

Antitrust Alert

Criminal Liability for In-House Counsel

November 19, 2010

The recent indictment of a former GlaxoSmithKline in-house attorney is a stark reminder to corporate counsel that government investigations can lead to criminal charges. This indictment again demonstrates the government's willingness to prosecute individual in-house attorneys if they are believed to have obstructed federal investigations. Simply put, in the course of fulfilling their corporate and professional responsibilities, in-house counsel may become targets. And in-house counsel responding to government inquiries may find themselves torn between their corporate obligations and the risks they may face as individuals.

Background

On November 8, 2010, former GlaxoSmithKline associate general counsel Lauren Stevens was indicted on counts of obstruction of justice, making false statements and concealing documents.¹ The charges relate to a Food and Drug Administration (FDA) investigation into whether Glaxo promoted its antidepressant Wellbutrin for off-label, unapproved purposes. Stevens is alleged to have knowingly and falsely denied that Glaxo representatives promoted off-label use and concealed documents evidencing such promotion. Stevens allegedly asked other lawyers involved in responding to the FDA investigation to provide a memorandum outlining the pros and cons of producing the requested documents. After concluding that the documents would "provide incriminating evidence about potential off-label promotion" that could be used against Glaxo, Stevens failed to turn them over. A Glaxo sales representative later provided some of these documents to the FDA. Stevens faces a possible combined 60-year prison sentence.

Corporate Counsel and Criminal Liability

The Stevens indictment expands on recent government actions and policy statements that focus on prosecuting corporate individuals for their conduct in connection with the investigation of corporate wrongdoing. Stevens is not the first—and surely not the last—in-house counsel to face criminal liability in relation to federal probes of corporate violations.

Since Sarbanes-Oxley and Enron, a number of corporate counselors have been charged with securities-related violations that arose from their actions in response to federal investigations.² The SEC filed suit against Biopure Corp. for making misleading statements to the FDA, and, while the company settled (without any monetary repercussions), its general counsel was ordered to pay a \$40,000 civil penalty for aiding and abetting the fraud.³ In an accounting fraud investigation against Computer Associates International, the general counsel was charged with conspiracy to commit securities fraud and obstruction of justice.⁴ The attorney pled guilty and was sentenced to two years in prison, followed by three years of supervised release. In another fraud case, Rite Aid's general counsel was sentenced to 10 years in prison and a \$20,000 fine for committing fraud and obstructing justice.⁵

¹ Indictment, *United States v. Lauren Stevens*, No. RWT 10 CR 0694 (D. Md. Nov. 8, 2010).

² Ross Bricker, David Bradford, John Ward, Jr. and Roya Behnia, "In-House Counsel Ethics and Privilege: How Protecting Yourself Can Help Protect Your Company from Liability," 21-25, PriceWaterhouseCoopers (June 19-20, 2008), http://www.pwc.com/en_US/us/general-counsel-forum/assets/gcf-chicago-062008.pdf.

³ U.S. Sec. and Exc. Comm'n, "SEC Settles Civil Injunctive Action Against Biopure Corporation and Its General Counsel," Sept. 12, 2006, <http://www.sec.gov/litigation/litreleases/2006/lr19825.htm>.

⁴ Dep't of Justice, "Former Computer Associates Executives Indicted on Securities Fraud, Obstruction Charges," Sept. 22, 2004, http://www.justice.gov/opa/pr/2004/September/04_crm_642.htm.

⁵ U.S. Sec. and Exc. Comm'n, "SEC Settles Fraud Case Against Rite Aid's Former Lawyer," Sept. 30, 2005, <http://www.sec.gov/litigation/litreleases/lr19409.htm>.



The theme of the October 2010 Food and Drug Law Institute FDA Enforcement conference was “More Individuals, More Often.”⁶ Speakers predicted that more corporate officials would face prosecution, despite a lack of evidence that they actually participated in, or even had knowledge of, the alleged underlying violations. In other words, in-house counsel risk prosecution simply for the way they respond to a government inquiry, even if there is no claim that they were involved in the underlying actions.

In the Department of Justice’s “Principles of Federal Prosecution of Business Organizations,” U.S. Attorneys are provided guidance for making decisions to prosecute corporations and corporate individuals.⁷ The policy regarding the obstruction of government investigations calls for prosecutors to consider, among other factors, whether the corporation has instructed employees to conceal relevant facts, provided incomplete records or made misleading assertions. Commenting on the Lauren Stevens indictment, Assistant Attorney General for the Civil Division Tony West warned that “[w]here the facts and law allow, the Justice Department will pursue individuals responsible for illegal conduct just as vigorously as we pursue corporations.”

Implications for Corporate Counsel

The above actions and policy statements by the Department of Justice, Securities and Exchange Commission and FDA make clear the government’s stance that prosecuting corporations alone may be insufficient and that it can and will pursue individual corporate employees—including in-house counsel. Additionally, the continuing erosion of attorney-client privilege protection of in-house communications further complicates the role of corporate counsel and places them at increased risk.⁸ As a related issue, there has been a dramatic increase in the frequency of court sanctions related to e-discovery, often for spoliation of evidence.⁹

In response to cost pressures, in-house attorneys appear to be taking charge of document review and production more frequently. However, escalating criminal liability risks and privilege issues should be weighed against cost concerns. When a company learns it is the subject of a government investigation, in-house lawyers should seriously consider consulting outside counsel before responding to the investigation and involving them in decisions about the scope of production. Seeking the advice of outside counsel may not fully insulate corporate attorneys, but it can mitigate the risk of criminal liability from acts taken in responding to the investigation. At the very least, in-house attorneys must thoughtfully consider how best to fulfill their corporate obligations in light of added pressures to cooperate fully with government investigations and the risk of becoming a government target.

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⁶ Douglas B. Farquhar, “Watch Out! At FDLI Conference, Government Says More People Will Be Convicted of Crimes,” Oct. 14, 2010, http://www.fdalawblog.net/fda_blog_hyman_phelps/2010/10/watch-out-at-fdli-conference-government-says-more-people-will-be-convicted-of-crimes.html.

⁷ Dep’t of Justice, Principles of Federal Prosecution of Business Organizations, § 9-28.730 (Aug. 28, 2008), <http://federalevidence.com/pdf/2008/09-Sept/Blog.502BusProsec.Sept2.pdf>.

⁸ See, e.g., J. Brady Dugan & Allison Walsh Sheedy, “Europe’s High Court Highlights Differences for In-House Counsel Between Attorney-Client Privilege in Europe and the US,” Akin Gump Strauss Hauer & Feld LLP client alert, Sep. 21, 2010, <http://www.akingump.com/CommunicationCenter/newsalertdetail.aspx?pub=2564>.

⁹ See “Year in Review: Courts Continue Imposing Sanctions for Electronic Discovery Shortcomings,” Kroll Ontrack, Dec. 1, 2009, <http://www.krollontrack.com/news-releases/?getPressRelease=61396>.