

Uninvited Guests:
What to do When the
Government Comes
Knocking

KEKER
VAN NEST
& PETERS

Jan Little
Brook Dooley



Presenters



Jan Nielsen Little
bdooley@keker.com



Brook Dooley
bdooley@keker.com

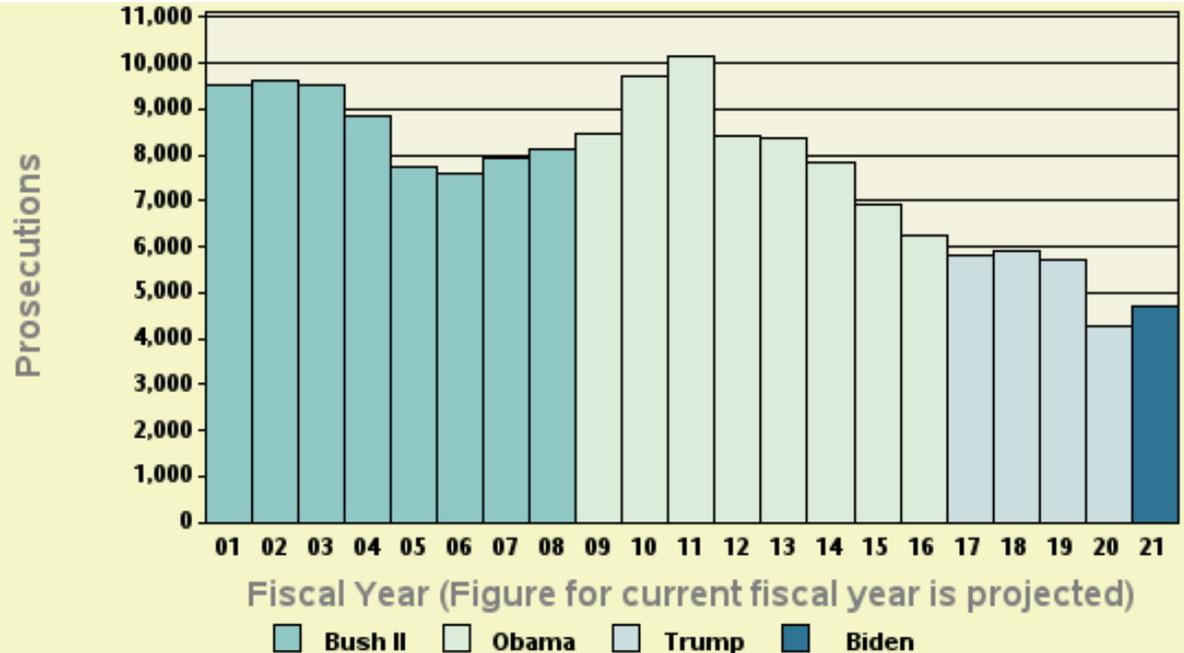
AGENDA

1. Current **Landscape**
2. When the Government **Calls You**
 - Document requests / subpoenas
 - Interview requests / GJ subpoenas
 - Search warrants
3. When You Might **Call the Government**
 - Cooperation to avoid corporate liability
 - Corporate victim: weighing benefits and risks of government involvement
4. **Questions**

**The Current
Landscape:
Renewed Focus
on White-Collar
and Corporate
Crime**



Historical Trend: Declining White-Collar Prosecutions



Lisa Monaco,
Deputy Attorney General
October 28, 2021, Speech
ABA White Collar Institute



“We will hold those that break the law accountable and promote respect for the laws designed to protect investors, consumers and employees.

“Accountability starts with the individuals responsible for criminal conduct... [I]t is unambiguously **this department’s first priority** in corporate criminal matters **to prosecute the individuals who commit and profit from corporate malfeasance.**

“...I have and will continue to make clear to our prosecutors that ... **the fear of losing should not deter them....** [W]e will urge prosecutors to be **bold** in holding accountable those who commit criminal conduct.”

