
RESPONDING TO ANTITRUST CRIMINAL INVESTIGATIONS

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I. LEARNING OF AN INVESTIGATION

A. A Raid “Search and Seizure”

- 1. FBI agents, U.S. Marshalls and DOJ Attorneys***
- 2. Search warrant issued by U.S. District Court based upon probable cause***
- 3. No prior notice***

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- 4. *Panic call from client – what to do?***
- a. *Little chance of having court stop the search and seizure, emergency orders seldom granted to stop search and seizure***
 - b. *Talk to DOJ attorney and client personnel on the scene***
 - (1) *Agree to what areas to search (where the documents DOJ wants may be)***
 - (2) *Copy electronic documents being seized***

(3) Client personnel cooperate to limit search but no substantive questions

(4) DOJ provide list of items being seized

(5) After seizure permitted to copy documents or have access to documents

(6) Try to find out what investigation about

c. Preserve all documents not seized

B. “Cold” Visit to Client Personnel

- 1. FBI or DOJ attorney show up at person’s home or office unannounced***
- 2. May serve a subpoena for documents to be produced later***
- 3. Ask questions and show documents***
- 4. Do not have to talk – best if obtain contact information and report to General Counsel’s office***

C. *Grand Jury Subpoena For Documents*

- 1. *Scope - very broad***
- 2. *Message to client personnel to preserve all documents***
- 3. *May include private documents***
- 4. *Meet with DOJ attorneys as soon as possible***
 - a. *Narrow scope of document request***
 - b. *Phased production***
 - c. *Statements rather than documents such as summaries of data***
 - d. *What investigation about***

II. INTERNAL INVESTIGATION

A. Notice to personnel to preserve all documents

- 1. Destruction of documents could be criminal (obstruction of justice)***
- 2. Electronic documents may include personal devices sometime used for business (e.g. cell phones, tablets, PCs, home computers, etc.)***
- 3. Suspend company document destruction program***

B. *Interview personnel*

- 1. *Explain you represent company not individual and individual free to consult with own attorney***
- 2. *Determine what documents (emails, reports, letters, etc.) they may generate or receive***
- 3. *Determine how documents stored***
- 4. *Probe for all contacts with competitors***
- 5. *Obtain work history (e.g. past employment with competitors)***
- 6. *May interview multiple times as gain more information***

C. Document Production

- 1. As subpoenaed documents gathered have names, dates, etc. coded electronically for retrieval***
 - 2. Review documents including electronic data for problems or exculpatory information***
 - 3. Produce to DOJ in format requested (Bates numbered, etc.)***
 - 4. Follow up questions with client personnel***
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III. ATTORNEYS FOR OTHER PARTIES

- A. Contact attorneys for other parties under investigation***
- B. Joint Defense Agreement
(carefully drafted to protect confidentiality and avoid conflicts)***
- C. Determine scope of investigation***
- D. Share information***

IV. “TO PLEA OR NOT TO PLEA” DEALING WITH DOJ

A. *DOJ Leniency (“Amnesty”) Program (corporate and individual)*

- 1. May not be available after investigation begins but “Amnesty Plus” could be available if can provide information on criminal activities not under investigation*
- 2. Have to move quickly (can put down a “marker” to preserve a place in line)*
- 3. If fail to cooperate fully leniency may be voided*
- 4. May limit civil liability in damage actions under Antitrust Criminal Penalties Enforcement and Reform Act*

B. Discuss with DOJ what a plea may involve

1. Rule 11 of Federal Rules of Criminal Procedure

2. Amount of fine

a. Up to \$100 million per count for corporations and \$1 million for individuals (15 U.S.C. 1) or twice the gain or loss caused by the conspiracy (18 U.S.C. 3571(c) and (d)). DOJ utilizes the Sentencing Guidelines promulgated by the U.S. Sentencing Commission (for courts they are advisory not mandatory, U.S. v. Booker, 543 U.S. 220 (2005))

3. Sentencing Guidelines provide for the calculation of culpability scores (e.g. U.S.S.G. 8C2.5)

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4. *Evaluate impact of plea on private antitrust damage actions (can be prima facie evidence in private damage action, 15 U.S.C. 16(a))*
 5. *Status of “carve-outs” (corporate personnel who may be separately indicted and will not be protected by corporate plea agreement) – (can the number be reduced?)*
 6. *Debarment if bid-rigging on Government procurement*

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7. *International impact (could the competition laws of other countries be involved?)*
 8. *Level of fines in similar criminal antitrust pleas*
 9. *Financial status of client (would a high fine put it out of business?)*

V. REPRESENTATION OF INDIVIDUALS

A. Separate counsel for individuals

- 1. Company may pay for separate counsel but not obligated to do so***
- 2. You may assist in obtaining separate counsel***
- 3. Need joint defense agreement***

B. Can the individual reach a plea deal with DOJ or get immunity from prosecution?

1. Will it involve incarceration?

2. Is he or she willing to testify against friends, co-workers, and his or her employer?