and procedures in place and properly training key staff on what to do when law enforcement calls are some of the most important steps a corporation can take in this post-Enron world we live in.

HAVING A RESPONSE POLICY IN PLACE

In light of these new realities corporations face, the first step a company should take is to establish internal guidelines addressing interaction with government agents. Companies should have a response policy in place and communicate this policy to all employees, especially receptionists, executive secretaries, and those employees who are likely to be the first approached by law enforcement.

A key element of a corporate response policy is identifying a designated person (“DP”)—and a hierarchy of backup designated persons (collectively referred to as “alternative DP”)—to respond to all federal requests. The DP should be an individual with a significant degree of authority and responsibility. For example, a company may wish to use its head of security or CFO. The alternative DP should be an individual who would be available if the primary DP is unavailable.

The company should create and distribute a plan for reaching the DP and alternative DP in the event of an investigation. This contact plan should include distributing work phone numbers, cellular phone numbers, and any other appropriate way to reach them. Since investigative contacts are usually unscheduled and happen at odd hours, a company should make sure the DP and alternative DP can be paged, “Blackberried” or telephoned in case of an emergency. Furthermore, a company should inform building security personnel of the procedures for contacting the DP and alternative DP, particularly if agents are executing a search warrant.

THE INITIAL CONTACT

A corporation should be aware of the various ways federal agents may initiate an investigation. From less intrusive to more intrusive, some of the ways the government may initiate contact include: a telephone inquiry, a visit, a civil investigative demand or administrative subpoena, a grand jury subpoena, a “forthwith” subpoena, and a search warrant. Because each mode of contact with the government poses its own pitfalls for the under- and unprepared, a corporation should plan appropriately for each possibility.

Whatever form the initial contact takes, this first interaction between law enforcement and the corporation is very important because it will frequently set the tone for the investigation, its scope, and law enforcement’s willingness to make accommodations based on a corporation’s time and staffing concerns.

Once a corporation learns about the investigation, it should assess with its professionals whether and to what extent it intends to cooperate substantively with the investigation. There are advantages and disadvantages to early complete cooperation. Under Department of Justice guidelines and SEC procedures, early and thorough cooperation by a corporation may lead to a decision not to file criminal charges, defer criminal charges and not to file an SEC enforcement action. On the other hand, a company that “lays its cards on the table” and cooperates fully with the investigation may educate the government about its position too early in the game, foreclose various strategic approaches, and otherwise leave the corporation too vulnerable to the whims of an individual prosecutor or enforcement attorney. It is incumbent on the company to cooperate with a law enforcement inquiry, to be sure, but the company must also be prepared to defend itself if necessary. Only by knowing the benefits and risks of a particular strategy can company management and the Board of Directors make important

decisions that can affect the very future existence of the company. For instance, while it is usually best not to be indicted, a deferred prosecution agreement can still create huge problems for any company that does business with the government, and there can also be costly and burdensome compliance requirements that if not scrupulously followed could still lead to the initiation of criminal charges years after the events in question. The strategic element of surprise will be lessened if and when the company later decides to oppose the government. Divulging too much information also has the potential of compromising the company’s position in any civil actions that may follow.

Regardless of the degree of substantive cooperation, it is important that the company make clear to the agents that it will facilitate procedurally any authorized search or investigative procedures. In doing so, the company must be sure that the initial contact does not inadvertently waive any privacy rights of employees, clients, and customers, the rights against self-incrimination, attorney client privilege, or work product protection. In addition, to the extent possible, counsel should be engaged to provide representation to all employees prior to any government interviews.

A corporate response plan should include the following steps for the initial contact:

- (1) The person who is contacted, regardless of his identity or rank in the corporation, should immediately contact the DP to advise him of the request and presence of the agents;
- (2) If they are physically present, the agents should be requested to remain in the reception area until the DP comes to greet them; and
- (3) The receptionist or initial contact person should not give the agents the name or office location of any individual other than the DP.

