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Kirkland Alert

## Minnesota District Court Decision May Open Door to Broad Discovery of Confidential Presentations to Government Investigators

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Companies facing government investigations frequently choose to have their counsel make presentations to the government about the relevant facts and law, including whether a potential violation of the law has occurred and the appropriate amount (if any) of damages or penalties. Such discussions and presentations are commonplace and are generally encouraged by the government.

A recent decision by the U.S. District Court for the District of Minnesota, in the context of a False Claims Act investigation and *qui tam* litigation, may increase the risk that such presentations would be discoverable in subsequent civil litigation. While the District of Minnesota decision relates specifically to a False Claims Act scenario, its holding potentially could be extended to other types of investigations where presentations to the government address subject matter relevant to other civil litigation. Companies who are responding to government investigations should consider this development and discuss it with their counsel before making decisions about whether, how and what to present to government investigators.

Defendants Commonly Make Presentations to the Government in *Qui Tam* Investigations Under the False Claims Act and Other Contexts

Sealed *qui tam* complaints alleging potential Anti-Kickback Statute ("AKS") and False Claims Act ("FCA") violations typically result in subpoenas and civil investigative demands to companies named as defendants in the suits. Companies defending against such allegations often make presentations to the government in an effort to provide relevant factual and legal context, demonstrate that any putative AKS/FCA theory lacks merit, or discuss pre-litigation settlement possibilities. While such

presentations are especially important in the *qui tam* context, where the government must decide whether to intervene in a case originally brought by a private relator, they are also common in numerous other types of government investigations as a way to present the company's position to the government in a confidential, out-of-court setting.

Companies typically seek to ensure confidential treatment of such presentations through a variety of means, including requesting Freedom of Information Act ("FOIA") confidential treatment, characterizing the materials as subject to Federal Rules of Evidence 408 and 410, and by not providing the government attorneys with paper or electronic "leave behind" copies of the presentations. Companies also rely upon 31 U.S.C. § 3733(i)(2)(c), which places limits on the disclosure of confidential information obtained in response to civil investigative demands under the FCA, and 18 U.S.C. § 1905, which generally prohibits the disclosure of confidential business information and trade secrets obtained by government officials in the performance of their official duties.

### Prior Courts Considering the Issue Have — at the Government's Urging — Set a High Bar for Discovery of Presentations to the Government

In *U.S. ex rel. Underwood v. Genentech, Inc.*, Case No. 2:03-cv-03983 (E.D. Pa. 2010), the U.S. District Court for the Eastern District of Pennsylvania denied a *qui tam* relator's motion to compel discovery of a series of presentations made by defense counsel to the government during an FCA investigation. The *Underwood* court's decision appears to rely heavily on a statement of interest filed by the government itself urging that the presentations be protected from discovery. The government's statement of interest emphasized that allowing discovery of such presentations would have a "chilling effect": that is, it would discourage defendants from making such presentations based on concerns that any statements or admissions could later be used against them by private litigants, even if their position was persuasive to the government and led to a declination to intervene. It would also have a chilling effect on the government itself, limiting its ability to have frank discussions with defense counsel based on the potential for such communications to be disclosed to *qui tam* relators and ultimately to the public. This chilling effect, the government argued, would impede its ability to investigate and resolve *qui tam* claims brought on its behalf.

The government also argued against the relator's claim that he was entitled to the presentations because, by prosecuting a non-intervened *qui tam* case where the government was the real party in interest, he "stood in the shoes" of the government.

The government argued, to the contrary, that during its investigation of the *qui tam* relator's allegations and deliberations regarding whether to intervene, its interests were not necessarily aligned with those of the relator: "the government's interest is in determining whether justice requires intervention in the allegations presented by the relator." This process necessitated "a robust give and take process in which the government and the defendant candidly discuss the relevant arguments . . . until the government reaches a point where a truly educated decision can be made."

