Responding Strategically To A Criminal Investigation In The United States — An Antitrust Model[1]

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INTRODUCTION

More than any year in history, 1999 established the extraterritorial reach and impact of the United States Department of Justice ("the Department"). In a variety of price-fixing, bid-rigging and similar cases, the United States collected record fines and imprisoned foreign nationals. Due primarily to a series of prosecutions of various international cartels, the Antitrust Division assessed nearly $1 billion in criminal fines in fiscal year 1999—more than in the previous 30 years combined. In the Antitrust Division's "Vitamins" Investigation, the Department collected over $850 million in criminal fines, including a record fine of $500 million from Hoffman-LaRoche. Hoffman-LaRoche's former President of the Vitamins and Fine Chemicals Division, Dr. Roland Brönnimann, is currently serving a five month jail sentence. In addition, European, U.S. and Japanese chemical manufacturers have contributed over $120 million in criminal fines in connection with an ongoing investigation into a 17 year international conspiracy to suppress and eliminate competition in the food preservatives industry.

The then record fine of $100 million for Archer Daniels Midland in the lysine investigation, though less than two years old, has been obliterated. In fact, the Department is lobbying to increase the statutory maximum fine under the Sherman Act, currently $10 million for corporations or twice the gain derived from the crime or twice the loss suffered by the victims if either of those amounts is greater than $10 million (but in no case more than $100 million)[2].

In light of the rapidly escalating penalties, the Antitrust Division's assault on international cartels, and the Department's emphasis on money-laundering, health care fraud, False Claims Act violations, government contracts and environmental offenses, merit both attention and preparedness in boardrooms around the world for all companies doing business in or with the United States.

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[1] An antitrust case approach is utilized, in part because criminal antitrust investigations have generated significant recent publicity, but also because they present most, if not all, issues common to other federal criminal investigations, in addition to certain critical issues unique to the Antitrust Division of the United States Department of Justice.

[2] *Hearings on International Antitrust Enforcement before the Subcomm. on Antitrust, Business Rights and Competition of Senate Judiciary Comm.*, 105th Cong. (October 2, 1998) (prepared statement of Joel I. Klein, Assistant Attorney General, DOJ).

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I. PROTECT AND ORGANIZE

When a company headquartered outside the United States first learns that it is or may be the subject of an investigation in the United States it must act immediately if it hopes to influence its own destiny, avoid common mistakes, and either successfully defend or negotiate the least onerous penalty. Notification can take many forms—a company may learn internally of potential wrongdoing by its employees or may find out about an investigation from a competitor, an alleged co-conspirator, a distributor, or a customer. In addition, of course, the company may receive a grand jury subpoena through a U.S. subsidiary or distributor and even, heaven forbid, may suffer a search of its facilities in the U.S. or abroad by the relevant authorities.[3]

No matter how the company first learns of the existence of an investigation, it must act immediately to:

1. ensure that management and relevant employees are alerted to the existence of the investigation (sharing as few facts as possible) and advised that anyone who may contact them about the investigation should be referred to a single individual, usually inside counsel;
2. ensure that no documents, e-mail, products or materials are destroyed; and
3. engage experienced counsel in the United States.

Once U.S. counsel has been engaged, he or she, working in combination with the company's general counsel and/or management, must immediately identify who from within the company will be responsible for the company's response to the investigation. Ideally, this individual or committee should not have any potential criminal exposure or include anyone with such exposure.

After an individual or committee is empowered, the list of pressing decisions for counsel and client include:

1. determining what, if any, involvement in the alleged wrongdoing the company may have;
2. determining what, if any, involvement officers, directors or employees of the company may have;
3. deciding whether the company should conduct an internal investigation and, if so, how that investigation should be structured;
4. considering whether, and to what extent, the company should participate in a joint defense;
5. ensuring that whatever information gathering and reporting mechanisms are utilized, care is taken to create and preserve the protections of attorney-client privilege and work product; and,
6. identifying and analyzing the likely collateral consequences of the investigation (e.g., civil litigation, investigations by authorities in countries other than the U.S., debarment, political inquiries by the U.S. Congress).

