

The logo consists of the text "K&L GATES" in white, uppercase, sans-serif font, centered within a solid orange square. This square is positioned in the upper left quadrant of the slide, overlapping a blue background that features a bokeh effect of light spots.

K&L GATES

Dealing with the Complex Issues that Arise When Responding to SEC Subpoenas for Documents

Luke T. Cadigan
Stephen J. Crimmins
K&L Gates, LLP

Speakers



Luke T. Cadigan



Stephen J. Crimmins

AGENDA

- SEC's new approaches to enforcement
- SEC subpoenas and voluntary requests
- Critical first steps
- Preservation and collection of documents
- Reaching out to the SEC
- Ways to reduce costly volume of production
- Addressing privilege issues
- SEC Data Delivery Standards
- Freedom of Information Act (FOIA) protections
- Cover letter and production
- Other issues that arise

SEC'S NEW APPROACHES TO ENFORCEMENT

- New leadership including numerous former prosecutors
- SEC professing and demonstrating aggressive enforcement agenda
- Will now pursue “even the smallest infraction”
- Staff can now issue subpoenas more quickly and easily
 - Because Enforcement has delegated authority, SEC approval is no longer necessary
- Particular focus on investment advisers (hedge funds, private equity funds, mutual funds), financial statement and accounting fraud, insider trading, microcap fraud, and market structure violations
- Suggests increased number of subpoenas

SUBPOENAS AND OTHER REQUESTS

- Subpoenas
 - Impose legal obligation to comply
 - SEC may go to federal court to secure compliance
 - SEC need only show the subpoena is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant
 - Technically, sanctions for failure to respond may include a fine of up to \$1,000 and/or imprisonment for up to a year
 - Party may go to federal court to challenge the subpoena
 - Challenges are rarely successful but extreme circumstances may provide a basis
 - Would require party to disclose publicly the investigation

SUBPOENAS AND OTHER REQUESTS

- Requests to regulated entities
 - Regulated entities such as registered investment advisers and broker dealers must provide certain information, if requested, even without a subpoena
 - Failure to provide mandated documents can result in fines, imprisonment, suspensions, bars, and other sanctions
- Voluntary requests for information
 - Consider treating them like subpoenas
 - SEC staff can quickly get authorization for a subpoena
- SEC forms 1662 and 1661 provide cautionary disclosures, including possibility of sharing documents with other authorities

FIRST STEPS

- Read the subpoena or request
 - To varying degrees, it will indicate what the SEC is investigating
 - Also, in case of a subpoena, consider requesting a copy of the SEC's formal order of investigation under Rule 7(a) of the SEC's Rules of Practice
 - Check date it was sent and deadline for response
 - Staff involved may indicate if it is a specialized unit case
 - Look at scope of the subpoena and start considering issues and challenges raised
- Deal with it quickly – Do not sit on it
- Designate a point person to oversee collection effort
- Handle it internally or engage outside counsel as appropriate to your resources and nature of inquiry

PRESERVATION AND COLLECTION OF DOCUMENTS

- Keep a record of all steps taken in the document preservation and collection process
- Talk to your IT staff or service provider about preserving documents on system/server
- Turn off automatic document deletion processes
- Depending of nature of the subpoena/inquiry, make copies of specific hard drives, etc.
- Send litigation hold to all persons that may have responsive documents
- Have persons with responsive documents provide them to point person
- Segregate documents by custodian and/or as kept in the ordinary course of business

PRESERVATION AND COLLECTION OF DOCUMENTS

- As appropriate, formulate and use a list of key word searches to locate responsive emails and other searchable documents
 - Make sure to save a list of key word searches used
- You will typically need to ask people multiple times for documents and then also need to check to make sure you have everything
 - If documents are missed, the Staff will not believe your production efforts were adequate, and it will change the tone of the investigation
- Consider whether documents beyond scope of the subpoena should be produced to ensure proper context is provided

REACHING OUT TO THE SEC

- Preferable to wait until you have started the collection process and have a sense of the volume of documents and other production issues and challenges
- Comforting to SEC Staff to know that firm/individual is complying and that there is a contact person
- Initial discussion gives important first impression
 - Preview helpful facts/documents if appropriate
- Negotiate narrowing of the scope of the subpoena as appropriate in light of challenges
 - Choose your battles carefully

REACHING OUT TO THE SEC

- If necessary, seek an extension that is reasonable under the circumstances and/or a rolling production
 - As practical matter, SEC Staff has no recourse if one misses a deadline, but delay can affect view of cooperation
- Confirm any agreements or understandings with staff in writing before acting
- Inform staff of problems or delays as they arise
 - Serves to keep expectations realistic, and demonstrates good faith as you work through problems

