

You've Been Served, Now What?

Crafting a Corporate Response



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Why We Are Here

- **Understand what “Served” means**
- **Understand trends**
- **Prepare for what’s coming before it happens (and hope it never happens)**
- **Whistleblowers & Retaliation**
- **Presentation is available for download:
pointcompliance.com/served**



Why We Are Here



K&L GATES

Corporate Responses to
Investigative Requests by
the Federal Government

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- A primary source for today's information is from K&L Gates' Corporate Responses to Investigative Requests by the Federal Government

http://www.klgates.com/files/Publication/0fffa665-105a-4792-8f9f-e70e4d1d1c77/Presentation/PublicationAttachment/9c0a79cc-6fa8-4013-a543-56097132ed9d/orporate_Responses_white_paper_for_Mark_Rush.pdf





Why We Are Here

- **Trends**

- **According to Bloomberg's 2017 Trends in Government Contracting, compliance and accountability are on the rise.**
 - This is true for all businesses not just government contractors
- **That means all organizations must be more diligent than ever about following the rules.**





Why We Are Here

- **Trends**

- **New Era of 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.**



Why We Are Here: Trends

- **Trends**

- **DOJ recovered \$4.7 billion in civil False Claims Act settlements and judgments for FY 2016.**

- Of the \$4.7 billion recovered, \$2.5 billion came from the health care industry, including drug companies, medical device companies, hospitals, nursing homes, laboratories, and physicians.
- The \$2.5 billion recovered in fiscal year 2016 reflects only federal losses. In many of these cases, the Department was instrumental in recovering additional millions of dollars for state Medicaid programs.
- This is the seventh consecutive year the Department's civil health care fraud recoveries have exceeded \$2 billion.



Why We Are Here: Trends

- **Trends**

- **DOJ recoveries:**

- The next largest recoveries came from the *financial industry* in the wake of the housing and mortgage fraud crisis.
 - Settlements and judgments in cases alleging false claims in connection with federally insured residential mortgages totaled nearly \$1.7 billion in fiscal year 2016 – the second highest annual recovery in this area.
 - In the last 8 years, the U.S. has recovered more money from private contractors based on alleged fraud against the Government than it had in the previous 153 years.
 - Total recoveries since FY 2009 is \$31.3 Billion.



Why We Are Here: Trends

- **Trends**

- **DOJ recoveries:**

- Of the \$4.7 billion the government recovered in fiscal year 2016, \$2.9 billion related to lawsuits filed under the *qui tam* provisions of the False Claims Act.
 - During the same period, the government paid out \$519 million to the individuals who exposed fraud and false claims by filing a *qui tam* complaint.
 - The number of lawsuits filed under the *qui tam* provisions of the Act has grown significantly since 1986, with 702 *qui tam* suits filed this past year – an average of 13.5 new cases every week.
 - The growing number of *qui tam* lawsuits, particularly since 2009, has led to increased recoveries.



Why We Are Here

- **Trends**

- **DOJ recoveries:**

- From January 2009 to the end of fiscal year 2016, the government recovered nearly \$24 billion in settlements and judgments related to *qui tam* suits and paid more than \$4 billion in whistleblower awards during the same period.

