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The Calm Before the Storm—Are You Prepared for an Antitrust Search Warrant?

From 2010 to 2015, the Antitrust Division of the U.S. Department of Justice filed criminal charges against more than 120 corporations and more than 350 individuals, and collected fines and penalties of more than \$8 billion. In fiscal year 2017 alone, the Division sentenced 30 individuals to prison (the most since 2012) and tried a record-setting nine criminal cases. This week, the Division is expected to issue its annual update, which will report on enforcement activities during fiscal year 2018.

An effective compliance program can lower your company's risk of a criminal antitrust investigation. But if your compliance efforts fail, you must also be prepared for the worst—complying with a grand jury subpoena or having the FBI knock on your door with a search warrant in hand.

Our seasoned criminal defense attorneys and former antitrust enforcers, whose experience includes prosecuting antitrust crimes and participating in so-called "dawn raids" on businesses under investigation, offer the following checklist of issues to consider in planning for how your company will respond to a criminal antitrust investigation. But this "checklist" is just that—it's no substitute for working closely with counsel to craft a detailed playbook and toolkit for each item on the list.

1. **Designate an attorney to take point.** Using a rotation system, there should be at least one company attorney or other employee who is designated to be on-site and prepared to lead the response to an FBI visit. Security personnel should ask the agents to wait for the designated employee to arrive, but be aware that agents with a search warrant can refuse that request.
2. **Monitor the search.** Request the ability to monitor the search but recognize that the agents can deny that request and can confine all employees to one central location. If the agents ask to inspect an area of the facility or seize a document not covered by the warrant, do not argue, but state that the search is being permitted under protest to preserve the company's position that the search is illegal.
3. **Employees can be interviewed.** The agents may ask employees questions during the search. It is also very common for Antitrust Division attorneys and FBI agents to visit executives at their homes, early in the morning before going to work. Advise all employees that they are not under any obligation to answer questions but are free to do so if they choose. If a search warrant is executed, employees who do not absolutely need to be on-site should stay away from the premises being searched, as their presence may prompt an interview that would not otherwise take place. If employees insist on being present, be aware that the FBI may request to take a forensic image of their personal electronic storage media (e.g., cell phones), and the employees may consent.
4. **Inventory before the agents leave.** The agents are required to provide an inventory of all documents or other materials seized. Create a written record of any disagreements with the agents regarding the scope of the search or the items taken.
5. **Actions after the agents leave.** Suspend any normal document destruction or non-retention policies. Preserve any information related to the search and the government's investigation. Request that employees not discuss the search among themselves or with others, except company counsel. Prepare for possible media inquiries and coverage.
6. **Carefully analyze the grand jury subpoena.** Rather than executing a search warrant, or after a search is completed, the government may serve your company with a grand jury subpoena. If a search warrant hasn't already been executed, experienced antitrust counsel can examine the contents of the subpoena to help you determine if the company is a witness, subject or target of the investigation, and analyze whether it is likely that the investigation has progressed beyond its initial stages.
- 7.

Preserve relevant information. If not done already following a search warrant, suspend automatic email deletion functions and document destruction or non-retention policies, issue a litigation hold notice, and instruct employees to preserve all electronically stored information and other documents that are responsive to the subpoena or relate to the investigation. This may require preserving documents located at other company facilities, including those outside the United States.

8. **Develop a communications strategy and plan.** Do not immediately go public (unless legally required, for example, by the securities laws) or communicate with the Antitrust Division until you have a thoughtful strategy in place. Consult with antitrust counsel as soon as possible to decide whether the company should issue a public statement and when to engage directly with the Division. If a search warrant has been executed, the Division may already have a "leniency" applicant, a company or individual who is granted immunity in return for cooperating with the investigation. But experienced counsel can help decide whether it is advisable to call the Division and determine if leniency is still available.
9. **Conduct an internal inquiry.** Interview employees to determine who has knowledge about the relevant events and to identify where emails, electronically stored information and other responsive documents are located. The investigation should be carefully designed to ensure that documents are protected by the attorney-client privilege. This will be the first opportunity to understand whether company employees have any information that could support an allegation that the company violated the law.
10. **Carefully execute your collection and production plan.** At the appropriate time, communicate with the Division to understand how and when it will agree to modify the instructions in the subpoena so that there are no unfortunate surprises later. Otherwise, strictly follow the Division's protocols for the production.

The Division has investigated alleged criminal cartel activity in markets for many different products and services. Regardless of your company's line of business, an FBI raid or service of a grand jury subpoena is unsettling and disruptive to a company's day-to-day functions. Senior management will also be on high-alert and will demand immediate information from the legal department regarding the company's response. The best way for in-house counsel to be prepared for that call is to have a thoughtful plan in place, be sure it is up-to-date and ensure that everyone is trained in their respective roles.

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