Crisis Management

Schulte Roth&Zabel

28TH ANNUAL

PRIVATE INVESTMENT FUNDS SEMINAR

JANUARY 22, 2019

Partner
New York Office
+1 212.756.2372
aneliya.crawford@srz.com

Practices

Shareholder Activism

Mergers & Acquisitions

Hedge Funds

Regulatory & Compliance

Aneliya S. Crawford

Aneliya represents hedge funds and other large investors in matters concerning shareholder activism, proxy contests, hostile takeovers, corporate governance and mergers and acquisitions. Aneliya is one of the leading attorneys representing activist investors globally, with close to 200 major shareholder activism contests, including campaigns in the United States, United Kingdom, Canada, Australia and Latin America. Aneliya has extensive experience providing strategic guidance to investors on activist strategies, including proxy contests, settlement negotiations, corporate governance, consent solicitations, letter-writing campaigns, hostile takeovers and M&A transactions. She provides counsel to clients on their equity investments in public companies, and she also represents public and private companies in mergers and acquisitions and asset purchase and stock purchase transactions.

Aneliya was named to *Crain's* 40 Under 40 Class of 2018 and has been named a New York "Rising Star" by *Super Lawyers* magazine each year since 2014 for her shareholder activism and M&A practice. Most recently, she represented Trian Fund Management in the largest proxy contest to date. The successful campaign sought the addition of Trian CEO and founding partner Nelson Peltz to the Board of Directors of Procter & Gamble. Aneliya earned her M.L.A., *magna cum laude*, from Harvard University, her J.D. from Benjamin N. Cardozo School of Law, where she was a Dean's Scholar, and her B.A. from American University in Bulgaria.

Special Counsel
New York Office
+1 212.756.2465
kelly.koscuiszka@srz.com

Practices

Broker-Dealer Regulatory & Enforcement

Litigation

Regulatory & Compliance

Kelly Koscuiszka

Kelly focuses her practice on securities enforcement and regulatory matters for broker-dealers, private funds, financial institutions, companies and individuals. Kelly also defends individuals and entities under investigation for or charged with securities fraud, mail/wire fraud, accounting fraud and insider trading. She advises clients on securities trading matters and, when necessary, represents them in regulatory investigations and enforcement actions by the SEC, DOJ, FINRA, and other self-regulatory organizations and state regulators. She also leads trading sessions for clients on complying with insider trading laws and best practices for electronic communications and related firm policies. Kelly also represents clients in civil litigation matters involving breach of contract, alter ego liability, fraud and cross-border disputes.

Kelly has been recognized by *New York Super Lawyers* as a Rising Star. Kelly earned her J.D. from Georgetown University Law Center, where she received the Georgetown University Law Center 2005 Advocacy Award, and her B.A. from Rutgers University.

Partner
New York Office
+1 212.756.2250
joseph.smith@srz.com

Practices

Investment Management

Private Equity

Real Estate Capital Markets & REITs

Energy

Joseph A. Smith

Joe represents private equity fund sponsors in connection with fund formation, the acquisition of portfolio investments and the implementation of exit strategies. In this capacity, Joe advises clients on securities, governance, ERISA, Investment Advisers Act and structural issues. He has extensive experience with all alternative asset classes, including venture capital and later-stage growth equity investments, leveraged buyouts, mezzanine investments, real estate ventures and opportunity funds, secondary investments and funds of funds. Joe has also represented many fund managers in connection with spinoffs and consolidations. In addition to domestic representations, Joe has advised private equity clients in connection with the acquisition and structuring of portfolio investments throughout Europe, Latin America and Asia. His representation of asset managers in the real estate sector includes advice concerning REIT offerings and privatizations, partnership roll-ups and cross-border investments.

Joe has been recognized as a leading practitioner by *Chambers Global*, *Chambers USA*, *Expert Guide to the World's Leading Banking, Finance and Transactional Law Lawyers*, *The Legal 500 US* and *New York Super Lawyers*. Most recently, Joe was quoted by *Private Equity International* in the article "LPAs: Finding the Right Balance" and by *Private Funds Management* in the article "Ringing the Changes." Joe co-authored the "United States Fundraising" chapter in *The Private Equity Review* (Law Business Research Ltd.) and he contributed to the *Fund Formation and Incentives Report* (Private Equity International in association with SRZ). Joe received his J.D. from New York University School of Law and his A.B. from Columbia University.

