

What to Do After Receiving a Subpoena from the SEC's Division of Enforcement

PENpoints

Given the SEC Enforcement Division's increased focus on private funds, a private fund and its employees should be familiar with the important initial steps to be taken upon receipt of an SEC subpoena.

As discussed in an earlier [KirklandPEN](#), the SEC's Division of Enforcement recently created a new investigative unit focusing on private funds, and adopted streamlined investigative processes and procedures. These developments are expected to increase the risk that a private fund or its employees will receive an SEC subpoena or otherwise become entangled in an SEC enforcement action. As a result, private funds, investment advisers and investment companies should be familiar in advance with the important initial steps to be taken if and when faced with a subpoena from the SEC's Enforcement Division.

What does receiving a subpoena mean? The Enforcement Division has authority to issue subpoenas demanding production of relevant information, either in the form of documents or witness testimony. The SEC typically issues document subpoenas—which may be directed at entities or individuals believed to have information relevant to an investigation—before requesting testimony. The SEC is under no obligation to describe the nature of its investigation, or even to disclose whether it believes anyone has engaged in any wrongdoing. The SEC does not have “targets” for its investigations, but instead considers everyone to be a “witness” until much later in the investigation. However, the SEC's document requests themselves often reveal the nature of its concerns.

What is the obligation to preserve documents? Any person (and its employees) receiving a subpoena must immediately preserve the requested documents. If a firm receives a subpoena, it must immediately take affirmative steps to insure that it and its employees preserve all potentially responsive documents, including issuing a prompt document retention notice to personnel, preserving all existing e-mails and other electronic documents, and suspending regular destruction of electronic and physical records (including backups). These actions should cover responsive materials

located either at work or at home. Destruction of responsive documents—even if inadvertent—often generates greater scrutiny than the underlying conduct.

What if the subpoena is overbroad and/or unduly burdensome? Often a subpoena requests production of a tremendous volume of information in a short time frame. Whether the subpoena is unduly burdensome or not, counsel (not the addressee of the subpoena) should contact SEC staff to acknowledge receipt of the subpoena and start a dialogue between the firm and the SEC. Counsel will then have an opportunity to discuss with SEC staff the scope of the subpoena, the priority of the categories of information to be produced, and any deadlines. A dialogue about what the staff is “really” focused on, and how the firm's information is organized, will often streamline the response. Even where the subpoena appears overbroad, the firm and its employees should immediately preserve all information requested. Collection (as opposed to preservation) efforts may be temporarily delayed until the scope of the subpoena has been negotiated with SEC staff.

Should I talk to the SEC directly? Once the SEC learns that a party is represented by counsel, it must direct all communications through counsel. Before an attorney appears on the scene, however, the SEC is free to contact individuals and entities directly and ask questions. If contacted, one should resist the urge to engage in dialogue with the SEC beyond pleasantries, and should inform the SEC that firm policies require such discussions to be coordinated through counsel. If the SEC requests an expedited or impromptu

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interview, counsel should schedule the time and place. Speaking to SEC staff prematurely could result in employees inadvertently making uninformed statements that may later prove inaccurate or incomplete.

The SEC also is free to contact former employees and other third-parties until such time as they are represented by counsel. If certain former employees are integral to the SEC's apparent area of interest, a careful decision should promptly be made as to whether counsel for the subpoena recipient should reach out to them.

Should employees discuss the subpoena among themselves? The short answer is "no." Aside from cooperat-

ing with firm counsel, employees should not discuss— orally or in writing—the subpoena under any circumstance. Ad hoc communications about the subpoena among employees are generally subject to scrutiny during the investigative process. Employees who later testify may be required to disclose with whom they spoke and what was said. Such meetings can be perceived negatively as a wrongful effort to reconcile competing recollections. Sarcastic or joking e-mails relating to the subpoena or the investigation can be taken out of context and are not appropriate. In most cases counsel should take the lead in controlling the subpoena response and any related investigation.

If you have any questions about the matters addressed in this *KirklandPEN*, please contact the following Kirkland authors or your regular Kirkland contact.

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PENbriefs

UK CRC Energy Efficiency Regulation

The UK has recently introduced a compulsory carbon emissions trading scheme for organizations with high energy consumption. The scheme will initially cover around 5,000 business operating in the UK, including retailers, hotels, utilities and others. The UK Environment Agency has indicated that it will treat a private equity firm and its portfolio as a single organization for the purposes of the scheme, so any private equity firm whose portfolio includes significant UK operations should assess whether it is required to register with the UK Environment Agency. For more details, see the recent European Edition of [KirklandPEN](#).