- **Penalties have increased:**

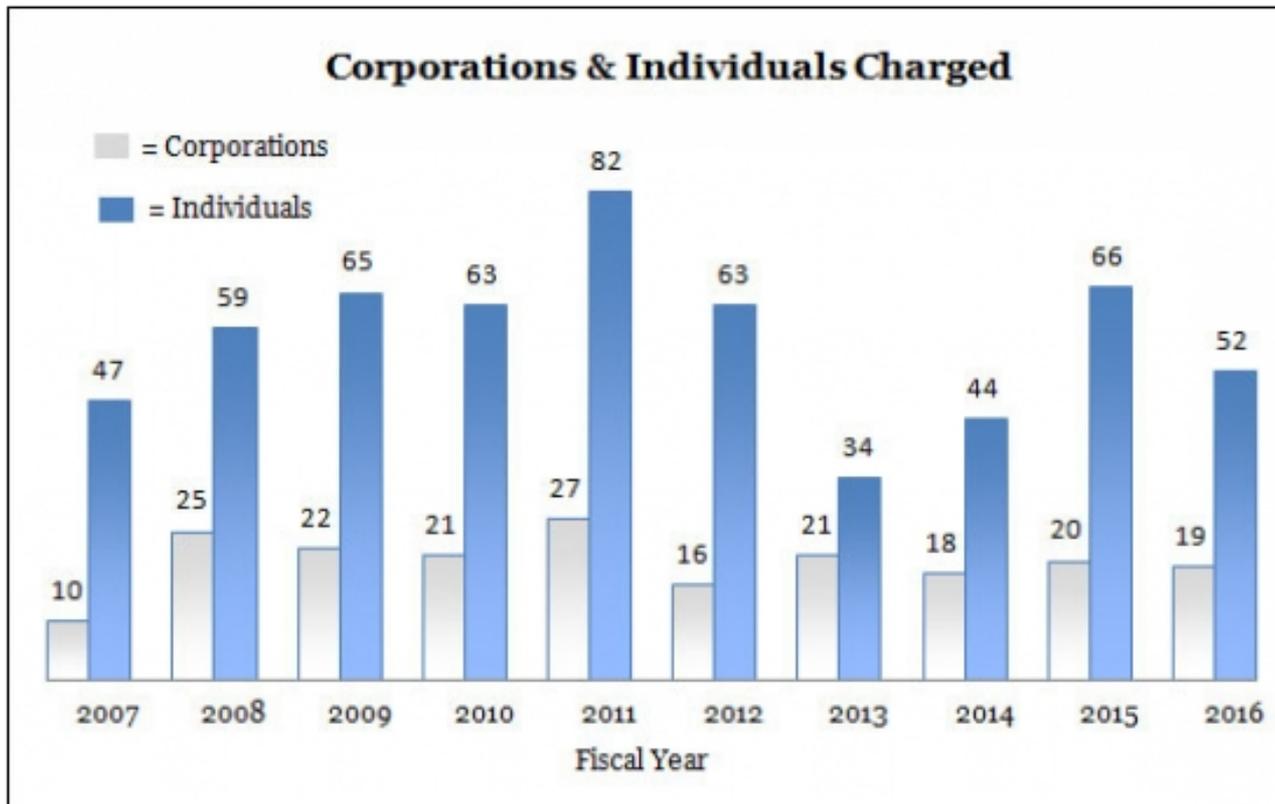
- **False Claims Act Penalties Almost Double:**
Civil monetary penalties under certain sections of the False Claims Act are increased from \$5,500 to \$10,781 (minimum penalty), and from \$11,000 to \$21,563 (maximum penalty).