Partner
New York Office
+1 212.756.2471
michael.swartz@srz.com

Practices

Litigation

Shareholder Activism

Blockchain Technology & Digital Assets

Complex Commercial Litigation

Securities Enforcement

Securities Litigation

Michael E. Swartz

Michael is co-chair of the Litigation Group and head of the shareholder activism litigation practice. He focuses on complex commercial litigation and antitrust, particularly as it relates to mergers and acquisitions. His litigation practice includes shareholder activist litigation, M&A litigation and other corporate control disputes, as well as securities litigation. Michael has particular expertise with litigation involving Sections 10(b), 13(d), 14(a), 16(b) and 20(a) of the Securities Exchange Act. Recently, he represented Trian Fund Management LP in its proxy contest with Procter & Gamble, and a series of victories on behalf of venBio Select Advisor LLC in its proxy campaign at Immunomedics Inc. Among other things, for venBio, he obtained a TRO blocking the closing of a global license agreement, which effectively would have amounted to a sale of the company. Michael represented Cerberus Capital Management LP in its $9.2-billion acquisition of Safeway Inc. In addition, Michael analyzes transactions to determine whether they raise antitrust issues, develops strategies to address potential concerns and represents clients in front of the U.S. Department of Justice, the Federal Trade Commission, state attorneys general and others, and in litigation challenging transactions on antitrust grounds.

Michael has been recognized by his peers and clients in *Benchmark Litigation: The Definitive Guide to America's Leading Litigation Firms and Attorneys*, *The Legal 500 US* and *New York Super Lawyers* in the area of business litigation. His litigation victories have been featured in *The Hedge Fund Journal* ("Immunomedics Proxy Contest: SRZ Achieves Unprecedented Litigation Victories"), *Hedge Fund Legal and Compliance Digest* ("Schulte's Michael Swartz Discusses Section 16(b) Litigation, Exemptions and Strategies for Hedge Fund Managers to Reduce Risks of Non-Compliance") and, most recently, the Litigation Group, co-chaired by Michael, won *Law360*'s Asset Management Practice Group of the year for its representations of leading private investment funds. In addition, Michael's recent publications include contributing to *The Activist Investing Annual Review 2018* (Activist Insight, in association with SRZ) and the 2018 *Shareholder Activism Insight* report (published by SRZ in association with Activist Insight and Okapi Partners). He also co-authored the "Information Sharing with Market Professionals" chapter in the *Insider Trading Law and Compliance Answer Book 2018* (Practising Law Institute). He is currently the regional vice chair for the mid-Atlantic region of the Lawyers' Committee for Civil Rights Under Law and is also a member of the ABA's Litigation and Antitrust sections. A former law clerk to the Honorable Irving R. Kaufman, Circuit Judge for the U.S. Court of Appeals for the Second Circuit, Michael obtained his J.D. from Columbia Law School, where he was editor of the *Columbia Law Review*, and his B.A., *magna cum laude*, from the University of California, Los Angeles, where he was elected to Phi Beta Kappa.

Partner
Washington, DC Office
+1 202.729.7476

New York Office
+1 212.756.2413

pete.white@srz.com

Practices

Litigation
Financial Institutions
Regulatory & Compliance
Securities Enforcement
Securities Litigation
White Collar Defense & Government Investigations

Peter H. White

Pete is co-chair of the Litigation Group and a member of the firm's Executive Committee. He concentrates his practice on representing corporations and executives in managing crisis situations, including grand jury investigations, internal investigations, SEC enforcement proceedings, False Claims Act and qui tam lawsuits, and shareholder class actions. Pete has litigated disputes involving accounting and securities fraud, Foreign Corrupt Practices Act violations, government program fraud, false claims and statements, antitrust violations, public corruption, tax evasion, insider trading, environmental violations and other claims. A former Assistant U.S. Attorney for the Eastern District of Virginia and the District of Columbia, Pete has served as lead counsel in over 80 federal and local jury trials and many more bench trials.

A recipient of the Department of Justice Director's Award for Superior Performance as an Assistant U.S. Attorney, Pete has performed with comparable skill as a private practitioner. Pete is a fellow of the American College of Trial Lawyers, and has been recognized as a leading litigator by *Chambers USA*, *Benchmark*, *The Legal 500 US*, *Washington DC Super Lawyers*, *Washingtonian*'s "Washington's Top Lawyers" (criminal defense, white collar), *Who's Who Legal: Investigations, The Best Lawyers in America* (corporate compliance law, criminal defense: white collar, and litigation-securities), *Ethisphere: Attorneys Who Matter* and *The Washington Post* ("Their Own Defense"). Most recently, the Litigation Group, co-chaired by Pete, won *Law360*'s Asset Management Practice Group of the year for its representations of leading private investment funds. Pete obtained his B.A., with high honors, from University of Notre Dame and his J.D. from the University of Virginia School of Law, where he was Order of the Coif and on the management board of the *Virginia Law Review*. Upon graduation, he served as a law clerk to United States District Judge Richard L. Williams of the Eastern District of Virginia.

