

# Client Alert

State Attorneys General Practice Group

January 8, 2015

For more information, contact:

**Christopher A. Wray**  
+1 202 626 5570  
cwr@kslaw.com

**Norman Armstrong, Jr.**  
+1 202 626 8979  
narmstrong@kslaw.com

**J.C. Boggs**  
+1 202 626 2383  
jboggs@kslaw.com

**Gary G. Grindler**  
+1 202 626 5509  
ggrindler@kslaw.com

**Dixie L. Johnson**  
+1 202 626 8984  
djohnson@kslaw.com

**Catherine O'Neil**  
+1 404 572 2704  
coneil@kslaw.com

**King & Spalding**  
**Washington, D.C.**  
1700 Pennsylvania Avenue, NW  
Washington, D.C. 20006-4707  
Tel: +1 202 737 0500  
Fax: +1 202 626 3737

**Atlanta**  
1180 Peachtree Street, NE  
Atlanta, Georgia 30309-3521  
Tel: +1 404 572 4600  
Fax: +1 404 572 5100

[www.kslaw.com](http://www.kslaw.com)

## State Attorneys General Investigations and Enforcement: What to Expect in 2016

In recent years, state Attorneys General (“state AGs”) have significantly increased their investigative and enforcement efforts across a wide range of industries and matters, and these new efforts present a growing challenge to corporations and their counsel in 2016 and beyond.

King & Spalding LLP recently brought together multiple partners with extensive experience in the government investigations arena, as well as a current and former state Attorney General, and hosted two CLE panel discussions to assess this trend. During a December 1 e-Learn conference and a December 17 Energy Forum in Houston, Texas, the panelists identified several key strategies for companies to successfully navigate state AG investigations and enforcement actions in the future.

### **I. Energy Forum: “From Climate Change to Anti-Corruption: The Energy Sector in the Crosshairs of Government Enforcement Trends”**

On December 17, King & Spalding hosted an Energy Forum in Houston that examined the energy sector’s role at the forefront of state and federal enforcement efforts. The forum’s panelists included former Wisconsin Attorney General J.B. Van Hollen and King & Spalding partners **Christopher Wray, Dixie Johnson, Jeff Stein, and Brandt Leibe.**

During the forum, the panelists identified several different areas where federal and state enforcement trends have directly affected energy companies. For example, the forum panelists discussed federal anti-corruption efforts and Foreign Corrupt Practices Act investigations into prominent energy companies, as well as several SEC securities disclosure issues that have particularly affected the energy sector. Further, the panelists also discussed New York Attorney General Eric Schneiderman’s investigation into ExxonMobil’s securities disclosures and their connection to climate change issues, among other recent energy-related investigations.

## II. E-Learn Conference: “State AG Investigations, Enforcement, and Collaboration: What You Need to Know”

The December 17 forum, which focused specifically on the energy industry, expanded upon an earlier December CLE that looked at state AG investigations more broadly. On December 1, King & Spalding conducted an “e-Learn” CLE discussion entitled “State Investigations, Enforcement, and Collaboration: What You Need to Know” that included current Georgia Attorney General Sam Olens, former Wisconsin Attorney General Van Hollen, and King & Spalding partners **Norm Armstrong**, **J.C. Boggs**, **Gary Grindler**, and **Catherine O’Neil**. During the e-Learn discussion, the panelists discussed the motivations that drive particular state AGs’ offices, the working relationships between state AGs and federal regulators, and areas where state AG enforcement efforts continue to grow.

## III. Key Takeaways for Corporate Counsel

Over the course of both events, the panelists provided the following recommendations for companies who are facing, or are likely to face, an investigation or enforcement action from a state Attorney General’s office.

### 1. Understand the Motivations Driving Individual State AGs

State AG enforcement priorities are driven by political trends and considerations, and an elected AG’s partisan affiliation will inevitably inform his or her enforcement priorities. During the December 1 e-Learn discussion, Georgia Attorney General Olens explained that Democratic state AGs often focus on issues like student loans, drug prices, and climate change, whereas Republican state AGs tend to place a greater emphasis on issues like consumer fraud, identity theft, and payday lending.

Although partisan affiliation plays a role in determining enforcement priorities, the e-Learn panelists also identified areas, like cybersecurity and data breaches, that all AG offices are pursuing with greater vigor. Former Wisconsin Attorney General J.B. Van Hollen pointed out that there is wide bipartisan agreement that cybersecurity and online data breaches are the most significant issues facing state AGs today. In light of the different motivations that drive individual state AGs, King & Spalding partner Catherine O’Neil recommended that companies learn about the different political dynamics driving individual offices. O’Neil noted that “having some sort of inside perspective into the particular AG’s office that you’re dealing with is extraordinarily useful.”

### 2. Monitor Enforcement Trends Within Your Industry

During the December 17 Energy Forum, Christopher Wray encouraged companies to monitor state and federal enforcement developments within their own industry. Specifically, Wray encouraged companies to pay close attention to the specific settlement terms that government agencies impose on competitors within their industry. According to Wray, “settlements . . . lay out the rules of the road for what are best practices.” Settlement terms, even though they formally apply to another company, nevertheless signal what the government’s expectations are within a given industry and provide helpful information to competitor companies about the government’s priorities and concerns.