**Biden
Administration:
Prosecuting
Corporate
Crime a “First
Priority”**



U.S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

October 28, 2021

FROM:

THE DEPUTY ATTORNEY GENERAL

SUBJECT:

Corporate Crime Advisory Group and Initial Revisions to
Corporate Criminal Enforcement Policies¹

- Corporations under investigation must identify “all individuals” involved in potential misconduct, “regardless of their position, status, or seniority.”
- “All prior misconduct”—including overseas conduct—must be evaluated when prosecutors are considering possible resolutions for companies.
- Corporate monitors are not the exception. Prosecutors are free to require imposition of monitors to supervise companies’ compliance with plea, non-prosecution, and deferred prosecution agreements.

Three DOJ Policy Changes

DOJ and SEC Enforcement Priorities

Corruption

- FCPA
- Anti-Money Laundering Act

Cybersecurity

- DOJ / SEC Emphasis on prevention and reporting
- DOJ False Claims Act initiative
- National Cryptocurrency Enforcement Team

Anti-Trust

- Tuna and Chicken Price-Fixing Cases
- Wage-Fixing Cases
- “No Poaching” Cases

N.D. Cal. Initiatives and Prosecutions

“Corporate Fraud Strike Force”

Trade Secret Theft

--*United States v Lam* (Genentech / JHL)

--*United States v. Kim* (Broadcom)

Cybersecurity

--*United States v. Nikulin* (LinkedIn)

--*United States v. Sheppard* (Twitter)

--*United States v. Sullivan* (Uber)

Corporate Fraud

--*United States v. Holmes* (Theranos)

--*United States v. Kail* (Netflix)

Unwanted Government Inquiries

- Document requests / subpoenas
- Requests for interviews / testimony
- Search warrants and other “hardball tactics”

Risks

- Business disruption
- Loss of employee morale
- Harm to reputation / brand
- Financial damage

**What This
Could
Mean for
You**

Document Requests & Subpoenas



"I've already put the evidence in a tidy little bag for you."

Documents

Assess the Threat

Who is making the request?

--Local, state, federal?

--Prosecutor v. agency (e.g., SEC)?

Who is the government investigating?

--Your company and/or its executives?

--Third-party (customer, supplier, client, etc.)?

What is the government seeking?

How is government making its request?

--Informal request?

--Administrative subpoena?

--GJ subpoena?

When is a response due?

Documents

Privilege, confidentiality, trade secret & competitive concerns

Hurt your standing with government

Sanctions by administrative agencies

--*SEC v. Lucent Technologies* (\$25M fine)

--*SEC v. Morgan Stanley* (\$15M settlement)

Criminal penalties

--18 U.S.C. § 1512(b) & (c) (withholding documents)

--18 U.S.C. § 1516 (obstructing federal audit)

--18 U.S.C. § 1519 (concealing records)

Know the
Risks in
Responding

Documents

Understand Your Rights

- **No authority** to enter or interview
- **No obligation** to produce “forthwith”
- Subpoena **does not** trump privileges
- Subpoena **does not** trump Fifth Amendment
- **FOIA** protection

Documents

Preservation and Production of “Bespoke” Databases

--*United States v. Holmes* (Theranos)

Passwords and “BYOD” Policies

--Fifth Amendment and corporate records

--Fifth Amendment and personal devices

--Fifth Amendment and hybrid devices

“Ephemeral Messaging”

