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Ten Things to Do When Your Company Receives a DOJ Grand Jury Subpoena

You have just received notice of a grand jury subpoena *duces tecum* from the Department of Justice Antitrust Division in connection with a price-fixing investigation. (The likelihood of doing so may be on the rise. In 2008, the Division had 137 pending grand jury investigations, filed 54 criminal cases, and charged 59 individuals and 25 corporations. The Division currently has nearly 150 open cartel investigations. In 2009, the Division collected over $1 billion in criminal fines.) What should you do? Below are ten suggested practical steps.

1. Inform the company's key decisionmakers.

Receipt of a grand jury subpoena is a critical incident. The company's key decisionmakers should be informed. This discussion may also be an appropriate time to present a brief overview of the Sherman Act, the DOJ's authority, and the nature, scope, and purpose of a criminal investigation.

2. Ensure that no relevant documents are destroyed.

You must avoid even the appearance of anything that could be construed as an unwillingness to cooperate with the investigation, or worse, the obstruction of justice. Therefore, the company and its lawyers should 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, it is likely that counsel can identify the more obvious ones (*e.g.*, decisionmakers who had any authority relating to pricing, as well as their assistants). There may be good reason to circulate such a memorandum more widely.

3. Retain outside antitrust counsel.

Although in-house counsel are often adequately equipped to deal with many aspects of a criminal investigation, outside counsel with experience in antitrust investigations will also likely 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 personal and professional potential conflicts if colleagues are implicated, but the numerous demands of the investigation, especially in its critical early stages, often can overwhelm in-house counsel.

4. Consider contacting the DOJ.

It is important to establish an atmosphere of cooperation with the DOJ. In addition, through discussion, counsel may learn something about the DOJ's focus and true interests, especially as negotiations ensue over the scope of the subpoena. Counsel will probably want to try to narrow the usually overbroad subpoena, or at least identify areas of higher priority that can be addressed first. For example, the DOJ may be willing to allow the company to search its headquarters files first and produce them. Then, if the DOJ wants additional documents, but not before, the company would search its offsite locations or branch offices. Counsel should not make any statements to the DOJ about the burden of compliance or the locations, existence, or non-existence of files unless counsel is absolutely sure that they are accurate.

5. Determine the company's status.

Counsel may want to inquire whether the company is the subject or a target of the investigation. Oftentimes, the DOJ does not make this determination until late in the investigation, so the fact that a company is classified as a subject may convey a misleading sense of security. Another way to probe the issue is by asking permission for counsel to also represent individual employees. If the DOJ objects, there is likely a serious issue.

Knowing whether a company is a subject or a target has important ramifications. The Antitrust Division has a corporate leniency program, which essentially insulates from criminal liability the first company (and its officers) in a cartel which spills the beans to the government. (Leniency also may eliminate treble damages exposure in certain civil contexts.) 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. You do not want to guess at leniency. The Antitrust 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?"

6. Ascertain the key players.

Identifying the key players 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, 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.

7. Determine the scope of file searches.

Once the key players are identified, it becomes possible to identify existing files that 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 do not overlook other areas of possible interest – including trade association files, telephone logs, and travel expense/reimbursement files, which are often the focus of a government investigation.

8. Prepare a memorandum for corporate employees.

The existence of an investigation is likely to prompt discussions between and among corporate employees. In addition, the company would probably prefer to designate one or several people to communicate with the DOJ. However, both counsel and the company must be scrupulous to avoid even the appearance of interfering with a criminal 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, employees' interests may or may not be totally aligned with that of the company, and they may have Fifth Amendment rights not to testify. Usually, the best way to balance these competing interests is to circulate a memorandum from 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 or contacts with the government.

9. Interview key personnel.

Counsel should interview 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 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.

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

Counsel may want to contact competitors. 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. While counsel may have discussions, company executives should entirely refrain from discussing the investigation with their counterparts at competitors.