Only after consideration of all of the preceding points should decisions be made about when, how and through whom the company will engage the government, governments, and/or political bodies involved in the investigation.[4]

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[3] Coordinated investigative steps, including raids, searches, and joint or multiple prosecutions are increasingly common. Cooperation between the U.S. and the European Commission has become routine and is expanding as the result of the 1991 bilateral agreement regarding enforcement of competition laws. In addition, in recent cases the U.S. has enjoyed the assistance of the Bundeskartellmat, the German cartel agency, and the Japanese Fair Trade Commission. Canada too is not only a source of assistance, but a frequent enforcer in its own right—usually in the wake of successful U.S. prosecutions.

[4] While investigations by the U.S. Congress are beyond the scope of this piece, suffice it to say they can pose significant practical and strategic problems. *See* J.C. GRABOW, CONGRESSIONAL INVESTIGATIONS—LAW AND PRACTICE (1988). Televised testimony, forced waivers of applicable privileges (if the privilege is recognized at all), and embarrassment to key executives or customers, are only a few of the painful tools in the Congressional arsenal. Foreign companies can expect very little restraint by Congress in these nationalistic and politically polarized times, and great care should be taken in dealing with Congress and its investigators.

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II. FACT GATHERING

A. Understand the Company and its Position.

It is imperative at the outset of any defensive effort to master the facts as quickly as possible. In that regard, and while core documents are being gathered, it is important that those responsible for the defense become fully educated with regard to the company's structure, financial strength and business objectives, personnel and relevant competitive and collaborative relationships, as well as the potential consequences to the company as a whole that relate to the products, services and / or customer relationships which are the focus of the inquiry. In addition, existing compliance policies should be examined and refined, if necessary.[5]

B. Separate Counsel Considerations and Employee Interviews.

Among the immediate considerations is whether any officers, directors, or employees will require separate counsel. In many cases, it may not be readily apparent that an employee requires separate counsel, and that decision must wait until after an interview. In connection with the interviews of officers, directors and employees, and in order to preserve available privileges to the maximum extent possible, the interviews should be conducted by experienced U.S. counsel who, if the governing laws of the relevant country recognize a privilege, may be assisted by company personnel or other counsel. Careful attention must be given, however, to structuring the relationship between U.S. counsel and whomever may provide assistance to the company in connection with its defense (e.g., employees, local counsel, accounting firms, investigators, experts and auditors).

C. Border Stops.

Companies and affected employees also should be alerted to the possibility that individuals may be subjected to a border stop by the U.S. authorities. If travel is absolutely necessary, at risk individuals will need the name of an attorney to contact, if stopped. If an individual is stopped and refuses to be interviewed, he or she can lose his or her passport and be detained in the U.S. until the evidence is received. If, however, a plea agreement for the company or individual ultimately is reached with the authorities, "safe passage" arrangements can be provided for affected employees.

D. Document Assimilation and Review.

Documents should be selected and organized carefully and in a manner that ensures that all relevant documents are identified, their source and location are memorialized, and nothing is altered or destroyed. If production to the government is contemplated, the documents should be secured, although it is not advisable to number or label them until a subpoena or other formal request is received. When, and if, labeled, the labels should convey to the defense team, and usually not the government, at least the source and original location of the document and, if possible, the portion of the government request to which it is responsive. When circumstances permit, the core or key documents should be segregated and reviewed prior to any interviews. Multiple interviews of a single

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[5] All companies, foreign and domestic, should have compliance programs that include antitrust compliance provisions. Compliance programs are an indispensable and arguably required part of any forward-thinking company's corporate governance. *See In re Caremark*, 698 A.2d 959, 970 (Del. Ch. 1997) ("A director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards."). While there are no guaranties, corporate compliance programs, particularly for companies subject to significant government regulation, if designed, implemented and enforced successfully can (1) sensitize a company and its employees to its legal obligations, (2) provide additional confidence in the quality and integrity of products and operations, (3) enhance employee morale and loyalty, (4) enhance customer loyalty, (5) help to prevent regulatory and / or criminal violations, and (6) mitigate the consequences of any violations which occur notwithstanding the existence of the program. Thoughtful design, subsequent employee education regarding the content and objectives, careful monitoring, and firm enforcement are the critical ingredients of a meaningful program. In the calculus of the Department of Justice, the existence of an effective and enforced program is an important mitigating factor in both the decision to charge and the calculation of a penalty.

