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5 Steps for Handling an Antitrust Subpoena or CID

From the Experts

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The news is filled with stories about government investigations into possible violations of antitrust laws: alleged anticompetitive conduct by Google, price fixing by Apple and bid rigging by large financial institutions. In-house counsel should be prepared to respond quickly if your company is served with either a subpoena—signifying a criminal investigation—or civil investigative demand (CID). This article provides five steps in-house counsel should take upon receipt of a subpoena or CID.

1. Analyze the Document

A careful reading of the subpoena or CID may signal how far along the government is in its investigation. If the document's language uses inside lingo and is narrowly tailored with specific terms of art used in the industry, it may indicate that the investigation has progressed and that the government may already be working with a cooperating witness or whistleblower. A corporate recipient of a subpoena has a right to know if it is a "target," "subject" or "witness" of the government's investigation. Determining your company's status may help to determine the degree of flexibility the government may have in negotiating compliance with the subpoena or CID.

2. Conduct an Internal Investigation

One of the first steps you should take is to educate yourself about the alleged conduct. Interview relevant employees, examine any relevant emails or chats and put a litigation hold/preservation notice in place. This will



allow you to assess the scope of the company's involvement in the subject matter of the investigation, its potential liability and make a risk assessment and a recommendation to the company's board.

At this point, in-house counsel of public companies should also be aware of their disclosure obligations. You should determine if the receipt of the subpoena/CID—or the underlying events that the internal investigation reveals—are material events that require disclosure.

3. Consider Participating in the Corporate Leniency Program

A unique feature of criminal antitrust enforcement is the existence of the U.S. Department of Justice's Corporate Leniency

Program. This program was introduced and expanded because of the inherent difficulty of piercing an antitrust conspiracy. By promising leniency to the first participant to come forward and provide evidence, the DOJ has incentivized corporate co-conspirators to assist government investigations. The program has been so successful that more than 50 jurisdictions around the world have similar programs modeled after it. Thus, counsel should determine in which jurisdictions it should apply for amnesty and not limit itself to the well-known U.S. program.

Leniency carries several benefits along with some burdens. Most important, a successful leniency applicant will not face criminal prosecution or monetary fines beyond possible restitution. Nonprosecution typically

extends to implicated current employees, and leniency applications are kept confidential.

A leniency applicant may also be immune from treble damages in follow-on civil litigation if the company cooperates satisfactorily with the civil plaintiffs. This benefit is codified in the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA). To enjoy the ACPERA benefit, a leniency applicant must make sure to provide a full and *timely* account of all facts known to it, and furnish all documents or other items potentially relevant to the civil action. Compliance or noncompliance with ACPERA is determined by the judge presiding over the civil action—and it is not automatic. Recently, a judge in the Northern District of California determined that an applicant was not entitled to ACPERA benefits because it was dilatory in providing the required cooperation. (*In Re Aftermarket Automotive Lighting Products Antitrust Litig.*) It is important to consult outside counsel throughout the government investigation and beyond to ensure that you will receive all available benefits from the leniency process.

Of course, the decision to participate in the leniency program requires careful consideration of the burdens associated with participating. Participation requires significant cooperation. A company must disclose all relevant facts, produce all relevant documents and attempt to secure the cooperation of key individuals. Further, only one company can win the leniency race, so companies considering applying often do not enjoy the luxury of lengthy discussion and debate. A “second-in” cooperator may still receive benefits, but any discounts are typically smaller and are discretionary.

4. Determine the Location of the Alleged Conduct

U.S. antitrust enforcers do not have jurisdiction over purely foreign anticompetitive conduct. Indeed, the Foreign Trade Antitrust Improvements Act (FTAIA) limits the reach of the Sherman Act to situations in which foreign conduct “has a direct, substantial and reasonably foreseeable effect” on U.S. commerce. Thus, if the alleged anticompetitive

conduct is foreign, the FTAIA may provide a defense to your company’s conduct.

There is currently a circuit split on the reach of the FTAIA. The U.S. Court of Appeals for the Ninth Circuit has held that the FTAIA extends only to foreign conduct that has a direct anticompetitive effect in the U.S. The Seventh and Third Circuits extend the reach of the FTAIA to foreign conduct that has a “reasonably proximate causal nexus” to effects caused in the U.S. A case currently pending before the Ninth Circuit (*U.S. v. AU Optronics Corp.*) may cause the Ninth Circuit to rethink its approach and, ultimately, the U.S. Supreme Court may decide this issue. The reach of the FTAIA will have vast implications for a company’s liability with respect to foreign anticompetitive conduct.

Counsel should also be aware of other implications of foreign conduct. For example, while not typically fully enforced, foreign blocking statutes that prevent the export of evidence for use in U.S. judicial or administrative proceedings may provide a basis for negotiating a subpoena or CID’s scope.

5. Remember the Limits on the Government

While the government has substantial power to collect information via a grand jury subpoena or a CID, there are limits on how the government can use the information it obtains through these means.

Federal Rule of Criminal Procedure 6(e) prevents disclosure of grand jury proceedings and evidence, even to other government attorneys conducting a parallel civil investigation. The only exceptions permitted are (1) disclosure to other federal or state criminal prosecutors; (2) a court order directing disclosure; or (3) the defendant itself requests disclosure. DOJ’s antitrust division treats a leniency applicant similar to one subject to a grand jury subpoena. It will not disclose the identity or information from a leniency applicant absent prior disclosure, a court order or agreement with the applicant.

Disclosure of CID material is governed by the Antitrust Civil Procedure Act (ACPA), which authorizes disclosure only: (1) to Congress; (2) to the Federal Trade Commission; (3) to

third parties “in connection with the taking of oral testimony”; and (4) for official use in connection with court cases, grand juries, or a federal administrative or regulatory proceeding in which the DOJ is involved. Thus, CID materials cannot be disclosed to state, foreign or other federal agencies. It is critical to remember that only materials produced in response to the CID are subject to these limitations on disclosure. Voluntary submissions (such as white papers) can be disclosed and are not exempt from a Freedom of Information Act (FOIA) request. A best practice to avoid disclosure is to ask the antitrust division to include a request for a white paper in the CID so that it is covered by the ACPA and exempt from most disclosure.

Conclusion

Complying with a subpoena or CID is a difficult but crucial process. Keeping these five steps in mind will help a company evaluate all its options in responding to a subpoena or civil investigative demand from the antitrust division or other antitrust enforcement agencies, and maximize the likelihood of a positive, cost-effective outcome.

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