Furthermore, companies that monitor developments are better able to spot enforcement trends early and rectify compliance issues before they become the subject of a government investigation. Wray explained that when regulators learn about misconduct in one company, they often suspect that the same problem is present at similarly situated companies. Because of this, an investigation or enforcement action against one company will often lead to

similar investigations against its intra-industry competitors. Wray offered the following recommendation to corporate counsel:

“When you see a competitor announce in their disclosure that they’ve got an investigation, whether it’s with a state AG, the SEC, the Justice Department or all of the above, immediately start trying to figure out as much as you can about what they are dealing with and start asking yourself questions internally: Is there any chance at all we could have a problem like that since they’re in the same industry in the same place? Is there something we ought to do . . . so that we don’t end up being in the crosshairs?”

In this way, companies can identify areas where the government is likely to investigate and proactively move to improve and reinforce compliance in those critical areas.

### **3. Engage Proactively with State AG Offices**

Companies and their counsel should also take the time to develop strong working relationships with state AGs’ offices. Attorney General Van Hollen explained that companies traditionally “[haven’t] been proactive enough in the Attorney General space” and have not engaged with state AGs before they face an investigation. However, as state AG enforcement efforts have increased, and state AGs have become more involved in high profile areas like climate change and financial regulation, it has become absolutely critical for companies to develop strong working relationships with state AGs and the attorneys in their offices.

Van Hollen explained that if an AG or attorneys within an AG’s office have a pre-existing relationship with a company and its counsel, that company will be better positioned to constructively engage with the AG’s office and successfully resolve issues if and when they arise. If a situation develops where the AG has specific concerns about the company, then the company’s counsel can often utilize the pre-existing relationship and trust to address those concerns and rectify any problems before there is a formal investigation or enforcement action.

On a more prosaic level, a healthy working relationship with the state AG will also help a company to navigate the different divisions, personalities, and dynamics within an AG’s office. As Catherine O’Neil explained, “You . . . sometimes have to deal with multiple divisions or units within a particular AG’s office in a single case . . . Knowing exactly where to go and who to talk to and who the decision makers are going to be” on those particular issues is “a critical piece of your strategy when you’re trying to determine how to get these types of cases resolved.”

During the e-Learn conference, Gary Grindler explained that few state AG investigations are conducted by a single AG acting alone. Instead, many investigations consist of multiple state AGs’ office working in concert, and many others are conducted alongside a parallel investigation by the Department of Justice (“DOJ”) or another federal agency. When multiple offices and agencies become involved, it becomes that much more crucial for corporate counsel to engage with all the relevant decision makers to successfully resolve the investigation. As Grindler explained, “you’ve got to have the dialogue with the key actors if there is a consortium of state Attorneys General and a parallel DOJ investigation. You want to be talking to the head of the respective investigations and think about whether there are ways in which you can reach a resolution with everybody.” Companies that proactively engage state AGs and develop relationships within AGs’ offices will be better situated to identify and engage with the relevant decision makers if and when an investigation occurs.

## 4. Develop a Corporate Reputation for Integrity and Honesty

Most importantly, companies must develop reputations for a commitment to compliance and honesty in their interactions with state AGs and other government agencies. Companies are increasingly likely to be “repeat players” before state AGs and other government agencies, and company counsel must remain cognizant that a particular investigation or case may not be the last time the company interacts with a particular enforcement agency. Because of this, the reputation that a company develops in early interactions will positively or negatively affect later interactions for a long time to come. As Wray explained, if a company establishes early on that it is committed to doing the right thing and shows good faith in its interactions with government attorneys, then “the next time something comes up[, the government’s] first impression of the company is [that] these are the good guys.”

In order to develop a reputation for integrity, companies and their counsel need to substantively commit to corporate compliance and invest the significant time and energy required to support that commitment. During the December 17 Energy Forum, Dixie Johnson encouraged in-house attorneys to respond immediately to compliance issues, to evaluate them carefully, and to rectify them quickly. As Johnson explained,

“If you can get on top of [compliance issues] quickly, . . . you really can calm things. You also may have the opportunity to set things right in a way that will help the government see your efforts if an investigation arises. As you know, it takes a lot of energy to do that. You have to get up every day and deal with every single situation, but there are really good reasons to address issues consistently and promptly.”

Companies who make the underlying commitment to corporate integrity will reap benefits in their future interactions both with state AGs’ office and other government agencies.

## Conclusion

In coming years, state Attorneys General will continue to play an increasingly important role in the government enforcement arena, and companies must develop effective strategies for navigating state AG investigations and enforcement actions. Because of this, companies should carefully consider the recommendations provided during the December 1st and 17th CLE events. Companies that learn about the underlying motivations driving state AG enforcement priorities, monitor state AG enforcement trends within their respective industry, develop relationships with state AGs, and maintain reputations for compliance and integrity will best position themselves to successfully navigate their interactions with state AGs’ offices.

\* \* \*

## King & Spalding’s State Attorneys General Practice

King & Spalding’s State Attorneys General Practice is jointly led by our firm’s government investigations and public policy groups, and is supported by our strategic alliance with former Wisconsin Attorney General J.B. Van Hollen, who also served as president of the bipartisan National Association of Attorneys General.

*Celebrating more than 125 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 800 lawyers in 17 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality and dedication to understanding the business and culture of its clients. More information is available at [www.kslaw.com](http://www.kslaw.com). This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered “Attorney Advertising.”*