Nine Things to Do When Your Company Is the Subject of an Antitrust Probe

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One of the more troubling calls an in-house attorney can receive is a call disclosing that his or her company has received, or is about to receive, a grand jury subpoena duces tecum from the Department of Justice Antitrust Division. Often, the call may herald the beginning of a long and involved investigative process. Given that frequently this call presages in-house counsel's first involvement in a criminal proceeding, with its concomitantly higher stakes and perhaps unfamiliar rules, a certain uneasiness is probably inevitable – and appropriate.

The likelihood of receiving such a call is on the rise. The Microsoft case and its high-profile, high-tech facts have focused a great deal of public attention on the outer bounds of antitrust enforcement. Although the interest in and discussion of this celebrated case have probably been healthy, they may have masked the broader trend of more vigorous antitrust enforcement in more traditional areas. For example, in 1999, the Antitrust Division brought 57 criminal antitrust indictments or informations. That compares with 62 in 1998 but only 38 in 1997 and 42 in 1996.[2] These cases almost always involve price-fixing, bid-rigging, or related offenses, which are proscribed by the Sherman Act, 15 U.S.C. § 1.[3] Currently, the Antitrust Division has 36 grand jury investigations pending. The Division has also repeatedly emphasized that it collected about $1 billion in criminal fines in 1999.

Faced with an antitrust investigation, what should in-house counsel do? Although every investigation, and every industry, is different, some generalizations can be made. Below are nine practical steps to consider taking if and when you learn that your company is the subject of a criminal antitrust investigation. Many of the steps involve the gathering of critical information. Finding out what has happened is important not only to know the facts, but because the facts affect the handling of several important issues: whether or not to seek corporate leniency, whether separate counsel is necessary for individual employees, and most fundamentally, assessing the company's level of exposure.

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[2] See Antitrust Division, U.S. Department of Justice, 10-Year Workload Statistics Report FY 1990-1999. In the words of the Division, "[m]ost indicators in the report for FY 1990 - 1999 demonstrate consistently heavy and increasing workload." Id.

[3] 15 U.S.C. § 1 provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." The statute provides for criminal penalties for its violation, including fines and imprisonment.

1. Inform the company's key decisionmakers.

Receipt of an antitrust grand jury subpoena is an important, if not critical, incident. The company's key decisionmakers should thus be informed. This discussion may also be an appropriate time to present a brief overview of the Sherman Act, the Division's authority, and the nature, scope, and purpose of a criminal investigation, because there will undoubtedly be questions about these areas.

2. Ensure that no relevant documents are destroyed.

Grand jury subpoenas, of course, are criminal law enforcement mechanisms. This perhaps obvious fact should be kept in the forefront of the minds of counsel and corporate executives at all times. Because the grand jury investigation is a criminal proceeding, counsel and their corporation must avoid even the appearance of anything that could remotely be construed as an unwillingness to cooperate with the investigation, or worse, the obstruction of justice. For this reason, one of the first steps that should be taken is to circulate a memorandum or e-mail to the effect that a subpoena has been, or will be, received, and that documents relating to prices, price levels, price terms, competitor contacts, etc., should not be destroyed. Furthermore, the memorandum should indicate that document retention policies which would otherwise call for the destruction of these documents should be suspended.

Although at the very outset of an investigation counsel may not necessarily know all the appropriate recipients of such a memorandum (step four, below, concerns identifying the key players), it is likely that counsel can identify the more obvious ones relatively easily. These will undoubtedly be the decisionmakers who had any authority relating to pricing, as well as their assistants. But there may be good reason to circulate such a memorandum more widely – perhaps on a company- or at least division-wide basis – obviating the need to make an immediate determination of the key players.

3. Consider contacting the Antitrust Division.

Once a company has learned that it has received or is about to receive a subpoena, it is probably prudent to consider touching base with the prosecutors at the Antitrust Division. Although this may be something outside counsel (see below, step 9) can do more effectively, especially if they have a pre-existing relationship with the Division, in-house counsel may be adequately-equipped to make the first contact.

There are several reasons to contact the Division early on. First and foremost, it is important to establish an atmosphere of cooperation. In addition, through discussion, counsel may learn something about the Division's focus and true interests. Grand jury subpoenas are typically sweeping and broad, and often do not reveal what is motivating the Division's investigation. Although Division attorneys are likely to be circumspect, they may reveal some areas of special interest. That is especially so as negotiations ensue over the scope of the subpoena.

Whittling down the subpoena's scope is another reason to contact the Division. Because the subpoena is likely to be extremely broad, counsel will probably want to try to narrow it, or at least identify areas of higher priority that can be addressed first. For example, the Division may be willing to allow the company to search its headquarters files first and produce them. Then, if the Division wants additional documents, but not before, the company would have to search its offsite locations or branch offices. At the very earliest stages of the investigation, counsel probably will not know the extent of the files, their locations, or the true extent of the task required by the subpoena. (See below, steps four and six). It is thus quite important not to make any statements to the Division about the burden of compliance or the locations, existence, or non-existence of files unless counsel is absolutely sure that they are accurate. Before counsel has undertaken a full review, it is probably wise to limit discussions about these issues to generalities, and inform the Division that a review of files is being conducted.

Finally, counsel may want to inquire whether the company is the subject or a target of the investigation. These are terms of art at the Department of Justice, but essentially mean what they suggest: a "target" is a company identified by the Division as likely to be indicted; a subject merely has information relevant to the investigation. If the Division is willing to state that the company is a target, that is crucial information. However, oftentimes, the Division does not make this determination until quite late in the investigation. For this reason, the fact that a company is classified only as a subject may convey a misleading sense of security.