--Document preservation

--Misuse

Emerging
Issues to
Keep Your
Eye On

Documents

Prepare the Best Response

Accept service

Engage outside counsel

Issue litigation hold

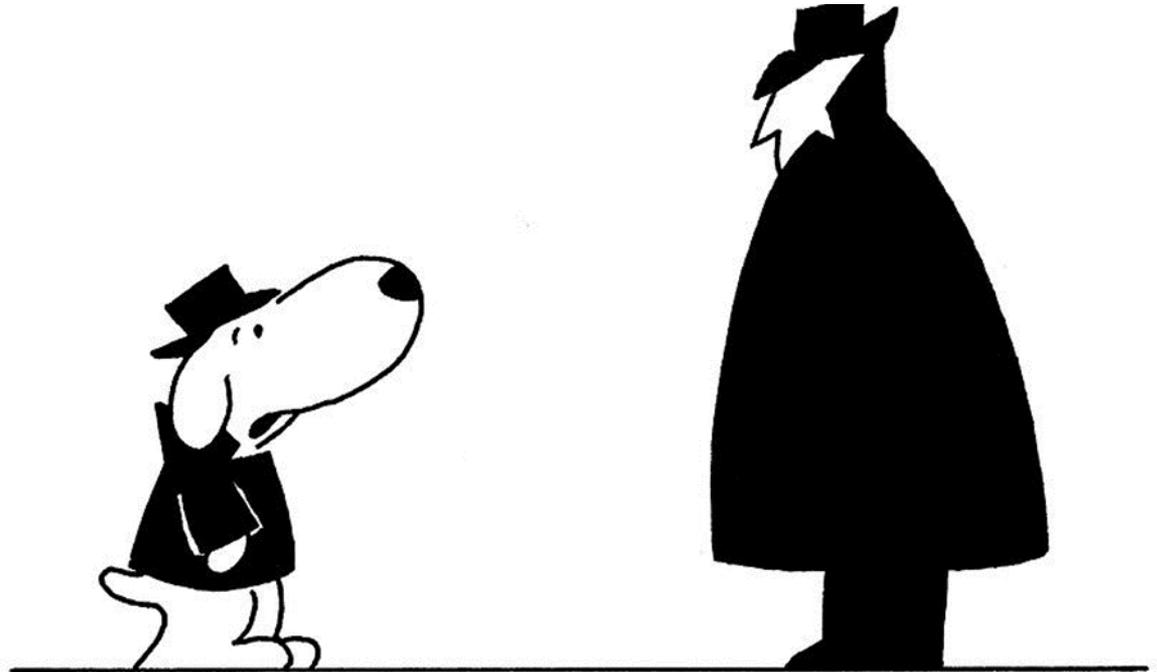
Contact issuing agency or prosecutor

Negotiate scope of request

Identify custodians and collect documents

Notify employees they may be approached

Interview Requests & Subpoenas for Testimony



C. Brown

"They rubbed my tummy, chief—I told them everything."

Testimony

Assess the Threat

Who is making the request?

Who is the government investigating?

What is the government seeking?

How is the government making its request?

- Informal request

- Administrative or civil subpoena

- Grand jury subpoena

- FBI knocking on your door ... or your employees' doors

Testimony

Privilege, confidentiality, trade secret &
competitive concerns

Unprepared Responses

False or Misleading Statements

--18 U.S.C. § 1001 (materially false statements)

--*United States v. Lieber* (China Initiative)

Omissions / Failure to Disclose

--*United States v. Craig*

--*United States v. Bonds*

Know the
Risks in
Responding

Testimony

Understand Your Rights

Employees can **decline, defer, or terminate** government interviews

Employees can **request counsel** – personal or company

Attorney-client, work-product, and 5th Amendment **privileges** are available

Employees can request **immunity** or “**queen for a day**”

Testimony

Educate employees on their rights

Clarify status: **subject v. witness v. target**

Discuss testimony with agency or prosecutor

- Topics of interview / testimony

- Relevant documents

Recommend an **attorney proffer**: “If my client says X, Y, and Z ...”

Practice, practice, practice

**Prepare the
Best
Response**

Search Warrants



"It's your father, dear—he doesn't need a warrant."



