



KIRKLAND & ELLIS

PRESENTATION FOR

# Chubb Preferred Securities Panel

2017

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## Securities & Shareholder Litigation

“Top-notch, smart and knowledgeable attorneys who are incredibly responsive to the client’s questions and business concerns.”

“They are excellent – they have a very talented bench across the board.”

Chambers USA, 2015

Kirkland’s securities litigators have exceptional depth of knowledge representing clients in high-profile matters including:

- Securities class action litigation
- Shareholder derivative litigation
- Merger, acquisition and proxy litigation
- Structured finance litigation
- ERISA-related litigation
- Investigations and enforcement actions by the Department of Justice (DOJ), the Securities and Exchange Commission (SEC), Financial Industry Regulatory Authority (FINRA), the U.S. Commodity Futures Trading Commission (CFTC), the Consumer Financial Protection Bureau (CFPB), and other federal, state and non-U.S. regulators
- Internal investigations

Among other current matters, Kirkland has represented Facebook and General Motors in class action litigation arising out of their respective initial public offerings, Royal Bank of Scotland, Ally, and First Horizon in numerous cases brought by institutional investors involving the sale of residential mortgage-backed securities, and issuers such as BP, Dow, Hecla Mining, Motorola, and Teva Pharmaceuticals in securities class action and derivative litigation. The Firm also has successfully represented many officers and directors in securities and derivative cases, including a recent dismissal for the directors of SAIC Inc., a leading information and technology company.

Kirkland often represents both purchasers and sellers, as well as their boards of directors, in connection with challenged mergers, tender offers and leveraged buyout transactions. These include actions in both state and federal courts and proceedings involving requests for preliminary or other emergency injunctive relief, as well as damages.

Kirkland lawyers also routinely represent their clients in investigations and enforcement actions brought by the SEC or other federal and state regulators, which may be concurrent with private litigation. These investigations and lawsuits often involve allegations of violations of the federal securities laws, such as allegations of false or misleading disclosures to shareholders, insider trading and other types of financial misconduct.

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## Select Securities & Shareholder Litigation Matters



***In re General Motors Company Shareholder Derivative Litigation*** (E.D. Mich.; Del. Ch.; Del.; Mich. Cir. Ct.)

Representing General Motors and certain of its current and former officers in multidistrict shareholder derivative litigation concerning its response to alleged ignition switch failures in several models of GM cars. In 2015, Kirkland prevailed on motion to dismiss in the Delaware action and successfully defended the result before the Delaware Supreme Court in 2016. The Michigan cases remain pending.



***In re Facebook, Inc. IPO Securities and Derivative Litigation***, MDL 2389 (S.D.N.Y.)

Representing Facebook, Inc. and its board of directors in multidistrict litigation comprised of more than 40 shareholder class actions and derivative lawsuits that were filed around the country relating to the company's \$15 billion IPO. Kirkland successfully won dismissal and/or removal of all state cases and obtained dismissal of the derivative suits in 2013 and 2014. On appeal in 2015, the decision was upheld and all claims were dismissed with prejudice. Kirkland continues to defend Facebook with respect to the remaining Securities Act claims.



***In re SAIC Inc. Derivative Litigation*** (S.D.N.Y.; 2d Cir.)

Represented the board of directors of SAIC, Inc. (n/k/a Leidos Holdings Inc.) in five consolidated shareholder derivative lawsuits arising out of the CityTime implementation project. Won complete dismissal with denial of leave to replead in 2013. Affirmed on appeal in 2014. In 2016, the Second Circuit denied the company's bid for a rehearing in the instant suit, leaving the 2016 ruling in place.



***In re BP p.l.c. Securities Litigation***, MDL 2185 (S.D. Tex.)

Representing BP in securities fraud multidistrict litigation (MDL) alleging BP and other defendants materially misrepresented BP's stock prior to and immediately following the Deepwater Horizon explosion on April 20, 2010. In 2015, BP won the dismissal of ERISA duty-to-monitor claims in a member case within the larger MDL. A class settlement received preliminary approval in 2016. Kirkland will continue to represent BP with respect to any settlement objections and related proceedings.



***Levine, et al. v. Liveris, et al.*** (E.D. Mich.)

Represented Dow Chemical and its directors and officers in a shareholder derivative action involving two separate sets of allegations attacking the decisionmaking and operations of the company. In 2016, the court accepted all of Kirkland's arguments, dismissed the action in its entirety, and entered judgment for the defendants on all claims.



***Assad v. Mines Management Inc., et al.*** (E.D. Wash.); ***Schubert v. Dobbs, et al.*** (Wash. Super. Ct.)

Represented Mines Management, Inc. in two cases seeking to enjoin a shareholder vote on the proposed acquisition of the client by Hecla Mining Co. In 2016, Kirkland defeated the plaintiffs' motions for expedited discovery and injunctive relief, and both cases were dismissed in their entirety.