This approach ensures that the DP or others within the company are advised in advance (even if only by a few moments) of the agents' presence or inquiries. It also contains the agents within a defined area, preventing them from wandering about unescorted. Law enforcement agents should understand this approach and be agreeable to the response. The only exception to this approach may occur when the agents have warrants. Suggested steps for dealing with search warrants are discussed below.

During the DP's initial contact with law enforcement, the DP should take the following steps:

- (1) Ascertain the identity of the agents and their respective agencies (whether state and/or federal);
- (2) Request to see the credentials of the agents—the privacy rights of a company's employees, clients, and/or patients demand it;
- (3) Ask for business cards. If business cards are not available, the agents' names and phone numbers should be written down;
- (4) Inquire as to the nature of the agents' visit;
- (5) Ascertain the identity of the prosecutor assigned to the investigation if the name is available;
- (6) Ask why the investigation was initiated;
- (7) Indicate to the agents that it is the corporation's intention to fully cooperate with the authorities in their investigation;
- (8) Explain that, as the DP, he is not in a position or authorized to answer any substantive inquiries by the agents, which must be directed to counsel; and

- (9) Provide the agents with counsel's contact information and,
 - (a) in the case of a request, promptly make arrangements for the agents to speak with counsel;
 - (b) in the case of a civil investigative demand (CID) or subpoena, explain that counsel will review the CID or subpoena so that the company can comply fully and promptly with the demand without compromising its rights or the rights of employees, clients, and customers;
 - (c) in the case of a search warrant, make clear that the agents will not need to wait for counsel's involvement and state that the company will comply with any authorized demands immediately.

When counsel first speaks with the agents, it is advisable that he inquire whether the corporation is the "target" or the "subject" of the investigation. As defined by the United States Attorney's Manual, Section 9-11.151, a target is "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant." A subject, on the other hand, is "a person whose conduct is within the scope of the grand jury's investigation." At a minimum, asking this question does two things. If it is answered by the agents, it gives the company's lawyers some valuable information. If not, it at least sends the message to the agents and the prosecutors that the company knows the rules of the road, which is a good message to send early on.

RESPONDING TO THE DIFFERENT CONTACT METHODS

A. TELEPHONE INQUIRY

The corporate representative who receives the initial telephone call should:

- (1) Ascertain the name of the government agent and the agency he represents;
- (2) Request the telephone number where the agent can be contacted, explaining that the reason for the request is to verify this is an official law enforcement inquiry and not a news reporter, prank telephone call, or ruse by someone to obtain proprietary or confidential information;
- (3) Advise the agent that a corporate representative will immediately return his call; and
- (4) Have the DP promptly return the call, preferably in the presence of or after having spoken with in-house counsel and outside counsel.

When the DP returns the call, he should follow the steps outlined above for the initial DP contact. Additionally, the DP should have another corporate representative in the room listening to the call and taking notes of the conversation. If possible, the in-house or outside counsel should likewise be present.

B. RESPONDING TO A GOVERNMENT VISIT

1. Contact with employees

Law enforcement agents cannot compel an interview of a company's employees. The grand jury can compel testimony, but an employee has a right not to submit himself to an interview. An employer may not instruct an employee to refuse to submit to an interview, as that type of instruction could subject the employer to an obstruction of justice charge. An employer or supervisor may only advise the employee that he has a choice and that he may speak with counsel prior to making that choice. Counsel for that employee, as opposed to counsel for the employer, may advise the employee not to speak with law enforcement agents without fear of encountering an obstruction of justice charge. It is therefore essential to make arrangements for counsel to be available to represent the employees before there are any interviews by government agents, especially during the execution of a search warrant.

Some law enforcement agents will call or approach employees when they are at home. Unfortunately, these employees will often speak with agents because they are not aware that they have the choice to refuse. A company should advise employees in advance of their right to counsel and their right to consult with counsel prior to any interview. It may be advisable to set forth the company's policy during orientation, in the employee handbook, or in some other intra-office publication.