Obstruction: deleting, moving or hiding documents

Business **disruption**; **reputational** and **public relations** harm

Employee reaction: **panic**; statements to agents

Exposure of **privileged or confidential** documents, **trade secrets**

**Search
Warrant**

**Know the
Risks**

Search Warrant

Understand Your Rights

Search **limited to place** set forth in warrant

Search or detention of **employees** not authorized

Agents must prepare **inventory** and provide **receipt**. Rule 41(f)(1)(B) & (C)

Special rules apply to **seizure of ESI**

--United States v. Comprehensive Drug Testing, Inc.

Right to obtain **affidavit** in some cases

Designate **point person**

Identify lead agent; request **ID**, copy of **warrant, name of prosecutor**

Contact outside counsel and ask agent to wait until counsel arrives

Send non-essential employees home

Advise employees that they may, but are **not required** to, speak to agents

Search Warrant

Prepare the Best Response

**When agents
arrive...**

Search Warrant

Prepare the Best Response

During the search...

Do **NOT** obstruct / interfere with search

Monitor search and take photos, video

Ask for copies of **necessary documents**

Object (politely) to seizure of **privileged** records; request they be isolated

Do **NOT** consent to search beyond warrant;
do **NOT** volunteer records

Request **inventory and receipt**

**Corporation
as Cooperator
or Victim:
Deciding
Whether to
Call the
Government**



Calling in the Government

Assess the Situation

What is potential wrongdoing?

How is company involved?

--Potential target, witness, victim?

--Exposure for company v. executive v. employee

Where did conduct occur?

Who has jurisdiction?

--Federal (DOJ/FBI) v. State v. Local Prosecutors

--Criminal v. regulatory

What does company want to accomplish?

Cooperation credit

Some measure of control

Greater consequence for wrongdoers and
deterrent effect

Expanded investigative tools

--Search / seizure of computers, phones, etc.

--Government preservation requests to ISPs

**Calling in the
Government**

**Consider
the Benefits**

Calling in the Government

Know the Risks

Lose control of timing and direction

Open doors (and computers, phones, etc.)
to investigators

Potential for privilege waiver

Significant time / expense / distraction

Impact on civil claims, including stay

Impact on individual employees

Increased press/publicity

Former Genentech employees charged with trade-secret theft

Indictment alleges principal scientist provided confidential information to consultants for Taiwan-based firm JHL Biotech Inc.

Russian Man Indicted For Hacking Into LinkedIn, Dropbox,

By JASON GREEN | jas
PUBLISHED: October 30, 2016 at 4:26 pm Filed Under: Dropbox, Formspring, Hacker, Indictment, LinkedIn, Russia, Silicon Valley, Yevgeniy Aleksandrovich Nikulin

Former Netflix VP Charged With Fraud, Money Laundering

May 2, 2018 at 5:20 pm Filed Under: Fraud, Michael Kail, Money laundering, Netflix

SAN JOSE (CBS SF) — A lawyer for a former Netflix executive indicted in federal court in San Jose on charges of fraud and money laundering Wednesday his client “v

Michael Kail “looks for proven untrue,” said de

Kail, 49, of Los Gatos, w Gatos-based video stre the authority to enter i services to Netflix.

He was indicted by a fe and money laundering

stock options from nine technology companies that had contracts with Netflix.

U.S. charges former Amazon manager and her family members with insider trading

WASHINGTON (Reuters) - The Securities and Exchange Commission on Monday charged a former finance manager at Amazon.com, Inc. and two of her family members with insider trading in advance of the company’s earnings announcements between January 2016 and July 2018.

The SEC alleged that Laksha Bohra, who worked as a senior manager in Amazon’s tax department, acquired and tipped her husband Viky Bohra with highly confidential information about Amazon’s financial performance.



Calling in the
Government

Increased
Press/
Publicity

Calling in the Government

Prepare to
Achieve the
Best
Outcome

Preserve documents

Do an investigation (mindful of privilege...)

--In-house?

--Outside counsel and/or experts?

Decide on **outside counsel**

--For the company?

--For individual executives and employees?

Careful communication with government

Align parallel **independent** investigations

Document losses and costs

Thank You!



"And above all, son, in whatever you do, try to avoid jail."