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individual and the unnecessary exposure of witnesses to facts or documents should be avoided.

E. Joint Defense Considerations.

In most cases companies will find that they are not the only targets of the government. Antitrust investigations typically involve multiple companies and multiple employees within those companies. Information from other targets or subjects of the investigation is quite helpful. Such information can be exchanged in certain circumstances, but great care should be given to structuring the exchange mechanisms. Joint defense agreements, common in the United States, and increasingly utilized elsewhere, permit individuals and parties to exchange privileged information and work product. These agreements are often in writing, particularly where joint defense counsel are unfamiliar with each other. If written, such agreements should specifically set forth the purpose of the agreement, the exchange mechanisms, and the obligations of the signatories. Obviously, joint defense agreements cannot and should not be used for any improper purpose, and they must permit parties to act in their own interest, even if to do so is not consistent with the interests of other parties to the agreement.

Armed with sufficient information to assess liability and exposure, it is now time to fight or negotiate.

III. ENGAGING THE GOVERNMENT

Counsel should approach the Department as soon as possible after counsel and the company reach the conclusion that the evidence supports a finding of wrongdoing. In fact, preliminary contact for the purpose of posturing the company as a good citizen with ethical management and counsel of integrity is wise where a company knows it is a target but has yet to gather sufficient information to commence actual negotiations. Even where no wrongdoing occurred and/or a vigorous defense is contemplated, prompt engagement is advisable. Protracted investigation is not only expensive, but likely will entail intrusive government review of products, services and personnel well beyond those relevant to the events which may have sparked the initial investigation.

A. What to Expect.

The Antitrust Division, in March of 1999, announced its formal plea agreement policy at the National Institute on White Collar Crime in San Francisco, California.[6] Since that time, as the author has learned from experience, the government has tolerated only the most minimal leeway in the policy.

The standard plea agreement requires: (1) acknowledgment of wrongdoing; (2) identification of the time period involved; and (3) complete cooperation by not only the company but all related entities—parents, subsidiaries, affiliates, predecessors and partnerships. Cooperation is defined in excruciating detail and includes the production of documents, "wherever located" and the use of a company's "best efforts" to secure the truthful testimony and cooperation of all "current and former" directors, officers and employees—including making them available in the United States at the company's expense. Employees who refuse to cooperate may be identified in the agreement and excluded from its protection.

B. Why Cooperate.

The upsurge in antitrust enforcement activity in the U.S. is in large part attributable to the expansion of the Antitrust Division's Corporate Leniency Policy or Amnesty Program (attached hereto).

Under the program, both leniency and amnesty are conditioned upon a variety of

[6] The Antitrust Division agreements are likely to be utilized by other Department of Justice prosecutors in international cases. *See* Robert W. Tarun, *Plea Agreements In Int'l Cartel Cases May Be Corporate Prosecution Model*, BUSINESS CRIMES LAW REPORT, Sept. 1999, Volume 6, Number 8 at 1-5.

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factors including the timing of disclosure to the government, role in the conspiracy, absence of evidence of obstruction of justice, steps taken to terminate participation in the activity, and full and complete cooperation, among others.

More than anything, the timing of disclosure takes on a critical nature because the Department only grants amnesty to a single entity per conspiracy.[7] In addition, cooperation, if managed in conformity with the expectations of the Antitrust Division, can and will substantially mitigate the penalties sought by the Department.[8] Moreover, cooperation with the U.S. authorities when extended to other markets, and vice versa, can limit penalties in those other markets. In fact, companies that cooperate with authorities in the U.S., E.U. or Canada are now usually (but not always) seen cooperating with all three.

As a final note, the cooperation of officers, directors, and employees can significantly affect whether a company is granted amnesty. An unwillingness to cooperate with the government on the part of a significant number of employees can lead to the denial of amnesty for a company. For that reason, a company is likely to be asked to secure the cooperation of everyone from within the organization who was involved in the activity. This is often difficult, particularly when the individuals involved are no longer with the company. It is helpful in this effort if counsel can obtain an assurance from the prosecutors of the likelihood of individual amnesty under the program, in order to quell any fears individuals may have about their own criminal liability.

