Proskauer

HSR and Jail Time? The Importance of Being Earnest, and Getting Corporate Internal Investigations Right

July 25, 2012

Corporate and in-house counsel not accustomed to dealing with white collar defense issues can put themselves and their clients at risk when dealing with bad actors within the company. A routine merger investigation gone wrong reveals how this can happen and what to watch out for.

Compliance with the highly technical notification and waiting period requirements of the Hart-Scott-Rodino Act ("HSR") often requires a significant degree of careful analysis. The HSR Act requires notification to federal antitrust enforcers prior to the consummation of certain corporate transactions, and navigating the Act's pre-consummation requirements can be a minefield without proper advice. Documents submitted to support the company’s position in pursuing the merger must be accurate. And company personnel ought to be cautioned not to augment the company’s position by altering the documents submitted under Hart-Scott Rodino. Corporate counsel must in preparing the HSR submission make sure the documents are accurate. Counsel’s internal inquiry to collect the documents to submit must be done with sensitivity to how criminal statutes have, and can be, applied in this context. A recent Department of Justice prosecution highlights the importance of addressing these issues.

The agency filed felony obstruction of justice charges against Kyoungwon Pyo, a South Korean executive, *and his employer*, Nautilus Hyosung Holdings Inc., for altering documents submitted as part of a merger investigation into a transaction involving automated teller machines.[1] The company pleaded guilty and paid a $200,000 criminal fine, and Pyo agreed to serve five months in prison. the company was conducting an internal review to gather the documents to submit as part of its HSR obligations. According to the Plea Agreement with Kyoungwon Pyo filed July 2, 2012, Pyo falsified some of those documents, including the company's pre-existing strategic plans, and directed others to do so with the intention of misrepresenting and minimizing the competitive impact of the acquisition.[2] In a press release issued by the agency, Acting Assistant Attorney General Joseph Wayland in charge of the Department of Justice's Antitrust Division said "Senior corporate executives should understand that anyone who attempts to corrupt the process by falsifying materials submitted to the U.S. government will be held accountable for their actions."

The matter has obvious implications beyond HSR and antitrust issues. The actions of rogue employees are not predictable, but a company's response to the rogue employee's actions will significantly impact its own culpability in the ensuing investigation. The matter was brought under 18 U.S.C. § 1512, which proscribes the alteration, destruction, mutilation or concealment of a record, document or other object, or the attempt to do so, with the intent to impair the object’s integrity of availability for use in an official proceeding. The case highlights the importance of conducting proper corporate internal inquiry where there is an official proceeding, such as a HSR request, but also where no proceeding has been instituted yet one may be reasonably contemplated. Corporate counsel must be cognizant of other more broadly worded criminal statutes that apply to any case, such as here, where the organization is conducting an internal review, inquiry or investigation to respond to a pending or potential government investigation.

Most notably, this includes familiarity with 18 U.S.C. § 1519 which was passed as part of the Sarbanes-Oxley Act of 2002 to more directly address evidence destruction with the intent of obstructing any type of investigation or matter within the jurisdiction of a federal agency. This would include, for instance, merger investigations under the HSR Act. After a decade of enforcement under § 1519, its use has become more expansive. Today, internal investigations into suspected corporate wrongdoing must take into account not only witness tampering and aiding and abetting, but also the extended reach of the anti-shredding statute as the reach of § 1519. Prosecutions under § 1519 have extended not just to company employees, but even counsel participating in company internal investigations.[3]

In cases like *Hyosung* where the company must conduct an internal inquiry to respond to a government request for HSR information, counsel's primary role will be ferreting out the facts. Although prosecutors did not bring the *Hyosung* case under § 1519, the handful of cases where prosecutions under § 1519 were based upon similar activities in a connection with a non-law enforcement investigation demonstrate that corporate counsel must not only determine whether substantive violations occurred within the company, but also must scrutinize closely the responses of the organization to the government inquiry to uncover conduct possibly prosecutable under § 1519. The potential criminal exposure of the company and employee based upon those responses, including actions done in contemplation of, and during, counsel's interviews of employees, must be considered in these cases.

A clear-cut case of criminal wrong doing by an employee acting on his own raises complex questions for the company and its counsel – questions that go well beyond the original actions. With the potential for conflicts of interest within a company, and the specter of criminal prosecutions looming, extreme care must be taken through each step of a corporate internal investigation to get it right and reduce the company's exposure to the expansive reach of § 1519. [4]

[1] http://www.justice.gov/atr/cases/f274500/274512.pdf

[2] http://www.justice.gov/atr/cases/f284900/284932.pdf

[3] *See* Information ¶ 10, *United States v. Ray*, No. 2:08-cr-01443 (C.D. Cal. Dec. 15, 2008) (ECF No. 1).

[4] For a fuller treatment of Section 1519 prosecutions and the role of corporate counsel in internal corporate investigations, *See* Penetrating an Organization's Internal Investigation: Does 18 U.S.C. § 1519 Create More Problems Than It Solves?, Mark J. Biros, American Criminal Law Review, 2011-2012.

Related Professionals

- **John R. Ingrassia**
  Partner
- **Colin Kass**
  Partner