If agents intend to interview employees or call them before the grand jury, a corporation will be faced with many issues including, but not limited to, whether

- (1) the employee will need to obtain independent counsel;
- (2) the company will provide independent counsel for the employee; and
- (3) joint defense agreements should be entered into between the employee and company. Most of these issues will depend on an identification of who is the target or the subject of the investigation. However, counsel should be involved immediately after the initial contact to assist in negotiating this minefield.

2. Contact with management or control group members

Where law enforcement agents are attempting to interview management or other members of the company's control group, the company should be especially careful. What these individuals say or do can be binding on the company. Because of these potential ramifications, the corporation's counsel can properly limit contact with these individuals and insist upon being present to insure that the company's rights are not inadvertently waived. Other lower-level managers and employees can also make damaging admissions that could be used against a corporation. Government agents like to interview individuals early on in an investigation before a corporation has the opportunity to conduct its own internal investigation or retain counsel on their behalf. Some of the most damaging kinds of information can come from lower-level employees who are trying to be helpful but who may be mistaken as to some of the key facts.

C. ADMINISTRATIVE SUBPOENAS AND CIVIL INVESTIGATION DEMANDS (CID)

1. Administrative Subpoenas

Certain agencies, such as the DEA, INS, and FDA, have the power to issue administrative subpoenas/summons. They are similar to grand jury subpoenas, but are issued in an agency's name. The subpoena will be upheld as long as the administrative subpoena is "reasonable," meaning that it is within the authority of the agency, that the demand is not too indefinite, and that the information sought is reasonably relevant to a proper inquiry. A company should comply with them in the same manner as a grand jury subpoena, which is discussed below.

Individually identifiable health information maintained by covered entities (those which process claims electronically) is protected under the Health Insurance Portability and Accountability Act ("HIPAA"). Most health care institutions and plans are "covered entities" under HIPAA. Other companies who sponsor their own health or ERISA plans are also "covered entities" in their plan sponsor function; thus, it is important for the company to be cognizant of the distinction between those functions and regular employment functions to avoid running afoul of HIPAA regulations.

Under HIPAA, a covered entity must disclose information to health oversight entities, such as the Department of Health or the Board of Medicine, upon a duly authorized request from that agency. For example, the Secretary of Health and Human Services must only make an appropriate request related to health care oversight, and the covered entity must comply. Where information is being requested for a reason other than health oversight, such as for a violation of the law, the company may disclose information only upon court order, a court-authorized administrative subpoena, or a CID. Under certain authorized requests, criminal investigators in the federal government may share the documents under subpoena with the civil investigators without violating the secrecy provisions of Federal Rule of Criminal Procedure 6(e).

In certain national security cases, such as terrorism cases, the FBI can issue National Security Letters ("NSLs"). Before the Patriot Act, the FBI could use NSLs to obtain records concerning suspected terrorists and spies. The Patriot Act amended the law to allow the use of NSLs to obtain information about a broader range of individuals and entities. The recipient of a NSL cannot disclose it to any person, although a recipient can contact his lawyer about the NSL.

In at least one case, *Doe v. Ashcroft*, 334 F. Supp. 2d. 471 (S.D. N.Y. 2004), an internet service provider and the American Civil Liberties Union ("ACLU") successfully challenged 18 U.S.C. § 2709, one provision that authorized the use of NSLs. Specifically, the court found that as applied the law was unconstitutional because it effectively barred or substantially deterred any judicial challenge to the propriety of an NSL request. Furthermore, the court concluded that the permanent ban on disclosure was an unconstitutional prior restraint on speech in violation of the First Amendment.

In addition to NSLs, certain designees in the FBI can request that the Foreign Intelligence Surveillance Act Court (the "FISA Court") issue requests for records or tangible things under Section 215 of the USA PATRIOT Act, 50 U.S.C. § 1861(a)(1). Much like an NSL, a person who receives one of these requests cannot disclose it to anyone other than his lawyer.

