

A hand in a dark grey sweater reaches for the handle of a red binder. The binder is part of a stack, with several papers visible on top. The background is a solid teal color. The bottom of the image has a brown, textured overlay where the text is located.

**WHEN THE CARTEL INVESTIGATORS
COME CALLING:
TOP TEN DO'S, TOP TEN DON'TS**



THE CRISIS



A company may first learn that it is involved in an antitrust investigation in the US when federal agents appear at offices or homes armed with a search warrant to seize electronic and hard-copy records, computers, smart phones or other items that may contain relevant information.

No one expects to be handed a search warrant by a federal agent at the office, yet it is happening more frequently than ever before, and not only in the United States but around the world. In addition, it is increasingly common for the US Department of Justice Antitrust Division to coordinate its investigations with competition authorities in jurisdictions outside the US, particularly the European Commission, often to the point of coordinating the timing of searches or “dawn raids.”

To facilitate this cooperation and the sharing of information, the Antitrust Division has entered into a number of cooperation agreements with enforcement authorities in other jurisdictions. The result: a company with international operations may find itself facing cartel investigations, complete with government agents wielding search warrants and launching dawn raids, at multiple offices in multiple countries at the same moment.

To put your organization in the best possible position to effectively defend such an investigation, it is critical to be proactive and prepare for the possibility well in advance. Such preparation will allow you not only to understand what is happening when a search occurs, but also to have in place guidelines and procedures for dealing with the situation.

This handbook summarizes the process and provides the top ten “do’s” and “don’ts” for dealing with a search warrant in a cartel investigation in the US. In future similar publications, we will address related subjects including grand jury subpoenas, civil investigative demands from both federal and state agencies, internal investigations, and the roles of management and the board, including the need for and duties of a special committee.

WHAT IS AT STAKE

A negative outcome in a cartel investigation can be devastating for a company and its executives. The maximum corporate fine under the Sherman Antitrust Act is US\$100 million, but, under an alternative fine provision, the Antitrust Division has obtained fines as high as US\$500 million. Indeed, there is always a call for higher fines to punish and deter. And that's just in the US. In an international cartel case, multimillion-dollar fines may have to be paid in many jurisdictions across the globe. Private civil cases almost invariably follow in the wake of cartel investigations and can be equally devastating to a company.

These effects are not limited to companies. The Antitrust Division prosecutes individuals as well as corporations, and defendants are both domestic and foreign. The maximum prison sentence for an individual found guilty of price fixing is 10 years. To date, the longest sentence of incarceration imposed on an individual for a criminal antitrust violation has been four years.

With the stakes so high, a company needs to do everything it can to prepare to defend itself and its people. Prevention is the best medicine, but prevention does not always work, and investigations can be pursued based upon faulty information. In any case, responding quickly and properly to the disclosure of an investigation, whether by a search warrant, dawn raid or otherwise, can significantly enhance the ability to effectively respond and minimize the fallout from a cartel investigation.

WHEN YOU LEARN OF A CARTEL INVESTIGATION

How a company responds in the first few minutes and hours and the actions it takes over the following days will have a significant bearing on the ability to defend the company, management and employees. Speed is essential, but the response needs to be coordinated and directed. Two factors are noteworthy here: using experienced counsel, and preparing effectively and thoroughly.

This pamphlet is intended to provide you with general principles based on our experience. However, every company is different and we recommend further discussions with counsel about how these principles apply to your particular organization.

THE PREQUEL TO THE SEARCH

Execution of a search warrant is usually the first public sign of an undercover cartel investigation by the Antitrust Division. In the US, in order to obtain a search warrant, the government needs specific information that a crime has been committed and reason to believe that evidence of that crime is likely to be found at a specific location. Typically, the government will have this specific information only if it has the cooperation of an insider, perhaps a disgruntled former or current employee, or a purported co-conspirator who has applied for leniency.

The government may also have a cooperator in place who is recording conversations, either by taping phone calls or wearing a wire. Because antitrust offenses are now predicate crimes, the government may also have obtained a wiretap to listen in on calls and monitor meetings using sophisticated surveillance methods. The government particularly likes to monitor calls when it can on the day of a search to see if superiors are speaking to subordinates or competitors are speaking to each other to try to orchestrate a cover-up. On the day of the raid, or even the night before, government investigators may also approach employees or ex-employees who they think might be enticed into providing information or cooperating.

Government investigators may proceed with execution of a search warrant for a variety of reasons: when they think they have exhausted the ability to obtain evidence covertly; when they believe a covert investigation is about to be exposed, perhaps prompting the destruction of evidence; or when they believe certain potential evidence will be present in the premises to be searched. It may ultimately turn out that the information the government is acting on is false, incomplete or inaccurate, but that does not change the fact that the government has obtained a search warrant, the agents are going to search everywhere authorized by that warrant, and you need to be prepared to deal with it.

BE PREPARED – HAVE A PLAN

Advance preparation and instruction on how to handle a search warrant are critical to effectively deal with the “fog of war” on the actual day of the search.

For example, it is important to have a list of persons who are to be notified immediately as soon as knowledge of a search surfaces. Company counsel and already vetted experienced outside antitrust counsel should be contacted immediately. The board of directors and senior management also must be informed as soon as possible. A spokesman to handle all media inquiries should be identified in advance and trained. An on-the-ground person should be assigned in advance to handle the actual onsite search in each location with significant record keeping. In case such personnel are unavailable, there should also be designated backups for each of these positions. Employees should be advised on how to handle unscheduled visits from federal or other agents.

