

KIRKLAND & ELLIS

Government, Regulatory
& Internal Investigations

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 experience 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 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 Five: The Most-feared Firms in Litigation

Litigation Outlook, BTI, 2013–2018

Named #1 Firm in Litigation Powerhouse Rankings

Law360, 2016

GIR 100 and GIR 30

Global Investigations Review, 2017

Go-To Firm

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

Global Litigation Top 50

The Lawyer, 2012–2017

Tier 1 White-Collar Crime & Government Investigations

- Illinois

Chambers USA, 2017

Tier 1 White-Collar Crime

Benchmark Litigation, 2018

Tier 1 Criminal Defense: White Collar

- Nationwide
- Chicago
- Los Angeles

U.S. News and World Report, Best Lawyers®, 2018

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

- Nationwide
- Chicago

U.S. News and World Report, Best Lawyers®, 2018

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

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.

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.

Kirkland lawyers 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 extensive knowledge 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.

Financial Services

Financial Services

Representative Matters

Regulatory Matters

- Defend parties in regulatory enforcement proceedings and represent parties in connection with investigations by federal, state and industry regulators into sales practices, supervision, conflicts of interest, accounting and financial statement disclosures, trading irregularities, employment practices, records retention, anti-money laundering and foreign currency and commodities benchmarks.
- Conduct internal investigations into sales practices, supervision policies, financial controls, records retention practices, personnel decisions, compliance controls, licensing practices, trading restrictions, insider trading, anti-money laundering, accounting and financial statement disclosures, FCPA and rogue employees.

Civil Litigation

- Defend securities offering-related claims arising under the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940 and common law.
- Defend claims relating to the creation, ramping, collateral selection, selling, marketing, execution and pricing of CMBS, RMBS, CDOs, synthetic CDOs, CLOs, CBOs and credit default swaps.
- Defend Sherman Act, Commodity Exchange Act and related state law claims arising out of the alleged collusion of certain foreign exchange benchmarks and setting of spreads shown to clients and the alleged manipulation of gold and silver prices through participation in the Gold and Silver Fixes.
- Represent parties in connection with broker-dealer liquidations and the associated claims clawback and adjustment process.
- Represent parties in claims involving compensation plans, covenants not to compete and raiding of registered personnel.

Arbitrations

- Defend parties against claims related to sales practices, supervision, suitability, margin maintenance, concentrated positions, conflicts of interest, breaches of fiduciary duty, raiding and fraud.
- Pursue claims for expungement, breach of compensation agreements and enforcement of restrictive covenants for registered personnel.
- Pursue claims challenging arbitrability of disputes and scope of arbitration.

Representative Clients

3G Capital
AIG
Ally Financial
Altaris Capital
Bain Capital, Inc.
Carlyle
Citadel
Corus Bankshares
Credit Suisse
Deloitte & Touche
Deutsche Bank AG
Discover Financial Services
ESL Investments
Facebook
Golden Gate Capital
GTCR
H.I.G. Capital Management
JPMorgan Chase & Co.
KCG
Knight Capital Group
KPMG
Lincoln Financial Group
Macquarie Global
Madison Dearborn Partners
Magnetar Capital
MidOcean Capital
Morgan Stanley
New Enterprise Associates
Oaktree Capital
Pershing Square
PricewaterhouseCoopers LLP
Prudential
RBS Securities Inc.
SIPC
Selected Funds
Skandia
Spectrum Equity Investors
Summit Partners
Sun Capital Partners
The Blackstone Group
Thoma Bravo
Towerbrook Capital
UBS Financial Services Inc.
UBS Warburg
Van Kampen Investments
Vestar Capital Partners
Vista Equity Partners

Financial Services

Sample Results – Regulatory Matters

Judgment – Enforcement Division

- *In re Morgan Stanley DW Inc.* (Massachusetts Secretary of State, Securities Division)

Based on allegations of fraud, conflicts of interest, and improper sales practices, Massachusetts was seeking to rescind billions of dollars in mutual fund sales, impose fines of tens of millions of dollars, and revoke Morgan Stanley’s license to do business. After a five-week trial before the Massachusetts Securities Division, all claims against Morgan Stanley were denied with prejudice.

Judgment – Trial Court

- *SEC v. SIPC* (U.S. District Court, District of Columbia)

Represented SIPC in the first-ever case commenced against it by the SEC. SEC wanted to compel SIPC to compensate victims of a \$7 billion Ponzi scheme involving offshore CDs issued by an Antiguan bank controlled by R. Allen Stanford. After briefing, argument and an evidentiary hearing, the court denied the SEC’s application.

Settlement

- *In re Research Analyst Conflicts.*

Represented Morgan Stanley in an industry-wide investigation of alleged conflicts between investment banks and their research coverage groups. The total settlement amount paid by the eight major banks at the center of the investigation was \$875 million. Morgan Stanley paid the lowest amount of any bank — \$50 million — and was the only bank to avoid any finding of exaggerated, misleading or fraudulent research.