2. CIDs

Another investigative tool employed by the federal government is the Civil Investigative Demand, or CID, a compulsory pre-complaint procedure used to obtain documentary information, answers to interrogatories, and oral testimony. CIDs are often utilized by the Federal Trade Commission, the Antitrust Division of the DOJ, and the Commercial Litigation Branch, Civil Division of the DOJ (for investigations under the False Claims Act).

Although there are some differences between the CID authority granted to each governmental group, the basic procedural steps and safeguards are alike. Generally, a CID must be authorized by the Attorney General or Assistant Attorney General in charge of the division. CID materials are exempt from the Freedom of Information Act and, without the consent of the CID recipient, may only be used by a duly authorized officer, employee, or agent of the DOJ (or FTC) in connection with a case, grand jury, or federal administrative or regulatory proceeding. The Right to Financial Privacy Act provides for notification to customers for financial records.

Whenever a person fails to comply with a CID, the DOJ may file with the U.S. District Court and serve upon the CID recipient a petition for an order for the enforcement of the CID. The CID recipient also has the option to file in the district court and serve upon the DOJ a petition for an order modifying or setting aside the CID. In general, the Federal Rules of Civil Procedure apply to these petitions. Furthermore, no CID may require the production of material that would be protected from disclosure under the standards applicable to grand jury subpoenas or to other discovery requests.

D. GRAND JURY SUBPOENA

1. Subpoena duces tecum, an order to appear and produce documents

A company that receives a grand jury subpoena should immediately contact counsel to analyze the subpoena and its scope. For example, if government agents have drawn the subpoena too broadly, essentially requesting a fishing expedition, counsel may (and should) move to quash the subpoena or to negotiate a more reasonable scope with the government attorney supervising the investigation. Counsel should also attempt to work out a reasonable schedule for the production of documents.

Immediately after receiving the subpoena, the company should institute an “investigation hold,” directing its employees to maintain all potentially relevant records and not to alter them in any way. Any regular document destruction procedure should be suspended. Given the increasing use and awareness of electronic evidence, the company should also coordinate with its IT department to suspend any automatic deletion or overwriting of electronic records and e-mails.

Next, the company should appoint a custodian of records, if it does not already have one, who will coordinate with counsel to ensure compliance with the subpoena. The custodian of records should prepare a search memorandum outlining the document production process, containing a copy of the subpoena, and providing any additional description or clarification that might assist then individual in locating the records being sought. The memorandum should be circulated to all employees that may possess relevant records, and it should request that the employees return to the document custodian not only the documents being produced but also a log with a brief description of each record. As the records are being collected, the corporation should implement a screening process so that no privileged documents are inadvertently produced.

2. Subpoena ad testificandum, an order to appear and give testimony

If served with a grand jury subpoena, a witness may not refuse to testify (or produce documents) because he thinks the grand jury’s demands are unreasonable. A limited number of recognized privileges provide legitimate grounds for refusing to comply with a grand jury subpoena; each privilege is firmly anchored in a specific source—the Constitution, a statute, or the common law. A witness who asserts no legitimate grounds for failing to comply with the subpoena may be held in criminal or civil contempt, and fined and imprisoned.

The Fifth Amendment Privilege.

Grand jury witnesses may invoke the Fifth Amendment privilege against self-incrimination in response only to requests for testimonial communications. A corporation, however, has no Fifth Amendment privilege as a collective entity.

Attorney-Client Privilege.

A corporation, like individuals, may assert the attorney-client privilege, unless the government makes a prima facie showing that the privileged relationship has been used to further fraudulent or criminal activity. In the context of a corporation, it is important to note that the privilege belongs to the corporation, not the employee, and as such, may be waived only by the corporation. Furthermore, a corporation need not obtain the employee’s consent to waive attorney-client privilege.

