

**Playing with Fire:**  
What to do When the  
Government Comes Calling ...  
and When You May Need to  
Call the Government

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**KEKER**  
**VAN NEST**  
**& PETERS**

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# Presenters

# AGENDA

1. Current Landscape
2. When the Government Comes Calling
  - 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:  
Aggressive  
Pursuit of White-  
Collar and  
Corporate  
Crime, COVID  
Notwithstanding





# Increased Scrutiny

**The Recorder**  
March 4, 2019 · 🌐

San Francisco U.S. Attorney David Anderson has announced his new leadership team for the office and made a number of moves aimed at boosting the number of cases the office can prosecute and the speed with which it can handle them.



LAW.COM

**San Francisco US Attorney Nar  
Fraud 'Strike Force'**

**The Recorder** @RecorderTweets · Sep 16

San Francisco US Attorney Names No. 2, Launches Securities Fraud Section



San Francisco US Attorney Names No. 2, Launches Securities Fraud Sect...  
The moves are part of U.S. Attorney David Anderson's ongoing efforts to speed up prosecution timelines.



15  
19

# Enforcement Trends and Priorities

## Trade Secret Theft

--*United States v. Levandowski* (Waymo / Otto)

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

## Computer Hacking

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

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

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

## Cross-Border Focus

--*United States v. United Microelectronics*

--HP / Autonomy Investigation

## Hardball Tactics

“Full range of tools”: wiretaps, search warrants, and arrest warrants

*--Example: Insider trading cases*

RICO, Controlled Substances Act, and other “blue collar” criminal statutes

*--Example: Varsity Blues*

*--Example: Insys Therapeutics*

*--Example: JP Morgan*



# 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*



# 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

# 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

- Not generally available to corporations

- Not apply to corp. documents held by  
individual

FOIA protection

## 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



*"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

False or Misleading Statements

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

Omissions / Failure to Disclose

--*United States v. Craig*

--*United States v. Bonds*

Unprepared Responses

## Know the Risks



# 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."*



## Search 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**

## 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 the suspected crime?

**Who** would you call?

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

## 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](http://www.fbi.gov)    [www.ice.gov/iprcenter](http://www.ice.gov/iprcenter)***

# Calling in the Government

## Assess the Situation

# 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**

# 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

## Weigh the Risks and Benefits

### Benefits of Government Involvement:

- Greater consequence for wrongdoers and deterrent effect
- Greater investigative tools
- Obtaining and Preserving evidence
  - Government preservation requests to ISPs
  - Access to travel plans into the US
  - Search and seizure of documents, computers, phones, thumb drives

# Calling in the Government

## Weigh the Risks and Benefits

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**



## 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, 2

October 21, 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 i 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

## 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](http://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.

Careful **communications** with DOJ

**Choose** your **witnesses** wisely

Keep parallel investigations **independent**  
**but aligned**

Keep **documentation of losses** and costs of  
cooperation

## Calling in the Government

**Coordination  
Tips to  
Achieve Best  
Outcomes**

Thank You!



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