Why We Are Here: Trends

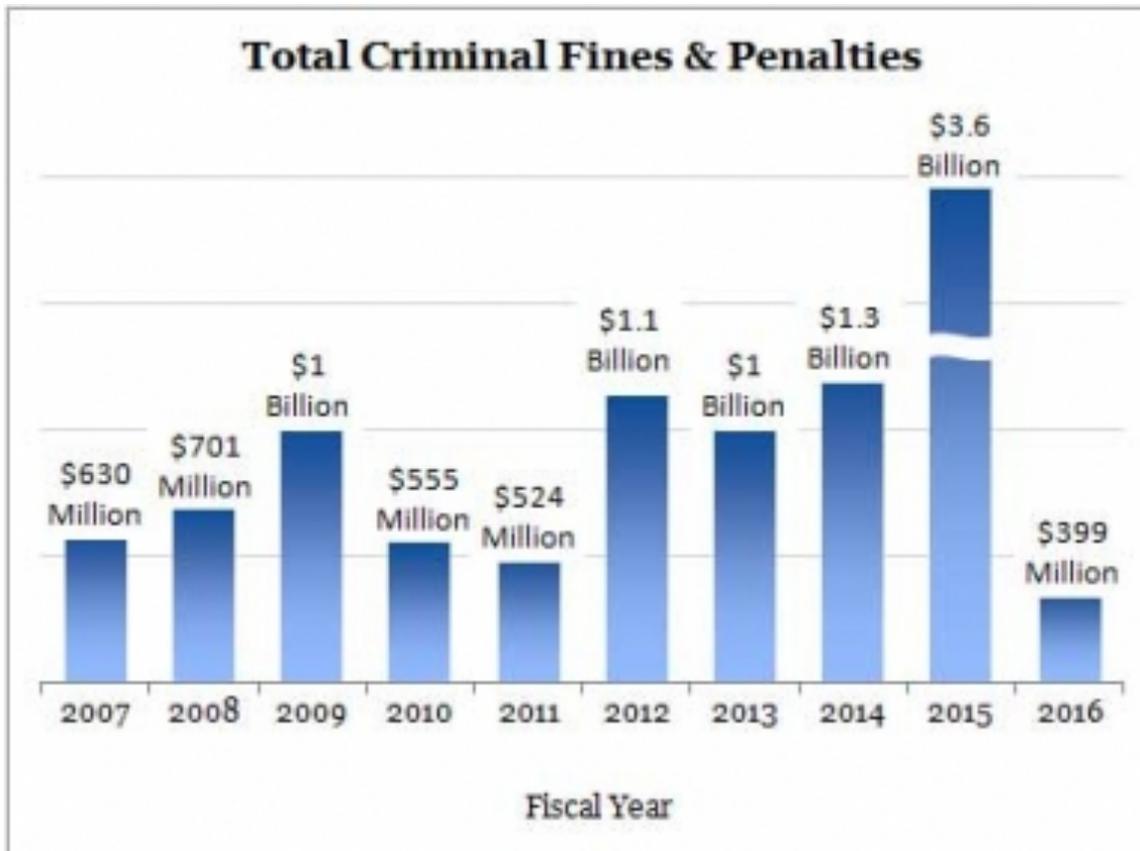
- **CRIMINAL ENFORCEMENT – ANTITRUST
Charts Through Fiscal Year 2016**





Why We Are Here

- **CRIMINAL ENFORCEMENT**
Charts Through Fiscal Year 2016





Why We Are Here

- **CRIMINAL ENFORCEMENT**
Charts Through Fiscal Year 2016





Types of Service

- **The Basics:**

- **Summons v. Subpoena**

- A **summons** provides legal notice to a party about a lawsuit. It is the first official notice to a defendant that he or she is being sued.
 - A **complaint** is a pleading filed by a Plaintiff stating the claims they have against the Defendant as well as the action they would like the court to take.





Types of Service

- **The Basics:**

- **Summons v. Subpoena**

- A **subpoena** is a legal order commanding the person or organization named in the subpoena to give sworn testimony at a specified time and place about a matter concerned in an investigation or a legal proceeding, such as a trial.
 - A **subpoena duces tecum** substitutes the requirement of your appearance to testify with a requirement that you supply specific physical material in your possession.
 - A **deposition subpoena** means that your sworn testimony will be taken during a phase of the trial process known as discovery, and will likely occur at a lawyer's office.



Types of Service

- **The Basics:**
 - **Subpoenas may be issued by the following people involved in the legal case associated with the subpoena:**
 - the judge presiding over the legal proceedings
 - the clerk of the court where the lawsuit has been filed
 - a private lawyer representing one of the parties in the lawsuit
 - a government lawyer such as the Attorney General or District Attorney (Note that the Attorney General and District Attorney can issue a subpoena during an investigation, before initiating a legal case)



You've Been Served: Now What

When Served: Do Not Discard ANY Paperwork!

- It contains very important information about your requirements to respond to this action against you.
- Throwing away the paperwork **will not** make the underlying matter go away





You've Been Served: Now What

- **Initial Contact**

- **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.



What's Most Important

- **Some of the most important steps a corporation can take in this post-Enron world we live:**
 - Having sound policies and procedures in place
 - Properly training key staff on what to do when law enforcement calls
 - Understand the language





What's Most Important

- **Having a Response Policy:**
 - 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.



What's Most Important

- **Having a Response Policy:**
 - 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.



What's Most Important?

- **Having a Response Policy:**
 - 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 reached via text or telephone in case of an emergency.



What's Most Important?

- **Having a Response Policy:**
 - 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.





What's Most Important?