3. Grand jury secrecy

Federal Rule of Criminal Procedure 6(e) prohibits grand jurors, government attorneys, government personnel assisting government attorneys, and other personnel (interpreters, stenographers, transcribers, etc.) from disclosing grand jury matters. While there are some limited exceptions to the general prohibition against disclosure (e.g., disclosure to government attorneys/staff for use in the performance of their duties; at the court’s direction in connection with a judicial proceeding; pursuant to the Jenks Act; etc.), information disclosed to the grand jury remains secret. Because of this protection, a corporation from whom proprietary information or trade secrets are sought should only disclose such information—if possible—before the grand jury. This secrecy does not exist to such a degree for the other methods used by the federal government to collect evidence.

The requirement of grand jury secrecy does not extend to the witness himself. A witness is free to speak about his grand jury testimony, absent some other restriction on his disclosure, such as a non-disclosure agreement or fiduciary relationship.

Post-grand jury debriefing procedure.

The corporation, through outside criminal counsel, may wish to implement a voluntary post-grand jury debriefing procedure. Outside counsel must be sure to do so in a manner that does not suggest, in any way, that the company is attempting to obstruct justice. A debriefing procedure can be beneficial because it allows outside counsel to monitor the progress of the investigation by interviewing witnesses after their grand jury testimony. Counsel should meet with individuals immediately after their testimony when their memory is fresh. A similar procedure may be utilized by outside counsel to follow up on other interviews or interactions between employees and law enforcement.

E. FORTHWITH SUBPOENA

Where there is a risk of destruction or alteration of documents, files, or other tangible evidence, subpoenas which require production “forthwith” may be issued, despite their burdensome nature. Forthwith subpoenas are not commonly utilized, as they may only be issued with the prior approval of the United States Attorney and, pursuant to DOJ policy, “should only be used when an immediate response is justified.”

While DOJ policy statements are not enforceable by private parties, one court has quashed a forthwith subpoena where the disregard of the DOJ policy on forthwith subpoenas was part of a pattern of “the overreaching [by] the government in its presentation to the grand jury.” *United States v. Sears, Roebuck Co., Inc.*, 518 F. Supp. 179 (C.D. Ca. 1981). See also *United States v. Jones*, 286 F.3d 1146, 1151-1152 (9th Cir. 2002)[Finding that FBI agents executing a forthwith subpoena overstepped their authority when they did so in a manner consistent with the execution of a search warrant, i.e., securing the premises, refusing to allow employees to enter their offices except in the presence of the agents and that City Attorney’s “consent” was not valid. If presented with a forthwith subpoena calling for such extensive production that it is a practical impossibility to comply, the corporation should move to quash the subpoena as being unduly oppressive.

F . SEARCH WARRANTS

Agents should not be asked whether they have a search warrant. If they do have a search warrant, they will let the contact person know. If the agents have a search warrant, the DP will be given a copy, and the agents will demand to be taken to the area or areas to be searched. Both the receptionist and the DP should be immediately responsive to the agents.

If the receptionist is presented with the search warrant, the receptionist should not take the agents to the area to be searched. Instead, he should take the following steps:

- (1) Immediately call the DP. The receptionist should not surprise the DP by showing up at his office with the officers in tow.
- (2) If the DP and the alternate DP are unavailable, the receptionist should notify the president and counsel for the corporation.

Once the DP has been advised of the search warrant, he should:

- (1) Notify counsel for the corporation;
- (2) Read the search warrant;
- (3) Obtain and maintain a copy of the warrant;
- (4) Not agree to any search broader than that authorized by the warrant; and
- (5) Raise the issue of retention of counsel for all of the employees.

Generally, agents will agree to wait a reasonable amount of time for the DP after the receptionist notifies him. Keep in mind, however, that the agents may be suspicious of any noticeable time lapse that would permit the destruction of any computer files or other documents. Thus, a timely response is critical.

Agents with a search warrant may opt to appear at the records department, bypassing the corporation’s receptionist. In this event, the records personnel should be trained to permit the search to the extent authorized by the warrant and to immediately notify the DP.

OTHER ISSUES OF CONCERN

A. PRIVACY AND PRIVILEGE ISSUES

1. Rights information provider

In responding to investigative requests, a company and its agents must be careful not to waive any potential privileges such as attorney-client privilege, work product protection, doctor-patient privilege, and Fifth Amendment privilege.