Department of Justice is Open for business

--Early disruptions

--Prosecutions are picking back up

--GJ proceedings and jury trials are back, but different

COVID-related prosecutions

--Price-gouging and the Defense Production Act

--Government loans (PPP and CARES Act)

--Insider trading

--Corporate disclosures

 Los Angeles Times

Feds begin fraud prosecutions over coronavirus PPP loans

One Los Angeles business owner allegedly went to Las Vegas and gambled away some of the \$9 million he received in emergency ...

Jul 23, 2020



Effects of COVID-19

What This Could Mean for You

Unwanted Government Inquiries

- Document requests / subpoenas
- Requests for interviews / testimony
- Search warrants and other “hardball tactics”

Risks

- Business disruption
- Loss of employee morale
- Harm to reputation / brand
- Financial damage

How you respond can determine extent of the damage, harm and disruption

Appropriate response sets the stage to limit the damage

Improper response can turn a small problem into a big problem

**Your
Response
Matters**

Case Study

United States v. Arthur Andersen



Calling in the Government

Assess the Situation

What is the suspected crime?

Who would you call?

- Local DA, FBI, SEC, USAO?
- REACT Task Force

Calling in the Government

Assess the Situation

Who is involved in the crime?

-- Senior executive, current or former employee, outsider?

-- Does the company itself face potential liability/criminal exposure?

Calling in the Government

When should you involve the government?

Conduct full **internal investigation** first?

Hire external counsel?

**Assess
the Situation**

Contact Law Enforcement

You are ultimately responsible for protecting your own intellectual property. Congress has continually expanded and strengthened criminal laws for violations of intellectual property rights to protect innovation; however, you need to take reasonable steps to protect your intellectual property and products, and document those measures.

Violations that may apply: Economic Espionage, Theft of Trade Secrets, Mail Fraud, Wire Fraud, Interstate Transportation of Stolen Property, Export Control, and Intellectual Property Rights.

If you believe your company is a victim of these crimes, contact the FBI or the National Intellectual Property Rights Coordination Center. Investigators cannot act if they are not aware of the problem. The FBI will minimize the disruption to your business, and safeguard your privacy and your data during its investigation. Where necessary, the FBI will seek protective orders to preserve trade secrets and business confidentiality.



Safeguard Your Company's Trade Secrets, Proprietary Information and Research
www.fbi.gov www.ice.gov/iprcenter

Calling in the Government

Assess the Situation

Calling in the Government

Assess the Situation

What does the company hope to accomplish?

How will government investigation impact any ongoing or potential civil action or financial resolution with the wrongdoer?

Calling in the Government

Understand Your Rights

INFORMATION AND ASSISTANCE
FOR
FEDERAL CRIME VICTIMS AND WITNESSES



Office of the
United States Attorney
Northern District of California
Victim-Witness Program

Victim-Witness Unit

415.436.6834 (San Francisco)
408.535.5176 (San Jose & Oakland)

www.justice.gov/usao

CRIME VICTIMS' RIGHTS ACT

The CVRA gives victims of offenses charged in Federal court the following rights:

- 1) The right to be reasonably protected from the accused.
- 2) The right to reasonable, accurate, and timely notice of any public court proceeding involving the crime or of any release or escape of the accused.
- 3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
- 4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
- 5) The reasonable right to confer with the attorney for the Government in the case.
- 6) The right to full and timely restitution as provided in the law.
- 7) The right to proceedings free from unreasonable delay.
- 8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

Calling in the Government

Know the Risks

Once the government is involved, your company **loses control** of:

- Timing
- Focus

Potential **stay** of civil claims, leading to delay of trial or settlement

Delay can prejudice ability to get preliminary injunction

Opening your doors (and computers) to government investigators



Calling in the
Government

Know the
Risks

Calling in the Government

Know the Risks

Potential for **privilege waiver**

Cooperating = significant **time and expense**
to company and witnesses over a
number of **years**

Increased **press/publicity**