Sample Results – Civil Litigation

Judgment – Appellate Court

- *Credit Suisse Securities (USA) LLC, et al v Simmonds* (U.S. Court of Appeals, Ninth Circuit)

Represented Morgan Stanley and served as liaison counsel for all underwriters in 54 separate cases challenging alleged “short swing” profits in 54 IPOs. After the Ninth Circuit ruled against the banks on a statute of limitations issue pertaining to Section 16(b) of the Securities Exchange Act of 1934, Kirkland took the lead in petitioning the U.S. Supreme Court for review. The Supreme Court granted review and, ultimately, reversed the Ninth Circuit’s ruling.



Financial Services

Judgment – Trial Court

- *Straily v. UBS Financial Services, Inc.* (U.S. District Court, District of Colorado)
Represented UBS in this putative nationwide class action on behalf of more than one million brokerage account holders seeking more than \$1 billion in damages. Plaintiff complained about the negative consent UBS used to amend account agreements to permit the daily sweeping of uninvested cash from UBS brokerage accounts to a UBS affiliated FDIC-bank, rather than to independent money market funds. After fact and expert discovery, but prior to trial and class certification ruling, UBS won summary judgment dismissing the action with prejudice.
- *Repex Ventures SA v. Madoff et al* (U.S. District Court, Southern District of New York)
Represented a foreign investment fund in a putative class action in which the fund's shareholders were seeking to recover more than \$2 billion that the fund had in turn entrusted with Madoff/BLMIS. The fund's motion to dismiss on *forum non conveniens* grounds, in favor of a Luxembourg forum, was granted in full.
- *Iron Workers Local No 25 v. Oshkosh Corp et al* (U.S. District Court, Eastern District of Wisconsin)
Represented Deloitte & Touche in a federal securities class action in which plaintiffs alleged that Deloitte aided and abetted Oshkosh's failure to record necessary impairment charges. The court dismissed all claims against Deloitte as a matter of law.
- *Intesa Sanpaolo v. Credit Agricole, et al* (U.S. District Court, Southern District of New York)
Represented a hedge fund in a case in which an Italian investment bank is complaining about losses of more than \$185 million associated with credit default swaps on a synthetic CDO and is accusing the hedge fund of hijacking the CDO collateral selection process in order to take winning short positions into and on the CDO. The court granted the fund's motion to dismiss with leave to amend. The motion to dismiss the amended complaint is *sub judice*.

Sample Results – Civil Litigation

Judgment – Trial Court

- *Maurice Levie v. ESL Partners, L.P., et al* (U.S. District Court, Northern District of Illinois)
Represented ESL Investments in a putative securities fraud class action arising out of the merger of Kmart and Sears. After discovery, the court granted summary judgment as a matter of law for ESL on all counts.

Financial Services

- *In re Societe Generale Securities Litigation* (U.S. District Court, Southern District of New York)
Represented a Societe Generale Director in a putative securities fraud and insider trading class action in which plaintiffs were seeking billions of dollars in damages due to alleged misstatements concerning Societe Generale's CMBS/RMBS positions and its handling of the Jerome Kerviel trading scandal. The court granted the Director's motion to dismiss all claims with prejudice.
- *City of Dania Beach Police & Firefighters' Retirement System v. Chipotle Mexican Grill, et al* (U.S. District Court, District of Colorado)
Represented Chipotle and its Directors in a putative securities fraud class action and related derivative suits that arose in the wake of a government investigation into hiring practices and a stock drop following a missed earnings target. The court granted Chipotle's motion to dismiss all claims.

Settlement – Defense Side

- *In re IPO Litigation* (U.S. District Court, Southern District of New York)
Represented Morgan Stanley as a underwriter in a series of putative class actions seeking damages from allegedly improper laddering practices in more than 300 IPOs. After successfully trying agreed upon bellwether cases on a private and confidential basis, Kirkland negotiated an industry wide settlement on behalf of all named underwriters resolving more than \$66 billion in claims on favorable terms.

Settlement – Plaintiff Side

- *Discover Financial Services v. VISA USA* (U.S. District Court, Southern District of New York)
Represented Discover in a price fixing action against Visa and Mastercard in the credit card industry. The case settled after fact and expert discovery but prior to trial with defendants agreeing to pay Discover \$2.75 billion.

Sample Results – Arbitrations

- Kirkland has obtained dismissals in more than 80% of the arbitration cases taken to final hearing.
- Damages awarded in cases taken to final hearing but not dismissed have been less than 2% of total damages sought.
- Because of this track record in final hearings, Kirkland has had great success settling arbitrations early and on favorable terms.



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