2. Privacy rights of the employee/client/patient

In a regulated industry, such as financial services and health care, a company cannot disclose information without a warrant or court order. For example, in the health care context, most federal and state privacy laws governing patients do not permit providing documents pursuant to a law enforcement request without a court order (e.g., in Pennsylvania, patient-specific HIV statutes). The health care provider could be subject to a civil lawsuit for the violation of privacy rights of patients if documents are turned over to agents without an appropriate order. Federal law also prohibits the disclosure of video rental client information without an appropriate court order.

If the company is not a regulated entity, nothing is legally stopping the company from disclosing information unless it has published a privacy policy (e.g., a company policy stating that no employee or client information will be disclosed unless required by law). Under these circumstances, no information may be disclosed unless there is a warrant or grand jury subpoena—there must be legal ramifications if the company chooses to withhold the information. A company that publishes a privacy

policy should pay careful attention to the wording of the policy, perhaps even clearly stating that it will disclose this information if required by law, court order, or in response to an authorized investigative demand.

In a company that is not regulated and has no privacy policy, the corporation may disclose what it wants—with some limitations. For example, a company that is in the U.S.-EU safe harbor has obligated itself to disclose information only when required by law.

While in the past federal law enforcement officers may have had an attitude that they were entitled to this information simply by virtue of their role, this mentality has changed. Generally, law enforcement is cognizant of the competing interests that companies have, and as a result, agents tend to want to play it safe and keep everyone happy.

B. TRADE SECRETS AND PROPRIETARY INFORMATION

As discussed above, the grand jury secrecy rule, Federal Rule of Criminal Procedure 6(e), provides some protection for a company's trade secrets and proprietary information that are disclosed before the grand jury. In other situations, a company that is being investigated may wish to seek greater protection of trade secret/intellectual property by addressing its concern to the government attorney supervising the investigation. Often the government will be reasonable in making appropriate arrangements to protect the company's proprietary information.

C. PUBLIC RELATIONS

While most companies have a policy addressing employee communications with the media, it is a good idea to periodically review this policy. When a corporation is under investigation, there is often a media frenzy. At such a time, it is especially important that the company speak with a unified voice. Counsel must coordinate responses to press inquiries so that statements are consistent with defense strategy. Furthermore, in making public disclosures, a company must be sure not to inadvertently waive privileges or disclose other confidential information.

D. DECISION WHETHER TO PERFORM AN INDEPENDENT INVESTIGATION

When a company becomes aware of a federal investigation, it should perform an independent investigation though experienced outside counsel, absent unusual circumstances. An independent investigation may lend credibility to the corporation's position, assist in the development of facts needed for a defense, and function as a public relations response. There are, however, disadvantages to an independent investigation. If done poorly, it may be costly and disruptive, privileges may be inadvertently waived, and there may be a PR backlash caused by leaks or assertions of whitewashing. The structuring of any independent investigation is extremely important. It must be done in a way that minimizes legal risk and protects confidentiality and privileged communications. For a more in-depth discussion of independent investigations, please refer to *How Corporations Can Avoid or Minimize Federal Criminal Liability for the Illegal Acts of Employees*, by Mark A. Rush and Brian F. Saulnier, March 1999, a K&L Gates publication addressing the issue.

CONCLUSION

What a company should do in advance to prepare:

- (1) Identify the DP and several alternative DPs;
- (2) Train receptionists, executive secretaries, and employees likely to be contacted on how to react to visits from agents;
- (3) Inform other employees of the company's response policy and their rights if approached by a law enforcement officer; and
- (4) Consider including an article in an employee publication on how to handle off-hour requests from investigative agents, which also includes a discussion of the employee's privacy rights, the privacy rights of the company's clients and customers, and the company's interest in its proprietary information.

By planning for this contingency, a corporation will not be caught off-guard and will not inadvertently waive any of its rights or the rights of its employees, clients, and/or customers.

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