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## Select Securities & Shareholder Litigation Matters

**CONFIDENTIAL**

### ***Confidential Stockholder Derivative Litigation*** (Del. Ch.)

Represented a Fortune 50 Pharmaceutical company's current directors and directors of its former parent in a shareholder derivative suit alleging that the directors improperly sought to shield themselves from potential liability and committed waste when they approved a general mutual release of liability as part of the company's spin-off from its former parent. The plaintiffs sought to set aside the release to pursue a claim for alleged violations of federal law in connection with the former parent's marketing of a pharmaceutical product. In 2015, the court granted the defendants' motion to dismiss, adopting all of Kirkland's arguments.



### ***Park Employees' and Retirement Board Employees' Annuity and Benefit Fund of Chicago, et al. v. Richard Smith, et al.*** (Del. Ch.)

Representing BioScrip and certain current and former directors and officers in a derivative action alleging that certain defendants breached their fiduciary duties with respect to BioScrip's public disclosures, oversight of company operations, secondary stock offerings and stock sales. In 2016, the court dismissed the lawsuit in a seminal ruling in which the court held — for the first time — that a change in a company board shortly after the filing of a derivative complaint required that demand excusal be evaluated as to the composition of the board after the turn over in directors. The plaintiffs filed an amended complaint, and BioScrip's motion to dismiss is pending.



### ***In re Hecla Mining Co. Derivative Shareholder Litigation I*** (D. Idaho)

Represented Hecla Mining Company and its officers in a shareholder derivative action alleging that the company and its CEO and CFO misled investors regarding the safety of the company's Lucky Friday mine, which experienced three significant accidents in 2011. Won motion to dismiss, with leave to amend, in 2014. Shortly thereafter, the plaintiffs voluntarily dismissed the case.



### ***Oldfather, et al. v. Ells, et al.*** (Del. Ch.)

Represented Chipotle Mexican Grill, Inc., its audit committee, and certain executives in a shareholder derivative suit alleging breaches of fiduciary duties and unjust enrichment in connection with stock-based incentive bonuses paid to Chipotle executives and its board. In 2016, Kirkland obtained complete dismissal of the case on the basis that the business judgment rule exempts the bonus decision from challenge.

### ***Richey, et al. v. Ells, et al. and Chipotle; Nelson, et al. v. Ells, et al. and Chipotle; Schmitz, et al. v. Ells, et al. and Chipotle*** (D. Colo.)

Represented Chipotle Mexican Grill, Inc. and its board of directors in a series of derivative lawsuits in which plaintiffs asserted "Caremark" claims arising out of investigations by the U.S. Securities and Exchange Commission, the United States Attorneys' Office, U.S. Immigrations and Customs Enforcement and others. The matter settled favorably in 2014.

# Government, Regulatory & Internal Investigations

## Most-decorated Firms

Litigation Power Rankings, The American Lawyer, 2016

Businesses and individuals today confront a challenging enforcement environment, and with confidence turn to Kirkland & Ellis for sophisticated and cost-effective representation. Our firm's expertise is uniquely well-suited to handle the primary and collateral consequences of government investigations, whether it be pre-investigation prevention and mitigation, internal investigations or defense of a government investigation, or resolution through settlement or trial.

Today's difficult enforcement environment manifests itself in many ways. Federal and state enforcement authorities are using more aggressive techniques in their investigations, such as wiretaps, paid whistleblowers and sweeping document subpoenas. Investigations are also increasingly complex, as multiregulator investigations become more and more common. U.S. regulators participate in formal task forces or otherwise coordinate their investigations with their federal and state colleagues, often accompanied by parallel congressional hearings. Foreign regulators are also an increasing presence, which presents complex issues of foreign law and regulation, privilege, data protection, labor law, multiple representation and investigation protocol.

Business misconduct is also increasingly viewed as a proper subject of the criminal law. Conduct that historically was either not prosecuted, or addressed through civil enforcement only, is now the subject of investigations by criminal authorities. Sometimes strict liability statutes are available to government enforcement authorities. The consequences of criminal violations are grave; for companies, wrongdoing by even a small number of employees may result in criminal charges against an entire company, an outcome that, while uncommon, may well present enterprise-level risks for an institution. Criminal cases often trigger parallel state and federal civil suits, as well as derivative and false claims suits.

Settlements have also become more harsh. A settlement may now include admissions of wrongdoing, debarment and other business restrictions, as well as extended periods of post-settlement government monitoring and reporting. Admissions, in particular, can impose significant costs on a company, including the loss of defenses to class action and shareholder derivative litigation, denial of insurance coverage, competitive disability in bidding and RFP processes, and even the threat of follow-on parallel criminal charges.

## Kirkland's Government, Regulatory & Internal Investigations attorneys include:

- Former U.S. Deputy Attorney General and federal judge in the U.S. District Court for the Northern District of Illinois
- Former Director of the SEC's Division of Enforcement and Chief of the Securities and Commodities Fraud Task Force in the U.S. Attorney's Office for the Southern District of New York
- Former Assistant Chief of the FCPA Unit of the U.S. Justice Department;
- Former chief and several deputy chiefs from respective U.S. Attorney's offices in New York and Chicago
- Former Senior SEC Enforcement Attorney with extensive SEC experience, including Chief of the Structured and New Products Unit
- Former Assistant Director of the SEC's Division of Enforcement
- Former head of the U.K.'s Serious Fraud Office, bribery and corruption, and international assistance units, resident in the London office
- Former Capitol Hill senior staff members, on both the Democratic and Republican sides
- Many former federal prosecutors and SEC Enforcement staff

# Government, Regulatory & Internal Investigations

Whether civil or criminal, enforcement investigations are increasingly expensive to resolve. Fines and penalties in the hundreds of millions and even billions of dollars are more and more common, often reflecting the excessive aggregation that can occur in multiregulator settlements. Adding to the sanctions are claims by whistleblowers operating under false claims acts or similar regimes.