Although the Division may not give you a meaningful response to the question of whether your company is a target, another way to probe the issue is by asking permission for in-house or outside counsel to also represent individual employees. If the Division objects, there is likely a serious problem.

Knowing whether a company is a subject or a target has important ramifications. For example, the Antitrust Division has a corporate leniency program, which essentially completely insulates the first company (and its officers) in a cartel which spills the beans to the government. This policy puts a premium on learning the facts quickly to determine if there has been any wrongdoing in order to maximize the corporation's possibility to obtain leniency. (In addition, whether or not a company is a target will affect the calculus of whether individual employees need their own separate counsel in the investigation).

You do not need or want to guess at leniency. The Division is always fishing until they get someone, but you can ask: "As we conduct our own investigation, and without suggesting any guilt, should we be considering a leniency application?"

4. Ascertain the key players.

Identifying the key players is an important step. It will affect the scope of the file search and determine, at least initially, the universe of information available to counsel. Every company has a different organization, so there is no way to list those who should be included in the group of key players. But the group must include everyone with pricing authority or input, as well as their assistants and secretaries. The group is likely to include former employees if the investigation relates to events that happened more than a few years ago.

5. Prepare a memorandum for corporate employees.

The existence of an investigation is likely to prompt some level of discussion between and among corporate employees. In addition, the company would probably prefer to designate one or several people to communicate with the Division about the investigation. However, because of the criminal nature of the investigation, both counsel and the company must be scrupulous to avoid even the appearance of interfering with the investigation, witness intimidation, or obstruction of justice, which can be prosecuted as separate offenses under 18 U.S.C. §§ 1503, 1505, and 1512(b). In addition, individual employees' own interests may or may not be totally aligned with that of the company, and they may have Fifth Amendment rights not to testify.

Balancing these competing interests can be tricky. Usually, the balance can be struck by circulating a memorandum from in-house or outside counsel to the effect that an investigation has begun, that counsel is representing the corporation, that individuals may wish to consult their own counsel, that individuals have the right to discuss the case with the government but also have the right to have counsel present if they choose, and that if counsel is indicated, the company will pay the fees. Employees should also be requested to inform corporate counsel of any discussions, contacts, etc. with the government. These points could be incorporated in the file-retention memorandum discussed above, or outlined in a subsequent document.

6. Interview key personnel.

The heart of counsel's inquiry should consist of interviews of the company's key personnel. Counsel should make sure that employees are aware that counsel is representing the corporation, and that the communications are protected by the corporate privilege. But if separate counsel is advisable, counsel may also want to advise the key employees at this time that it is indicated and will be provided.

The interviews should focus on competitor contacts, knowledge of competitors' pricing, and the company's prices and pricing practices. Any contacts with competitors, whether at trade association meetings or the like, should be explored. It is important to take careful notes during these interviews so that a clear record of the conversation can be maintained for future reference by outside counsel or otherwise.

7. Determine the scope of file searches.

Once the key players are identified, it becomes possible to identify with some certainty what files exist and must be searched. These files will almost always include pricing files, competitor contact files, and significant customer files. Also relevant will be market analyses and reports. But don't overlook other areas of possible interest – including trade association files, telephone logs, and reimbursement files. The latter two categories are prosecutor favorites, because they can be used, in conjunction with files obtained from competitors, to show that decisionmakers with pricing authority from two or more competitors were in the same place at the same time. Such evidence can be used to build a circumstantial case of price-fixing.

Once the initial file inventory has been completed, it can be used in further negotiations with the Division regarding the timing of compliance with the subpoena, or possibly to narrow its scope.

8. Determine if competitors or former employees should be contacted.

Counsel should consider whether competitors (especially those who have also received subpoenas) should be contacted. If the contacts are made at the counsel level and as part of an overall joint defense strategy, such contacts may usefully reveal the nature of the government's investigation, competitors' negotiations with the government over subpoena scope, etc. Careful consideration should be given to the use of a joint defense agreement to maximize preservation of the attorney-client and other privileges. Former employees may also have valuable information regarding the period of time in question. In fact, it may be essential to talk with them. But care must be taken to ensure that they are aware whom counsel represents.

Although counsel may want to consider contacting their counterparts at competitors, it should be made absolutely clear from the beginning that company executives should refrain from discussing the investigation with their counterparts. That is so because their discussions will almost certainly not be privileged, will likely eventually be discovered by the Division, and will only serve to arouse needless suspicion.

9. Retain outside antitrust counsel.

Although in-house counsel at many corporations, especially the larger ones, are adequately equipped to deal with many aspects of a criminal investigation, outside counsel will also almost certainly be required. The general counsel's office is part of the same corporate management that may be under suspicion by government attorneys. Not only does in-house counsel face serious personal and professional potential conflicts if colleagues are implicated, but the numerous demands of the investigation, especially in its critical early stages, usually cannot be met by in-house counsel legal staff. Corporate counsel should therefore move immediately to retain outside counsel with experience in antitrust investigations.

In-house counsel and their clients are often preoccupied with locating counsel knowledgeable about their industry, but this concern is misplaced – the value of criminal grand jury experience far outweighs industry expertise. The immediate critical questions have nothing to do with the details of how the industry works. The immediate needs are for a very fast and thorough investigation, sound judgment and as to leniency and related issues, experience of Division procedures and credibility with the Division attorneys from staff to the Assistant Attorney General.

Concluding thoughts

Coping with a grand jury antitrust investigation can be daunting task. But with careful and meticulous preparation and organization, it doesn't have to be overwhelming.