IV. SUMMARY

Many of the isolated tasks required to successfully walk the gauntlet of an antitrust investigation in the United States are the subjects of treatise-length treatment (for example, internal investigations). Notwithstanding the complexity and the stakes, however, experienced counsel acting quickly, ethically and skillfully can save a company tens, if not hundreds, of millions of dollars. The success of the Antitrust Division and the sums it has recovered have earned it greater resources and captured the attention of authorities around the world. More of these cases are underway and many more will follow. As a result, effective compliance programs and good law firms around the world are critical to the peace of mind of corporations that compete globally and their shareholders.

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[7] Department of Justice officials report receiving multiple applications for amnesty from several companies within a single industry, all on the same day. For that reason, delays of only a few hours can make all the difference with respect to whether a company is eligible for amnesty. Thus, even when a company has not completed a detailed investigation into its role in alleged wrongdoing, a company may be wise to line up for an amnesty marker by making a preliminary telephone call to the Department. Doing so is not risk free, but may save the company tens of millions of dollars in fines and may save officers, directors, and employees from significant jail terms that might otherwise be imposed. William J. Baer and Franklin R. Liss, *A Forgiving Policy but DOJ Grants Amnesty Only to the First Firm in the Door*, LEGAL TIMES, April 3, 2000, Volume 23, Number 14.

[8] Of course, no matter how successful a company is in limiting its criminal exposure, civil lawsuits are inevitable. The U.S. is far and away the most active and punitive civil forum and lawsuits are typically filed in both federal and state courts. Civil liability is easily established following a criminal plea. As a result, most civil cases settle.

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Department of Justice

CORPORATE LENIENCY POLICY

The Division has a policy of according leniency to corporations reporting their illegal antitrust activity at an early stage, if they meet certain conditions. "Leniency" means not charging such a firm criminally for the activity being reported. (The policy also is known as the corporate amnesty or corporate immunity policy.)

A. Leniency Before an Investigation Has Begun

Leniency will be granted to a corporation reporting illegal activity before an investigation has begun, if the following six conditions are met:

1. At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source;
2. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation;
4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
5. Where possible, the corporation makes restitution to injured parties; and
6. The corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.

B. Alternative Requirements for Leniency

If a corporation comes forward to report illegal antitrust activity and does not meet all six of the conditions set out in Part A, above, the corporation, whether it comes forward before or after an investigation has begun, will be granted leniency if the following seven conditions are met:

1. The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported;
2. The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a sustainable conviction;
3. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
4. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation;
5. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
6. Where possible, the corporation makes restitution to injured parties; and

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7. The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.

In applying condition 7, the primary considerations will be how early the corporation comes forward and whether the corporation coerced another party to participate in the illegal activity or clearly was the leader in, or originator of, the activity. The burden of satisfying condition 7 will be low if the corporation comes forward before the Division has begun an investigation into the illegal activity. That burden will increase the closer the Division comes to having evidence that is likely to result in a sustainable conviction.

C. Leniency for Corporate Directors, Officers, and Employees

If a corporation qualifies for leniency under Part A, above, all directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession will receive leniency, in the form of not being charged criminally for the illegal activity, if they admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation. If a corporation does not qualify for leniency under Part A, above, the directors, officers, and employees who come forward with the corporation will be considered for immunity from criminal prosecution on the same basis as if they had approached the Division individually.

D. Leniency Procedure

If the staff that receives the request for leniency believes the corporation qualifies for and should be accorded leniency, it should forward a favorable recommendation to the Office of Operations, setting forth the reasons why leniency should be granted. Staff should not delay making such a recommendation until a fact memo recommending prosecution of others is prepared. The Director of Operations will review the request and forward it to the Assistant Attorney General for final decision. If the staff recommends against leniency, corporate counsel may wish to seek an appointment with the Director of Operations to make their views known. Counsel are not entitled to such a meeting as a matter of right, but the opportunity will generally be afforded.

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