GEORGE MASON LAW REVIEW ANTITRUST SYMPOSIUM

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Cartels: Public and Private Enforcement

The Role of In-House Counsel

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I. (a) What are the initial steps that in-house counsel should take in relation to the commencement of a government investigation? For example, your company receives a grand jury subpoena or search warrant.

In these two instances, where an investigation has been initiated against the company and a formal court order issued, the responsive actions are clear. These would include internal retention of documents (litigation hold memo issued), implementation of a "blackout" in transactions in the company's securities (i.e., implementation of the company's Insider Trading Policy), retention of outside attorneys, initiation of internal investigation (and related issues of maintaining privileges, representation of company, not employees) and discussions with government, notification to the Board (possibly creation of special committee or assignment to Qualified Legal Compliance Committee), notification to independent public accountants (auditor) and disclosure (both public and non-public) discussions (including discussions with securities counsel regarding need for regulatory filings (e.g., Form 8-K, notification to listing agency (NYSE/NASDAQ/AMEX)) as well as possible need to disclose to other stakeholders (e.g., lenders, credit rating agencies, D&O insurers).

An extremely important issue to address is the company's defense strategy. In today's global economic environment, as well as global enforcement environment, this implicates issues requiring a detailed, comprehensive defense strategy that addresses not only multiple government investigations across various jurisdictions (each of which have different rules of procedure), but also civil litigation and its related discovery issues.

(b) Are there any different steps that should be taken if the investigation begins in different ways? For example, a competitor receives a grand jury subpoena, there are rumors of a leniency applicant, the European authorities perform dawn raids in the same or a related industry or allegations are received from an internal whistleblower.

Where a formal investigation has not (yet) been initiated against the company, but there are other indicators of something amiss, I would recommend that the company take similar actions as noted above; in particular, retention of outside counsel (to contact government on behalf of company, initiate internal investigation and discuss whether need litigation hold memo), notification to Board/auditors and discussion of public disclosure requirements or needs. You may also consider contacting your competitors' General Counsel but likely that will not be a good avenue for information.

The actions in response to an allegation received through an internal hotline would be similar to the above, including notification to the Board/Audit & Finance Committee, discussions with outside counsel as to whether the government should be contacted, and initiation of internal investigation.

II. (a) What are the hard issues in conducting an internal investigation? For example, how do you address the concern for the preservation of privileges, particularly if there may be violations in addition to antitrust concerns?

I would recommend working to preserve privilege at all times, until such time as the company determines it is in its best interest to waive (hoping that at that time, it knows all of the potential legal issues/violations surrounding antitrust concerns). Obviously, the decision to waive privilege needs to be thoroughly discussed with outside counsel and the Board of Directors (or Special Committee if one has been established), particularly in light of recent decisions on the Thompson Memo.

(b) How do you manage employees who refuse to cooperate or lie during interviews?

An employee's obligation to comply with all laws, regulations, rules, policies and to cooperate fully with the company in connection with a government/internal investigation, should be clearly laid out in the company's Code of Business Conduct & Ethics and its HR policies. If an employee refuses to cooperate or lies during the course of an investigation, these employees must be strictly disciplined (including potentially termination of employment). However, this must be done with an understanding of that employee's role in the conduct under investigation, in conjunction with discussions with government and possibly retaining separate counsel for that employee. For the company, it is important to enforce its employee policy of full cooperation in internal/government investigations, but to do so in a manner which does not prejudice the company's investigation (and effort to learn facts) and its position with the government.

(c) How should a company deal with a potentially culpable employee during an investigation?

The company will need to understand the extent and credibility of the evidence implicating the employee. It will also need to look at that employee's ability to continue performing his/her responsibilities, what is the nature of the alleged violation, and is "suspension" or "leave" until a final adjudication an option.

(d) What if important information is in the hands of former employees?

These are difficult situations, highly dependent, of course, on the company's relationship with the former employee. The company also needs to consider such issues as defense and indemnification obligations (for example, if the former employee had been an officer of the company).

(e) How specific should internal whistleblower complaints be before action is taken?

I believe all internal complaints deserve some level of investigation. For those less specific, investigation is understandably more difficult, but the in-house counsel should undertake some level of internal discussions/reviews. For complaints with more specificity, the internal investigation may also involve outside counsel and discussions with the relevant government agency. If the allegations and information is sufficient to investigate, then an investigation or review should be conducted by the General Counsel, outside counsel, or Director of Internal Audits, depending on the nature of the allegations. It should not matter if the source of the allegations is known or anonymous; if known, it facilitates the investigation/review and allows for better determination of credibility, etc.