The *Underwood* court largely adopted the government's arguments in denying the motion to compel production of the presentations. The *Underwood* court noted the strong policy interest in promoting candid settlement discussions, and also noted that the underlying factual information discussed in the presentations could be gleaned from documents already produced by the defendants. Therefore, the *Underwood* court denied the motion to compel because the relator had not demonstrated any compelling need that would override the policy interest in maintaining the confidentiality of the presentations.

#### The District of Minnesota's August 2019 Decision in *U.S. ex rel. Higgins v. Boston Scientific* Adopts a Broader Approach to Discovery of Presentations to the Government

In *U.S. ex rel. Higgins v. Boston Scientific*, No. 11-cv-2453 (D. Minn. Aug. 28, 2019), the U.S. District Court for the District of Minnesota ordered the defendant in a non-intervened *qui tam* litigation to produce all presentations to the government by the defendant's counsel, and documents related to those presentations, in response to discovery requests by the relator. The *Higgins* court rejected Boston Scientific's argument that settlement-related communications are discoverable only upon a showing of substantial need, noting that the Eighth Circuit had not addressed the issue of a heightened standard for discovery of settlement-related communications. The *Higgins* court therefore applied the general standard under Federal Rule of Civil Procedure 26, which permits discovery of any non-privileged material relevant to any party's claim or defense. The court also rejected Boston Scientific's arguments based on Federal Rule of Evidence 408, holding that Rule 408 governs only the admissibility of settlement communications to prove liability, while discovery is not limited only to admissible documents.

Next, the court rejected Boston Scientific's argument that public policy requires courts to protect communications between defendants and the government in *qui tam* investigations because such communications are necessary for the government to evaluate and potentially settle *qui tam* cases. In doing so, the *Higgins* court rejected

Boston Scientific's reliance on the *Underwood* decision and the U.S.' statement of interest in that case, holding that "[t]he CID [Civil Investigative Demand] provisions of the False Claims Act, not DOJ's policy concerns in another case, govern the custody of documents shared with the government in this case." Because the FCA's confidentiality provisions with respect to materials obtained pursuant to civil investigative demands prohibited only the government from disclosing confidential materials, the *Higgins* court held that those provisions were not relevant to whether a private party could be compelled to produce its own presentations to the government.

Finally, the court rejected Boston Scientific's claim that the government presentations were protected from disclosure under the attorney work-product doctrine, holding that Boston Scientific waived any work-product protections by intentionally disclosing the materials to the government, which was the real party in interest in the *qui tam* and therefore was Boston Scientific's adversary.

### Clients Should Consider the Potential Impact of *Higgins* on Discoverability of Presentations to the Government in Civil Litigation

Parties have long assumed that they can prevent or limit discovery of confidential presentations to the government in subsequent civil litigation. While its effect going forward is uncertain, *Higgins* should give attorneys pause. The *Higgins* court gave little weight to the government's past statements against the discoverability of such presentations, and declined to require a showing of "compelling need" before ordering production of presentations to the government, instead subjecting them to the low bar applicable to general discovery under Federal Rule of Civil Procedure 26. In essence, under the rule in *Higgins*, a relator need not show any particularized need for the presentations so long as they contain some information that would be otherwise discoverable.

Clients with active government investigations – especially, but not limited to, the FCA space – should discuss the potential impact of *Higgins* on their strategic approach to discussing the merits and possible resolution of their cases with the government. While presentations to the government will almost certainly remain a key component of defense strategy, clients should be mindful that counsel for *qui tam* relators and other civil litigants may seek to capitalize on *Higgins* to obtain such presentations and utilize any admissions or work-product they contain to their advantage in litigation. This may require a reevaluation of the types of information clients choose to include in their presentations and/or the format for presenting their arguments. For example, under *Higgins*, a PowerPoint presentation displayed, even if not actually provided, to the

government is potentially discoverable. But a company would likely have stronger arguments to withhold an outline of potential arguments that formed the basis for a meeting with the government. Clients should also consider whether the content of any contemplated presentations may be relevant to other ongoing or anticipated litigation, even if it is not directly related to the specific investigation in which the presentation is made.

Clients with questions regarding the issues raised by *Higgins* should contact one of the Kirkland attorneys listed below.

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