We have prepared this list of Do’s and Don’ts as a general guide should the FBI appear at your door with a warrant in a cartel investigation. However, on the day of a search, which will likely be completely unexpected, it is unrealistic to think employees will follow these guidelines fully without some prior training and legal advice.



WHEN AGENTS ARRIVE

TOP 10 DO'S

When agents knock on your door and announce they have a warrant:

1. Contact general counsel and outside antitrust counsel immediately.
2. Ask that the search be delayed until counsel arrives. Such a delay is granted at the agent's discretion and may be declined.
3. Immediately instruct all company offices and personnel in writing to preserve records and suspend any document destruction programs.
4. Designate at least one person to respond to inquiries from government agents, the media or anyone else until counsel arrives. Redundancy is needed to ensure a responsible person is always available.
5. Get a copy of the warrant, review it and transmit it to counsel. The warrant will set forth the areas the agents are authorized to search and what they are permitted to seize.
6. Speak to the head agent (but get the business cards and names of all agents). Ask why the company is being searched. Agents are not required to give any information beyond explaining the search warrant, but they may be willing to disclose information about the investigation if asked.
7. Advise employees of their rights. While it is better to do this in advance, advise employees that they each may decide whether to speak with agents. They may decline to speak to agents, speak to agents with conditions or simply be interviewed. The company can offer to make counsel available to sit in on any interview.
8. Have an escort accompany the agents as they conduct the search to watch what they are doing – however, note that you are not obligated to give a tour of your facility. Providing an escort helps ensure that the agents do not go to areas not authorized by the warrant, take material not authorized by the warrant or otherwise engage in improper conduct.
9. Observe what the agents are taking and object, with the advice of counsel, to the seizure of any material outside the scope of the search warrant. Your counsel can also object to the seizure of attorney-client communications. If these are taken anyway, ask that they be segregated from the other items that are being seized.
10. Make as detailed an inventory of everything seized as possible and the locations where documents were seized. Make copies if possible. The agents are required to leave an inventory, but it will typically be very vague.

TOP 10 DON'TS

Certain conduct must be avoided during a search:

1. Be cooperative as to the parameters of the search, but do not volunteer information about your business, industry or subjects relevant to the investigation. An agent may suggest that you answer questions off-the-record. There is no such thing as speaking “off the record” to make things “go better.” Only volunteer information when it is necessary to help smooth the execution of the search warrant – for instance, providing information about files or servers specified in the warrant. Be cooperative with the search, but not the investigation, without advice of counsel.
2. Do not authorize the inspection of any areas not covered by the warrant or the seizure of any documents not specified in the warrant.
3. Do not obstruct or interfere with the search. If there is a dispute about whether an area is specified in the warrant or whether documents are attorney-client communications, or any related disagreement, make notes but do not obstruct the agents if they decide to seize material.
4. Do not destroy, hide, alter or tamper in any way with documents or electronic information. This includes documents at the site that is being searched or at any other locations. Obstruction is a very serious felony and can be prosecuted even if it turns out that the reason for the search does not merit prosecution.
5. Do not instruct or suggest to any other employee that they destroy, hide or tamper with documents. This may open you to a charge of obstruction just as if you had done it yourself.
6. Do not instruct employees that they cannot speak with agents. This may be construed as obstruction. As mentioned earlier, the choice is the employees’ regarding whether they want to speak with the agents.
7. Do not lie to the agents about anything. This includes making deliberately misleading statements or omissions. Making false statements to the government about any subject, even something you consider minor, can constitute a felony.
8. Do not call competitors and warn them about the searches. Your competitors may be racing against you to cooperate with the government. What’s more, someone may be recording your call.
9. A search is cause for concern – but do not panic and overreact. It may be that your company was wrongly identified by a competitor, a former employee or some other source.
10. Most of the warnings in this list have been about not obstructing the investigators in any way. We cannot stress this enough. It is an unnecessary tragedy when the government cannot bring a case for whatever suspected crime led to the search, but someone gets prosecuted and faces prison for obstruction or false statements made during the investigation.

PROACTIVE, PROTECTIVE

If a search warrant in a cartel case is executed on your business, it is likely the result of months or even years of investigation. When the FBI appears at your door, it is important that your personnel know how to react. A call should be placed immediately to experienced criminal antitrust counsel. Job one for your counsel will be to act as the primary contact with the agents on your behalf as they execute the warrant. Once the search has been completed, counsel can communicate with the Antitrust Division prosecutor who is leading the investigation and immediately commence a thorough internal investigation – talking to management and key company personnel and gathering and reviewing documents and communications – to determine the facts as they relate to what the enforcement authorities are alleging. That investigation will allow antitrust counsel to advise you on your options.

Cartel investigation and enforcement is increasing around the world. Most companies would never get involved in a cartel. Yet cartels happen. Companies can be devastated; lives may be ruined. In the current climate, it is wise to put in place proactive, preventive compliance training and review procedures, and, just in case, protect your interests with a plan to respond to the worst-case scenario.

ABOUT US

DLA Piper is a global law firm with 4,200 lawyers in more than 30 countries throughout the Americas, Asia Pacific, Europe and the Middle East, positioning us to help companies with their legal needs anywhere in the world.

Cartel enforcement is global business and DLA Piper has the global resources and the experience to help you deal with it. Our former Department of Justice prosecutors, FTC enforcers and lawyers who have worked with competition agencies in other jurisdictions join career defense counsel and other professionals experienced in cartel representation to help clients effectively address the challenges of multi-jurisdiction cartel investigations.

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