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



What's Most Important

- **Initial DP Steps:**
 - Ascertain the identity of the agents and their respective agencies (whether state and/or federal).
 - Request to see the credentials of the agents—the privacy rights of a company's employees, clients, and/or patients demand it.
 - Ask for business cards. If business cards are not available, the agents' names and phone numbers should be written down.
 - Inquire as to the nature of the agents' visit.
 - Ascertain the identity of the prosecutor assigned to the investigation if the name is available.



What's Most Important

- **Initial DP Steps:**
 - Ask why the investigation was initiated.
 - Indicate to the agents that it is the corporation's intention to fully cooperate with the authorities in their investigation.
 - 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.
 - Provide the agents with counsel's contact information and
 - In the case of a request, promptly make arrangements for the agents to speak with counsel.



What's Most Important

- **Initial DP Steps:**

- 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.
- 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.



What's Most Important

- **Ask if the company is a target or a subject?**
 - 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 is “a person whose conduct is within the scope of the grand jury’s investigation.”





What's Most Important

- **Ask if the company is a target or a subject?**
 - **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.





What's Most Important?

- **What if it is a telephone call?**

- **The corporate representative who receives the initial telephone call should:**

- Ascertain the name of the government agent and the agency he represents;
- 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;
- Advise the agent that a corporate representative will immediately return his call; and
- Have the DP promptly return the call, preferably in the presence of or after having spoken with in-house counsel and outside counsel.



What's Most Important

- **What if it is a telephone call?**
 - 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.





What's Most Important

- **What if it is a Government Visit?**
 - **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.



What's Most Important

- **What if it is a Government Visit?**

- **Contact with Employees:**

- 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, employees will often speak with agents because they are not aware that they have the choice to refuse.



What's Most Important

- **What if it is a Government Visit?**

- **Contact with Employees:**

- 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, organizations must decide whether the employee will need to obtain independent counsel and whether the company will provide that counsel.
- Interviewing management poses different issues because they have the ability to bind the company by what they say or do.



What's Most Important

- **What if it is a Search Warrant?**
 - **Follow the process for contacting the DP:**
 - Agents are willing to wait a little bit for the DP but a noticeable time lapse may create suspicion. A timely response is critical.
 - **Do not destroy any documents or materials that could be considered evidence except in keeping with company internal rules regarding document destruction.**





WHISTLEBLOWERS



- **What if a Whistleblower is involved?**
 - **A *whistleblower* is a person who exposes any kind of information or activity that is deemed illegal, unethical, or not correct within an organization that is either private or public**
 - ***Qui tam* lawsuits are a type of whistleblower lawsuit that is brought under the False Claims Act, a law that rewards whistleblowers in successful cases where the government recovers funds lost to fraud.**
 - ***Qui tam* is short for a Latin phrase, “qui tam pro domino rege quam pro se ipso in hac parte sequitur” that roughly translates to “he who brings an action for the king as well as for himself.”**



What's Most Important

- **It is illegal to retaliate against a Whistleblower**
 - **Retaliation is taking any materially adverse action against the employee and includes:**
 - Firing the employee
 - Giving them negative evaluations
 - Disciplining or demoting them
 - Reassigning them
 - Reducing their pay
 - **Consequences of Retaliation:**
 - Severe penalties
 - **Better to place the person on administrative leave**
 - **Even better – have an Anti-Retaliation Policy**





What's Most Important?

- **Retaliation is on the rise – 2016 EEOC Statistics (in number of cases):**
 - Retaliation: 42,018 (45.9 percent of all charges filed)
 - Race: 32,309 (35.3 percent)
 - Disability: 28,073 (30.7 percent)
 - Sex: 26,934 (29.4 percent)
 - Age: 20,857 (22.8 percent)
 - National Origin: 9,840 (10.8 percent)
 - Religion: 3,825 (4.2 percent)
 - Color: 3,102 (3.4 percent)
 - Equal Pay Act: 1,075 (1.2 percent)
 - Genetic Information Non-Discrimination Act: 238 (.3 percent)



What's Most Important?

- If you are concerned about unethical behavior or possible fraudulent behavior, say something!



- This requires fostering a “speak-up” culture.



TAKEAWAYS

- **Have a policy in place for when the organization is served**
- **Have a communication plan**
- **Understand if a whistleblower is involved**
- **Do not retaliate**
- **Presentation is available for download:
pointcompliance.com/served**



OUR TIME IS UP!

Questions?



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