Crisis Management

I. Three Phases of Crisis Management

A. Prepare

B. Respond

C. Recover

II. Prepare

A. Designate a crisis management team.

1. Team may include the following key players:

(a) Partners

(b) GC

(c) CCO

(d) COO and other members of senior management

(e) Investor relations

(f) Representative from board of directors (if applicable)

(g) PR consultant

2. Identify individuals with prior experience with crisis management.

3. Define roles of members on the team.

B. Develop a crisis management plan.

1. Identify the goal(s) of the plan.

2. Tailor the plan to the firm.

3. Identify and evaluate potential crises:

(a) Threatened civil litigation

(b) Government subpoena

(c) Alleged insider trading

(d) Cybersecurity breach

(e) Fund performance

(f) Succession

4. Prepare template scripts or materials related to each potential crisis.

5. Develop a press strategy related to each potential crisis.

C. Develop and implement a policy regarding employee communication with the press, if not already in place.

III. Respond

A. Identify the crisis and consider timing of response.

B. Consult with counsel.

1. Internal vs. external counsel

2. Factors to consider when hiring external counsel:

(a) Experience with specific government agency

(b) Experience with underlying legal issues

(c) Experience with related litigation

(d) Experience with underlying industry

C. Litigation Hold

1. Preserve and retain, not delete or destroy.

2. Send to all relevant employees.

3. eDiscovery obligations:

(a) Firm hardware

(b) Personal hardware

4. Consequences of failing to preserve documents:

(a) Civil

(b) Criminal

5. General Data Protection Regulation ("GDPR") Issues

(a) GDPR is a data protection regulation that applies to all organizations established in the EU and organizations established outside of the EU that process personal data of natural persons located in the EU, and the processing relates to either (i) offering goods and services to persons located the EU; or (ii) monitoring behavior of natural persons located in the EU.

(b) What is personal data?

(i) Personal data means any form of information that relates to an identifiable natural person (i.e., individual) or allows one to identify such a natural person. Personal data includes name, contact details, social security number or equivalent and any other personal information (e.g., disciplinary history).

(ii) Certain categories of data referred to as "sensitive data" or "special categories of data" are afforded a greater level of protection under the GDPR. Examples of sensitive data include information about a person's racial or ethnic origin, health, political opinions or religious beliefs.

(c) GDPR has been in effect as of May 25, 2018.

D. Develop a message.

1. Identify groups receiving/requiring communication.

2. Craft a message and related talking points.

3. Consider timing of the message.

4. Consult with counsel to confirm the message protects privilege.

5. Understand consequences of the message.

E. Analyze disclosure obligations.

1. Required vs. voluntary disclosure

2. Potential audiences may include:

(a) Investors

(b) Fund board of directors

(c) Partners

(d) Employees

(e) Counterparties (e.g., prime brokers, lenders, etc.)

(f) Press

3. Self-reporting to regulators and/or government

F. Internal Investigation

1. Considerations:

(a) Scope

(b) Speed

(c) Internal vs. external counsel

2. Privilege Issues

   (a) Establishing privilege

      (i) Ensure counsel is directing the investigation and document that fact.

      (ii) Document that the investigation is being conducted for the purpose of obtaining legal advice and/or in anticipation of litigation.

   (b) Upjohn warnings

G. Whistleblower Issues

1. SEC Whistleblower Program

   (a) Established in 2011 to administer the new whistleblower program under Section 21F of the Dodd-Frank Act

   (b) The SEC is required to pay awards to eligible whistleblowers who voluntarily provide original information that leads to a successful enforcement action yielding monetary recovery of over $1 million.

   (c) The award amount is required to be between 10 percent and 30 percent of the total monetary sanctions collected in the SEC action or any related action.

   (d) Since August 2011, the SEC has received over 28,000 whistleblower tips.[1]

   (e) Employees are protected from retaliation.

2. The False Claims Act (FCA)[2]

   (a) The FCA prohibits any person from knowingly submitting a false claim to the government or causing another to submit a false claim to the government or knowingly making a false record or statement to get a false claim paid by the government.

   (b) In addition to the federal False Claims Act, more than 29 states have passed similar state-specific legislation.

   (c) The following actions are considered violations under the FCA:

      (i) Knowingly presenting (or causing to be presented) to the federal government a false or fraudulent claim for payment;

      (ii) Knowingly using (or causing to be used) a false record or statement to get a claim paid by the federal government;

[1] U.S. Securities and Exchange Commission, *Whistleblower Program: 2018 Annual Report to Congress* (https://www.sec.gov/files/sec-2018-annual-report-whistleblower-program.pdf).

