Lessons on How to Avoid Making a Bad Situation Even Worse –
The Antitrust Investigation of Morgan Crucible and the Obstruction of Justice Conviction of its Former Chief Executive Officer

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After a long battle and his conviction, Ian Norris, former CEO of Morgan Crucible, a manufacturer of carbon and ceramic products in the United Kingdom, now faces a maximum of five years in prison and a $250,000 fine. Norris, a U.K. citizen who fought extradition from the United Kingdom for almost seven years, was convicted yesterday by a jury in U.S. federal court in Philadelphia. Although the jury cleared him of two related counts of witness tampering and encouraging others to destroy documents, Norris was found guilty of obstruction of justice in connection with an antitrust investigation into fixing prices for certain carbon products.

In November 2002, Morgan Crucible and its U.S. subsidiary, Morganite, Inc. pleaded guilty in the United States to conspiring with their competitors, during a 10-year period, to fix prices for carbon products, including collectors and carbon brushes. As part of that guilty plea, Morgan Crucible and Morganite agreed to pay a fine of $10 million for their roles in the price-fixing cartel. In addition, Morgan Crucible pleaded guilty to attempting to influence the testimony of grand jury witnesses and to persuading a witness to destroy relevant documents, for which it paid an additional $1 million fine. In addition to its $11 million government fine, Morgan Crucible settled private class action litigation filed in the United States for $15 million in 2006.

Four executives, including Norris, however, were excluded from the U.S. plea agreement. After being indicted in 2003, the Antitrust Division of the U.S. Department of Justice (DOJ) sought to have Norris extradited for the price fixing and the obstruction of justice charges. Price fixing was not a criminal offense in the United Kingdom at the time of the offense, and therefore the Appellate Committee of the House of Lords ruled that Norris could not be extradited on the price fixing charge.1 The House of Lords, however, upheld the extradition order for Norris on the three ancillary obstruction of justice charges. On February 24, 2010, after all other avenues of appeal had been exhausted, the U.K. Supreme Court dismissed Norris’ appeal and opened the door for the first-ever extradition to the United States of a defendant in connection with an antitrust case. Norris’ trial and conviction for obstruction of justice followed his extradition.

Norris’ case is yet another cautionary tale of how not to proceed when under investigation by law enforcement officials. According to the superseding indictment, Norris’ missteps were abundant: After a federal grand jury subpoena for records in the government’s investigation of the price fixing was served on Morgan’s U.S. subsidiary, Norris instructed employees to locate and conceal or destroy company records containing evidence of the alleged price fixing agreement. According to the government, Norris formed a task force of employees to carry out this assignment. In addition, according to the indictment, a script of responses for employees was prepared to answer any questions that
might be posed by investigators or the grand jury. As alleged, the script contained material false statements and characterizations regarding the company’s actions. The indictment also described Norris’ plan to terminate one employee, and there were several highly inculpatory statements made during the course of the cover-up attributed to Norris. The indictment charged that Norris and others ultimately provided false and fictitious material information in response to the federal grand jury investigation.

There are many lessons to be learned from Norris’ case. First, it goes without saying that Norris’ high-risk strategy to avoid the possible charges of price fixing conspiracy is never a good idea. Efforts to obstruct an investigation through the real or perceived coaching of witnesses and document cleansing provide potent proof of criminality regarding the underlying conduct under investigation. Where a price-fixing or fraud prosecution might otherwise fail for absence of proof beyond a reasonable doubt of a specific intent to violate the law, deception, misstatements and cover-up attempts are the surest way to supply that missing proof to the government.

In Norris’ case, it turned out far worse. First, Norris’ conduct during the investigation surely damaged his and his employer’s credibility and likely enhanced the prosecution’s interest in pursuing his indictment for both price fixing and the alleged cover-up. Additionally, because Norris could not be extradited to the United States for the price-fixing conspiracy, Norris’ efforts apparently resulted in his conviction in the United States, when that could not have occurred otherwise.

Second, corporate executives and managers such as Norris should obviously never seek to manage personally the course of a law enforcement investigation. At the first sign of an investigation, corporate executives finding themselves in Norris’ situation and employees confronted by government agents bearing a subpoena for documents or requesting an interview should immediately contact qualified counsel, take no further steps regarding the matter, and delegate the handling and management of the investigation, including document collection and production, to defense counsel. Any other course runs the tragic risks that ultimately resulted in convictions of Morgan Crucible, Norris and some of Norris’ subordinates.

Third, executives and company employees under no circumstances should discuss or make statements to anyone other than counsel, including others inside the company, regarding the matter once an investigation has surfaced. Further, the preparation of a script on how employees should respond to law enforcement questions, and any similar writings or conversations by employees, are dangerous examples of precisely what not to do.

Fourth, once an investigation is underway, corporate executives and management should not in any way hint or instruct others to remove, delete, destroy or tamper with documents. Even the gathering of documents or handling of responses to a subpoena or other demand for documents should not be addressed or discussed by the business managers. This should be delegated to counsel, supported by appropriate staff from the company, and a litigation hold directive should be issued to all employees.

Fifth, for middle managers and rank-and-file employees, vigilance about the conduct and actions of management in the event the company comes under investigation is necessary. Participating or even acquiescing in conduct like that allegedly orchestrated by Norris can bring criminal liability to anyone involved, and is never worth the risk of losing the next promotion or even being fired.

For many kinds of misconduct and for many kinds of companies, the law may require that the company report and remediate when it discovers bad behavior. For many businesses, such action is also a feature of good corporate citizenship. In some circumstances, the company might want to consider just waiting to see what, if anything, happens after discovering misconduct. There is, however, no scenario in which the actions allegedly taken by Norris are ever a good idea. Whatever the company’s course in addressing a bad situation, don’t make it worse.

Creation of a strong culture of corporate and antitrust compliance, where training is accepted and where employees know that engaging in cartels or other unlawful activities will not be tolerated regardless of how they might temporarily increase revenues, is fundamental to avoiding a long and costly battle like Morgan Crucible’s. Employees can and should be trained to understand their rights when confronted by a government investigation without crossing the line.

Working with experienced former government prosecutors and antitrust attorneys to address issues arising under the antitrust laws and the risks from government investigations can help minimize the chances of liability for companies, their management and employees conducting domestic and international business.

Endnotes

1 The alleged price-fixing cartel ended in 2000. Two years later, the Enterprise Act of 2002 made price fixing a criminal offense in the United Kingdom for the first time.