

Getting Control of a Situation Not in Your Control: Steps You Should Take in the Interim Period Before You Go to the Feds or the Feds Come to You With Evidence of Cartel Activity.

By Robert R. Calo

In a perfect world, you are sitting at your desk one day and a client's in-house counsel calls and tells you that, as a result of the "vigorous and robust" compliance program you helped put in place a few years ago, the company has uncovered a scheme where employees are engaged in collusion with one or more competitors in the sale of the company's products. Obviously, this would not be good news for the client. But, looking on the bright side, this sequence of events is proving to be good news for you because you can now control the timing of the actions you take, including — in all likelihood — when and in what manner you approach the Department of Justice Antitrust Division ("the Division") to take full advantage of incentives offered by the Division's Leniency Program.

Unfortunately, the world is not perfect. The news that the Division may have your client in its gun sites will come to you in other ways, which will not allow you to control the situation. For example, your client may have been the subject of a "dawn raid" in a foreign country (which begs the question of whether or not your client is being looked at by the Division here in the U.S.). Or, perhaps, your client's major competitor may have made an SEC filing revealing a subpoena issued by the Division (which could lead one to conclude there may be a widespread investigation being conducted in your client's industry). Another possibility could be that an employee of a competitor tips off one of your client's employees that the competitor's management had uncovered their cartel activity and is rumored to be "going to the feds with the information." In all of these situations, you are not in control; you are playing "catch up," and you have to react quickly. Obviously, the first priority is to determine whether your client's company was involved in the collusive activity, and if so, work through the strategic pro's and con's of going to the feds yourself. However, while you are conducting that investigation and/or your client is weighing those strategic moves, there are several "best practices" steps that you need to take immediately to assist your client.

Prepare for Search Warrants. Obviously, this is an issue that usually goes away once you contact the feds, attempt to get a marker and/or pledge cooperation (cooperation, which typically includes acceptance of a subpoena for any documents the government would seek by a search warrant). But, there may be situations where you can't or won't be in a position to contact the feds to alleviate any worries of a search warrant. For example, your client may want you to conduct an independent, "quick-turn-around investigation" to substantiate or get a sense of the scope of cartel activities before it agrees to expose the wrongdoing to the feds. The management of your client's company also may want to delay any contact with the feds until it has vetted the issues (and the potential fall-out) with its major investors, business partners, vendors, or others who will be impacted by you going to the feds. The delay or inability to contact the feds can also be chalked up to just plain old logistics: your client may be headquartered in Asia or Europe, and its Board may want an in-person presentation from you before it decides whether or not to contact the feds. In any of these scenarios, there is an "interim" period where the feds can serve a search warrant to the company. You need to both: 1) warn the company that this is a possible consequence of any delay in contacting the feds; and 2) take steps to mitigate the harm caused by the execution of a search warrant.

To mitigate the harm, you need to institute a search warrant response plan for all of your client's facilities. Federal agencies use search warrants to obtain documentary evidence of crime, to obtain immediate access to those documents, and to obtain documents before they can be destroyed. However, you should be aware that, in connection with a search, agents often will also attempt to obtain interviews with employees who are at the location searched. These interviews can be disastrous for the company, as "off the cuff" statements and "admissions" that will harm the company may be made. A good search warrant response plan will establish a procedure for getting the agents the documents they are entitled to, but at the same time, get them out the door as soon and as efficiently as possible. Such tactics will minimize disruption to the client's work force, minimize rumors or bad publicity that can accompany the execution of the search warrant, and minimize employee interviews. For these reasons, a plan needs to be put in place immediately, while the client contemplates whether or not to go to the government.

Warn Employees: No Talking to Competitors. The law enforcement tools of wiretaps and consensually recorded conversations — once used almost exclusively in narcotics trafficking and organized crime cases — are now increasingly being used in white collar cases, including cartel investigations. Thus, the government may be listening to your employees' phone calls or meetings weeks or months before you become aware of possible cartel activity by the client. Moreover, given the strong incentives offered by the Leniency Programs at the Division, all participants in a cartel scheme have an incentive to cooperate against the other participants if it appears that the scheme "is blown" and will become public. Thus, the other companies that participated in the cartel activity and their employees all have a strong incentive to gather evidence against your client. For these reasons, another landmine to avoid during this interim period is having one of your employees panic and call an employee of a competitor and make statements or admissions that may be used against the company at a later date. The solution here is to "circle the wagons." All employees who have had contact with cartel collaborators in other companies need to be told not to talk to the collaborators in the other companies. Such toxic communications need to be shut off, as they pose a risk of additional criminal exposure to the company.

Institute Document Preservation Policies. In other words, all normal document destruction policies (for electronic and hard copy data) should be immediately suspended to allow you to gather all documents relevant to the allegations. Regardless of whether or not the client ultimately agrees to contact the government, or simply elects to wait for the feds to contact them, it is vital that your client institute immediate and sweeping document preservation policies so that you are able to get all documents (favorable or unfavorable) that you need to assess the client's exposure. The issuance of a strong and immediate preservation policy not only accomplishes this goal by preserving evidence, it also provides "insurance" for your client in the event an obstruction issue arises. Specifically, while your client, as an institution, may seek to "do the right thing" and preserve all relevant documents, one or more culpable employees may elect to destroy relevant documents. If and when such destruction is uncovered (and it is usually only a question of when), the harm and fall out to the company — in the form of an obstruction charge or an obstruction sentencing enhancement — may be mitigated or outright eliminated because of the document preservation plan you put in place at the outset of the case.

Disclosure Issues. If your client is a publicly traded company, you also need to bring in the services of disclosure counsel to see that the company adheres to the securities disclosure laws. The company will soon go to the feds with evidence of cartel activity or the feds will notify the company that it is under investigation. Under either scenario, the company will inevitably face the need to disclose a reportable event. The sooner you get the disclosure specialist in to take control of what is to be disclosed, the better they are able to control the timing and content of the message to Wall Street.

Get the Public Relations Machinery in Place. Not only are formal disclosure issues in the securities arena looming during this interim period before you have had contact with the feds, there are also public relations issues that need to be addressed. Your client’s competitors, vendors and others in the business community will soon hear some very unfavorable news about your client. It would be wise to use the time during the interim period to shape how the message will be delivered to the community.

Notify the Insurance Carriers. Defending criminal and regulatory antitrust actions is expensive and time-consuming. Defending the ancillary civil lawsuits that arise in conjunction with a government’s antitrust investigation is usually exponentially more expensive and time-consuming. Therefore, it is in your client’s best interest to promptly notify the appropriate insurance carriers or brokers of any wrongdoing because the defense of such conduct — and the fines levied for the conduct at issue — may be covered by one or more insurance policies. For example, the client may have Directors and Officers (“D&O”) liability policies, Errors and Omissions policies (“E&O”), fiduciary liability policies and/or general commercial liability policies. While it is true that these policies will frequently exclude coverage for intentional misconduct related to cartel activity based on various “fraud-type exclusions,” you should not assume that is the case. The time to make that analysis — as to whether the conduct is or is not covered — is after you give timely notice to the carrier. A failure to give “timely” notification when one becomes aware of the misconduct could result in denial of insurance funds that would have otherwise financed a defense, had notice been timely.

Tweak That Compliance Program. It is never too early in the investigation for you to determine if there are ways you can modify the compliance or training program in an effort to prevent the misconduct from occurring in the future or to better insure that it will be detected. In addition, such early efforts at “self-reform” — conducted even before the government is on the scene — can help play a part in demonstrating to government your client’s acceptance of responsibility and its commitment to being a good corporate citizen and cooperating with the government’s



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