[2] U.S. Department of Justice, *The False Claims Act: A Primer* (https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf); *see also* American Bar Association, *An Introduction to Whistleblower/Qui Tam Claims* (Aug. 21, 2013) (https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/an_introduction_to_whistleblower_qui_tam_claims/).

(iii) Conspiring with others to get a false or fraudulent claim paid by the federal government; and

(iv) Knowingly using (or causing to be used) a false record or statement to conceal, avoid or decrease an obligation to pay money or transmit property to the federal government.

H. Indemnification Issues

1. Separate Counsel

(a) Witness

(b) Subject

(c) Target

2. Joint Defense Agreement[3]

(a) Usually narrow and arises from litigation.

(b) Can be between co-plaintiffs, co-defendants and/or nonparties.

(c) Creates an exception to waiver of privilege.

(d) To maintain privilege, parties must demonstrate that:

(i) Communications were made pursuant to a joint defense;

(ii) Communications were made to further the goals of a joint defense; and

(iii) Privilege was not otherwise waived.

3. Common Interest Agreement

(a) Usually broader and does not need to arise from litigation.

(b) Creates an exception to waiver of privilege.

I. Cooperation

1. SEC

(a) Entities

(i) In 2001, the SEC released the Seaboard Report, which established criteria for the SEC staff to consider when determining whether and how to credit entities for self-policing, self-reporting, cooperation and remediation when making enforcement decisions.[4]

[3] Shari L. Klevens**,** Dentons, *Joint Defense vs. Common Interest Agreements*, (Sept. 30, 2015) (https://www.dentons.com/en/insights/newsletters/2015/september/30/practice-tips-for-lawyers/joint-defense-vs-common-interest-agreements).

[4] U.S. Securities and Exchange Commission, *Enforcement Manual* (Nov. 28, 2017) (https://www.sec.gov/divisions/enforce/enforcementmanual.pdf).

(ii) These criteria include: nature of the misconduct, circumstances around which the misconduct arose, duration of the misconduct, harm inflicted upon investors and other corporate constituents, detection of the misconduct, remedial steps taken after learning of the misconduct, nature and extent of the firm's cooperation with the SEC and adequacy of the newly adopted internal controls and procedures.[5]

(b) Individuals

(i) In January 2010, the SEC issued a policy statement announcing the analytical framework it would use to evaluate cooperation by individuals.[6]

(ii) The SEC announced consideration of the following:

(1) Assistance provided by the cooperating individual in the SEC's investigation or related enforcement actions;

(2) The importance of the underlying matter in which the individual cooperated;

(3) The societal interest in ensuring that the cooperating individual is held accountable for his or her misconduct; and

(4) The appropriateness of cooperation credit based upon the profile of the cooperating individual.

2. DOJ

(a) Current Policy

(i) A revised policy was outlined in public remarks by Deputy Attorney General Rod Rosenstein on Nov. 29, 2018 and codified in the Justice Manual.[7]

(ii) The revised policy provides that in order to receive cooperation credit in criminal investigations companies "must identify all individuals substantially involved in or responsible for the misconduct at issue" and provide prosecutors with "all relevant facts relating to that misconduct."[8]

(iii) In the civil context, companies should focus on identifying individuals who were "substantially involved in or responsible for the misconduct." In particular, companies "must identify all wrongdoing by senior officials, including members of senior management or the board of directors" in order to receive credit.[9]

---

[5] *Id*.

[6] U.S. Securities and Exchange Commission, *Policy Statement Concerning Cooperation by Individuals in its Investigations and Related Enforcement Actions* (Jan. 13, 2010) (http://www.sec.gov/rules/policy/2010/34-61340.pdf).

[7] Rod J. Rosenstein, Deputy Attorney General, U.S. Department of Justice, Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018) (https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0).

[8] U.S. Department of Justice, *Justice Manual*, *Section 9-28.700 - The Value of Cooperation* (https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations?utm_medium=email&utm_source=govdelivery#9-28.700).

[9] *Id*.

(b) Previously, pursuant to the Yates memorandum, in effect from September 2015 through November 2018, the DOJ focused on bringing criminal charges against individuals bearing responsibility for corporate misconduct based on an "all or nothing" approach.[10] Corporations were required to provide all evidence related to all individual misconduct in order to be considered for cooperation credit.

IV. Recover

A. Evaluate and address, as needed:

1. Reputational damage;

2. Disruption to business operations; and

3. Loss of business.

B. Conduct an after-action review.

C. Reevaluate efficacy of crisis management plan and improve.

[10] Sally Quillian Yates, Deputy Attorney General, U.S. Department of Justice, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015) (https://www.justice.gov/archives/dag/file/769036/download).

Schulte Roth & Zabel
New York | Washington DC | London
www.srz.com