## Prevention and Mitigation

This difficult enforcement environment places a premium on prevention of wrongdoing. Not only is the cost of after-the-fact resolution increasing, but companies not charged with wrongdoing can suffer great harm simply through the revelation of an investigation, including reputational damage, stock price drops, and the filing of follow-on shareholder derivative and class action suits.

Kirkland lawyers are in the prevention business – the firm is well-versed in assessing legal and compliance risk in multiple programmatic areas and then devising internal compliance and control programs that allocate limited compliance resources in a prudent and cost-effective manner to the organization’s highest risks. Kirkland’s focus is on organizational structure, sensible policies, individual roles and responsibilities, supervisory controls, risk management, whistleblower and other early-detection controls, and compliance programs — all structured to allow for successful business performance.

With Kirkland’s assistance, companies are better able to integrate risk-based, properly resourced compliance programs into their business operations. These programs increase competitiveness and profitability over time. They not only increase the odds of preventing violations in the first place, but they also position companies to legitimately assert that any putative misconduct was aberrational and thus should not properly be attributed to the corporate entity.

## Investigations

If allegations of misconduct are made, Kirkland lawyers have the knowledge and experience to conduct a comprehensive internal investigation and to defend and represent the company if a more formal, adversarial government-led investigation is initiated. Kirkland is experienced in the many complex investigative issues that can arise, such as confidentiality and privilege, data protection and parallel civil litigation. Kirkland lawyers reach credible and well-founded conclusions, and work collaboratively with clients to consider options under various disclosure regulations and government contracting programs.

## Fearsome Foursome: The Most-feared Firms in Litigation

Litigation Outlook, BTI, 2013-2017

## Named #1 Firm in Litigation Powerhouse Rankings

Law360, 2016

## GIR 100 and GIR 30

Global Investigations Review, 2016

## Go-To Firm

Who Represents America’s Biggest Companies?, Corporate Counsel, 2002–2016

## Tier 1 Criminal Defense: White Collar

- Chicago
- Los Angeles

U.S. News and World Report, Best Lawyers®, 2017

## Tier 1 Litigation: Regulatory Enforcement (SEC, Telecom, Energy)

- Nationwide
- Chicago

U.S. News and World Report, Best Lawyers®, 2017

## Government, Regulatory & Internal Investigations

Kirkland lawyers have represented corporations, their boards of directors, and individual corporate leaders in numerous significant investigations and prosecutions. These matters have variously included allegations of:

Health Care Fraud	Environmental Crimes	Privacy Issues
Securities Fraud	Export/Import & OFAC	U.K. Bribery Act Violations
FCPA Violations	Violations	RICO Violations
Government Contracting	Bank Fraud	Mail & Tax Fraud
Fraud	Commercial Bribery	False Claims (qui tam) &
Money Laundering	Criminal Antitrust	Whistleblower Retaliation
Financial & Accounting	Violations	Violations
Fraud	Obstruction of Justice	

### Case Resolution

Kirkland is renowned for its experience in complex litigation, arbitration and white-collar defense. Overall, the Litigation Practice Group comprises of approximately 500 attorneys throughout the Firm's offices worldwide, which represents clients in trial and appellate courts at the federal and state levels, before administrative tribunals, and in arbitrations and other dispute resolution proceedings.

Kirkland's extensive trial expertise is more valuable than ever in the current environment. The increasing cost of settling with the government, combined with the government's professed willingness to try more cases, requires that counsel prepare for the possibility of trial. Such preparation also provides an increased chance of achieving more successful and cost-efficient settlements through early identification of weaknesses in the government's legal theories, in the credibility of its witnesses, and in its narrative at trial. If the case cannot settle on appropriate terms, and thus proceeds to trial, Kirkland lawyers are second-to-none in their courtroom capabilities.

Lawyers in all of Kirkland's offices have tried cases, successfully to verdict or judgment, in virtually every business segment and substantive area including securities and shareholder matters, accountant liability, antitrust and competition matters, environmental matters, appellate class action, ERISA/benefits, insurance coverage, and international arbitration and ADR.

Finally, Kirkland's expertise reflects both geographic and subject-matter depth. Kirkland currently represents numerous multinational entities in administrative, regulatory and criminal proceedings before the European Union and other international governing agencies. For instance, Kirkland has a large Asian-based enforcement defense practice, composed of a team of multilingual attorneys who work closely with former federal prosecutors frequently in the region. Kirkland also has one of the most senior former English enforcement prosecutors, resident in Kirkland's London office, who helps lead the Firm's international teams.





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