WAYS TO REDUCE VOLUME OF PRODUCTION

- Steps to consider:
 - Remove exact duplicates of emails among custodians
 - Produce longest email in chain, but remove lesser included emails
 - Exclude spam or blast emails
 - Other reasonable steps may become apparent
 - For example, an overbroad subpoena for five months of email from a custodian may yield hundreds of thousands of emails when the SEC may be interested only in those few related to a specific topic
- Any narrowing of a subpoena should be cleared with the SEC Staff in advance and reflected in the cover letter and/or other correspondence
- All excluded documents should be preserved

PRIVILEGED DOCUMENTS

- Prepare a list of all inside and outside counsel with their email addresses
- Use the list, as well as key words as appropriate, to search for and segregate potentially privileged emails and other searchable documents
- Review potentially privileged documents to ensure privilege actually attaches
- Consider entering into clawback arrangement with the SEC to provide for return and non-waiver of privileged documents inadvertently produced

ATTORNEY-CLIENT PRIVILEGE

- Elements:
 - A communication
 - Made between privileged persons
 - In confidence
 - For the purpose of obtaining or providing legal assistance for the client
 - Restatement (Third) of the Law Governing Lawyers § 68
- Waiver
- Common interest

SEC DATA DELIVERY STANDARDS

- SEC requests documents to be produced to Enforcement's Centralized Production Unit (ENF-CPU) in accordance with SEC Data Delivery Standards (i.e., seven single-spaced pages of technical requirements)
- Requests all data be produced in structured format prepared for Concordance®
- All scanned paper, email, and native file collections should be converted/processed to TIFF files, Bates numbered, and include fully searchable text

SEC DATA DELIVERY STANDARDS

- Text and metadata of emails and attachments and native file collections should be extracted and provided in .DAT file using fields and format set by SEC
- Standards provide directions for production of audio files, video files, and email native files
- Electronic trade and bank records and phone records should be provided in Excel spreadsheets or delimited text files

FOIA PROTECTION

- Cover letter and each page of the documents to be produced should contain, at a minimum, “FOIA Confidential Treatment Requested by ABC, Inc.”
- Also include in cover letter language making clear request that the documents be treated as confidential and non-public under FOIA (5 U.S.C. § 552) and applicable regulations adopted by the SEC (including 17 C.F.R. § 200.83)
- Request notification and an opportunity to contest disclosure if the documents are the subject of a FOIA request
- Cite grounds for confidential treatment under FOIA (e.g., business confidentiality, containing sensitive information, disclosure of which would be detrimental to the firm)
- Copy SEC FOIA Officer

COVER LETTER AND PRODUCTION

- Read carefully the instructions in the subpoena and cover letter that accompanied it
- Follow the instructions as appropriate under the circumstances, e.g.:
 - Provide narrative description describing what was done to identify and collect documents responsive to the subpoena
 - State whether individual/entity has met its obligations under subpoena
- Consider providing descriptions or other discussion as appropriate to provide context for documents provided
- Describe any steps taken to narrow scope of subpoena
- Include FOIA protection language
- Encrypt production and provide password by separate email or letter
- Be prepared for follow-up questions and requests

OTHER THINGS SEC MAY INSIST ON

- Privilege log
- Business record certification (under Rule 902 of Federal Rules of Evidence)
- Certification of Completeness of Production
 - Sought from settling parties

OTHER ISSUES

- “Forthwith” subpoenas
 - Demanding immediate production of documents and/or electronic storage devices
 - SEC policy requires good-faith belief that responding party
 - is uncooperative or obstructive
 - a flight risk
 - may destroy, alter or otherwise falsify records
 - There are often good arguments in favor of less aggressive means of production
- Production of privileged documents (such as internal investigation materials) pursuant to confidential agreement
 - Some courts have held that such productions waive privilege

OTHER ISSUES

- Fifth Amendment privilege
 - Does not apply to corporations or corporate records
 - The fact that the contents of documents may be incriminating does not provide a basis for assertion of Fifth Amendment privilege to refuse production
 - However, the *act of producing* documents itself may constitute an incriminating communication sufficient to trigger the privilege where it provides information about the existence, custody, or authenticity of the documents produced

OTHER ISSUES

- Disclosure of subpoena
 - In general, no requirement to disclose fact of SEC investigation or subpoena
 - However, it may trigger contractual disclosure obligations to clients or other third parties
 - Do not mislead investors as to fact of subpoena or investigation
- Insurance coverage
 - Check D&O policy terms
- SEC jurisdiction over foreign entities
- SEC Enforcement Manual
 - <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>

QUESTIONS?

Luke T. Cadigan

Luke.Cadigan@KLGates.com

Stephen J. Crimmins

Stephen.Crimmins@KLGates.com

K&L GATES