PENnotes

YLG 2010 Real Estate Private Equity Symposium
New York, New York
April 21, 2010

The Urban Land Institute, in partnership with Kirkland & Ellis, invite you to join them for the YLG 2010 Real Estate Private Equity Symposium. This event will focus on private equity capital markets and investment strategy as the macro economy shows recovery signals but domestic real estate, historically a cyclical lag, continues to suffer. Kirkland partner Nathaniel M. Marrs, P.C. will moderate the symposium, which will feature panelists from Aviva Investors, Lazard Real Estate Partners, LoanCore Capital and Colony Capital. To register for this event, please visit www.kirkland.com/uli.

Kirkland & Ellis' First Annual Copyright, Internet and Trademark Symposium
April 21, 2010 - New York, New York
April 28, 2010 - San Francisco, California

Join Kirkland & Ellis for the first annual Copyright, Internet and Trademark Symposium, held in New York on April 21, 2010, and San Francisco on April 28, 2010. Panel discussions will cover topics including recent copyright, trademark and Internet developments, ethical issues in the IP context and the various forums in which false advertising can be challenged.

The 30th Annual Ray Garrett Jr. Corporate and Securities Law Institute
Chicago, Illinois
April 29 - 30, 2010

The 30th Annual Ray Garrett Jr. Corporate and Securities Law Institute will take place from April 29 - April 30, 2010, in Chicago. More than 400 law firm and in-house attorneys will come together for a discussion of current issues including the capital markets today, financing and the return of the equity market, regulatory reform and the M&A market. Kirkland partner R. Scott Falk, P.C., will chair a session on "The Thawing of the M&A Market."

Kirkland & Ellis' Hedge Fund Networking Event: Market and Regulatory Trends Update
New York, New York
May 11, 2010

Join Kirkland & Ellis, Houlihan Smith & Company and Rothstein Kass for a brief update on hedge fund market and regulatory trends in Kirkland's New York

office. Panel discussions will cover topics including proposed U.S. and E.U. regulation of hedge fund managers, pending tax legislation affecting hedge funds, current SEC examination and enforcement trends and accounting and valuation developments. Presenters will include Kirkland partners Scott A. Moehrke, P.C., Nabil Sabki, Robert H. Sutton, Charles J. Clark and Kevin W. Treesh.

Kirkland & Ellis' The Supreme Court and the Future of Diversity
Los Angeles, California
May 13, 2010

The Los Angeles office of Kirkland & Ellis and partner Eva H. Davis will host a talk with distinguished professor Erwin Chemerinsky, Founding Dean of the University of California, Irvine School of Law, as he takes a look at recent Supreme Court decisions and what the Roberts court may mean for the future of diversity.

The Road from Ruin: How to Revive Capitalism and Put America Back on Top
New York, New York
May 20, 2010

This discussion and book signing, hosted by Kirkland & Ellis and the Columbia Business School Alumni Club, features Matthew Bishop, U.S. Business Editor and New York Bureau Chief of *The Economist* magazine, who is co-author of *The Road from Ruin: How to Revive Capitalism and Put America Back on Top*. Written with Michael Green, the book delves into what can be learned from financial crises of the past, from the tulip craze of the 17th century to the Great Depression and credit crisis of 2008, to help set the agenda for a reformed 21st-century capitalism. To register for this event, please visit www.kirkland.com/roadfromruin.

ACG Chicago's Is Venture Capital a Valid Asset Class?
Chicago, Illinois
May 24, 2010

This ACG program will focus on the validity of venture capital in the Midwest, nationally and globally. Kirkland partner Bruce I. Ettelson, P.C., will moderate a panel of venture GP's, who will discuss the current fundraising environment for venture funds and its implications for venture capital financing transactions.

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Private Equity Practice at Kirkland & Ellis

Kirkland & Ellis LLP's nearly 400 private equity attorneys handle leveraged buyouts, growth equity transactions, recapitalizations, going-private transactions and the formation of private equity, venture capital and hedge funds on behalf of more than 200 private equity firms around the world.

Kirkland has been widely recognized for its preeminent private equity practice. *Buyouts* magazine recently recognized Kirkland as its 2010 "Law Firm of the Year" in its "Deal of the Year Yearbook." Kirkland also received the 2009 and 2008 awards for Best Law Firm (Private Equity Deals) in North America from *Private Equity International*. Additionally, Mergermarket ranked Kirkland first by volume for North American Buyouts and Exits in its "North American Private Equity in Review for 2009," and Pitchbook named Kirkland as one of the most active law firms representing private equity firms in its "Private Equity Breakdown" in 2009.

The Lawyer magazine recognized Kirkland as one of the "The Transatlantic Elite" in 2008 and 2009, noting that the firm is "leading the transatlantic market for the provision of top-end transactional services ... on the basis of a stellar client base, regular roles on top deals, market-leading finances and the cream of the legal market talent."

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