The company also needs to be cognizant of the whistleblower provisions of SOX, SEC and NYSE. An Audit Committee is required to establish procedures for receipt, retention and treatment of complaints received regarding accounting, internal accounting controls or auditing matters, including a procedure for anonymous reporting. Also, there are enhanced protections against retaliation, including prison for persons who knowingly take action to harm a person with intent to retaliate as well as the ability of the whistleblower to seek relief against the company, including reinstatement, back pay with interest and special damages. Accordingly, any action taken against an employee should be based solely on culpable behavior (violation of law, company policy) and not be based on their whistle blowing action.

(f) How does the availability (or potential availability) of leniency affect these decisions?

In my opinion, the rigor of the internal investigation should be the same, whether leniency is available or not, in order to determine the company's control issues and liabilities. However, one of the first issues that has to be considered by the company and its outside counsel is whether leniency is available and whether the company should approach the government.

III. (a) What are the internal reporting concerns? When should the Board be involved, when should a litigation or special committee be appointed, when and how should the CEO be circumvented?

In my opinion, whenever the issue is the result of a formal government investigation or a whistleblower complaint, the board or audit committee should be advised (immediately if a formal government investigation has been started). If the concern is raised as a result of a rumor in the marketplace or investigation started against a competitor or similar/related industry, I would do some initial investigation first before I discussed with the board.

If and when a litigation/special committee should be assembled is, in my opinion, dependent on such issues as the independence of the directors, the substance of the allegations, the probability of potential liability for the company or its officers/directors, the time commitment needed by the directors to address the situation, etc. A decision to create a special committee to include "independent directors" (perhaps as a result of allegations against management directors or other directors), should be made by the full board after advice from antitrust counsel and Delaware counsel (assuming your company is a DE corporation). It must be kept in mind that under DE law, a director, regardless of his independence, has the right to participate in all meetings of the Board and obtain information relevant to the company. Thus, the directors, including those who are not independent concerning the investigation, must understand their fiduciary responsibilities, potential for conflicts, etc. and be supportive of a special committee. Moreover, a director can not be forced off the board; he must resign or not be nominated for reelection.

Similarly, when and how the CEO should be circumvented would be highly dependent on his involvement or potential involvement in the allegations and the need for independence in reporting to and advising the board outside of the CEO.

(b) How should the independent accountants/auditors be handled?

In today's SOX world, you should consider advising the outside independent auditors of any concerns/issues/investigations very soon after first spoke with the Board/Audit Committee. The auditors will need to understand the nature of the allegations, impact on financial statements, public disclosure decisions, whether a litigation reserve/accrual should be established. A good working relationship with the auditors is critical, particularly in these difficult situations when issues such as disclosures and accruals could be sources of disagreement with your auditors.

(c) What are the securities law reporting concerns?

If a formal investigation/legal action has been commenced against the company, the company's Disclosure Committee should meet to discuss public reporting requirements (i.e., disclosure in an 8-K, or in periodic reports (10-Q or 10-K)). Appropriate disclosures will need to be evaluated at each stage of the investigation. The Disclosure Committee should also assist in determining the company's response to questions/inquiries from the public (e.g., no comment, we will vigorously defend, it's under review by our counsel, etc.). If a formal, public action has not been initiated, but an issue has been raised (through rumors, whistleblower or otherwise), the company's Disclosure Committee should consider the status of the issue each time the company

is speaking publicly (e.g., conference calls) or filing a public report (e.g., earnings press release, 10-Q, 10-K) to determine whether disclosure is necessary.

Additionally, the in-house counsel, with assistance from outside securities counsel and investigation counsel, should be focused during the initial investigation on whether any securities laws were potentially violated as a result of the actions under investigation.

IV. (a) What are the potential obstruction of justice issues?

Companies should have in place, prior to any issues, a document retention policy that is comprehensive and in compliance with all relevant legal requirements (e.g., SOX). Once an investigation is initiated or, in the case of a whistleblower complaint, sufficient level of internal investigation indicates that there is potential liability/litigation, the in-house counsel should immediately issue a litigation hold memo outlining retention requirements and process for collection.

(b) How should a company handle documents not technically responsive to the subpoena but potentially relevant to the investigation?

Very carefully! This should be discussed with outside counsel, but in my opinion, these documents should be reviewed by outside counsel and ultimately retained by outside counsel. These documents should be clearly identified as having been reviewed by counsel and determined to be not responsive.