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Strategies for navigating joint antitrust division and criminal division investigations

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From left to right: Barnett, Garza, Breuer and Raman

The criminal and antitrust divisions of the US Department of Justice are cooperating more closely than ever, especially on market manipulation and rate-rigging cases. But with different – and at times inconsistent – policies and practices, what does that mean for companies unfortunate enough to rouse the interest of both sections at once? Veterans of both divisions, Thomas Barnett, Lanny Breuer, Deborah Garza, Mythili Raman and Phillip Warren, explain.

In recent years, the US Department of Justice's antitrust and criminal divisions have announced massive, joint investigations of potential market-manipulation schemes involving commodity and financial markets, most notably of the alleged manipulation of benchmark interest and foreign exchange rates. The criminal division and US attorneys' offices have criminally prosecuted schemes to manipulate securities and commodity markets for many years. And the antitrust division has routinely supplemented antitrust charges with counts covering other crimes integral to the commission of antitrust offences. But these large joint antitrust and criminal division investigations are rare and of recent vintage.

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The DoJ has not yet articulated a policy explaining what factors may trigger joint investigations. It is possible the DoJ will decide to confine joint investigations to cases involving market-manipulation schemes in global financial and commodity markets and will not expand the practice to investigations of other types of conduct in other sectors of the economy. Only time will tell.

In the meantime, the prospect of a joint investigation by two DoJ divisions can present complex and difficult issues for any company considering how to respond, including whether and how to self-report to the DoJ. Taking into account the possibility of non-antitrust as well as antitrust criminal charges has long been important. But any company that finds itself the subject of a joint investigation must devise a strategy that takes into account each division's unique procedural as well as substantive requirements.

How should the possibility of a joint investigation affect a company's decision on whether to self-report criminal conduct to the DoJ?

For almost two decades, antitrust practitioners have preached, for good reason, that any company facing potential criminal antitrust liability should move quickly to determine whether to seek leniency from the antitrust division. And that undoubtedly remains good advice. There is no reason to think the recent joint investigations by the criminal and antitrust divisions presage joint activity in cases of traditional price-fixing, bid-rigging, or market-allocation schemes that are in the heartland of the Sherman Act (Title 15). The antitrust division will most certainly continue to have sole responsibility for prosecuting such cases, as it has in the auto parts, air cargo, and LCD panels matters. In addition, the antitrust division can be expected to continue its longstanding practice, without criminal division or US attorney involvement, of adding Title 18 and tax charges to cover conduct that is closely related to heartland criminal antitrust violations.

Nonetheless, given the recent, robust collaboration between the criminal and antitrust divisions on several global investigations, companies should recognise the possibility of a joint investigation when they are considering self-reporting an alleged fraud scheme that involves some collusive behaviour to the DoJ. And they should also recognise that a joint investigation - even one that starts out looking primarily like an antitrust matter - could eventually result in fraud or other criminal charges. As publicly reported, of the corporate dispositions in the criminal and antitrust division investigation of the alleged manipulation of the London Interbank Offered Rate (Libor), only one (a deferred prosecution agreement) included an antitrust charge; the remaining dispositions, including the guilty pleas

of certain financial institutions, involved other criminal statutes. And of the individuals charged in the Libor investigation only the first two executives, who were prosecuted in December 2012, faced antitrust charges. All individuals prosecuted since then have been charged with Title 18 conspiracy and fraud violations and not antitrust offences.

In spite of the increased potential for (and uncertainty surrounding) joint investigations, in most cases, the axiom will likely remain the norm: a company that uncovers a scheme that appears to involve some collusive activity should focus on whether it wants to pursue antitrust leniency. Since leniency is available only to the first company in an antitrust conspiracy to self-report and qualify, time is of the essence.

While the advisability of considering leniency early remains unchanged, the potential for joint investigations does alter the cost-benefit calculus for companies that are considering making a leniency application. Previously companies faced limited risk in applying for leniency, even for involvement in schemes not clearly recognised as core cartel conduct. They routinely approached the antitrust division quickly to initiate the leniency application process (by securing a marker) at the initial stages of internal investigations that had uncovered potential criminal antitrust violations. They did so even when they had not uncovered the full scope and nature of the conduct or were unsure whether the antitrust division would decide the conduct constitutes a criminal antitrust violation for which leniency was available.

In the past, once a company had secured a marker, it could complete its internal investigation and attempt to "perfect" the marker by providing enough information - through detailed attorney proffers, key documents, and percipient witnesses - to satisfy the government that it was reporting a criminal antitrust violation and that it qualified for leniency. And if the antitrust division decided that conduct for which it had granted a marker did not amount to a criminal antitrust violation, it usually closed the investigation without taking further action. This practice created strong incentives for companies to seek leniency markers. They could pursue leniency if the government concluded their conduct was a criminal antitrust offence and suffer no harmful consequences if it concluded otherwise.

The possibility that requesting a leniency marker could trigger a joint investigation (and prosecution for crimes other than antitrust violations) complicates the analysis. The DoJ has not yet announced a policy on when self-reporting may lead to joint investigations and prosecutions for non-antitrust crimes. AAG Baer did recently announce: "While the department never has and never would use other

criminal statutes to do an end-run around antitrust leniency, the point is that the leniency policy does not insulate corporations from all criminal exposure beyond the Sherman Act." But the DoJ has not yet explained what would constitute such an "end-run" around an antitrust leniency.

Thus, a company considering making a leniency application must analyse the nature of the conduct at issue with great care. If it is traditional cartel conduct, an antitrust division grant of leniency, without criminal division involvement, is likely to be available. This is the case even if the conduct includes elements that could amount to violations of other criminal statutes, such as a case of bid rigging involving the use of emails that may in theory constitute wire fraud prosecutable under Title 18. On the other hand, a joint investigation is a possibility if the conduct is not readily recognisable as a per se violation under settled antitrust jurisprudence and the conduct appears to be readily prosecutable under conspiracy and fraud statutes.

In any event, if a company decides to self-report to the DoJ in a matter involving a potential fraud scheme involving collusive activity, but which may not be clear-cut cartel behaviour, it should recognise that the antitrust and criminal divisions are likely to consult with one another regardless of which division is approached first. Put another way, a company will gain no strategic advantage by initially approaching just one division. For example, making an initial approach to the antitrust division alone will not improve a company's chances of obtaining leniency. Nor should a company expect to be able to play one division off against another. Instead, it should assume that the divisions will share all information provided to them and will arrive at a common decision on whether a joint investigation is appropriate. And if a joint investigation is opened, subjects should understand that the divisions will coordinate their investigations.

What unique challenges do subjects of joint investigations face?

Subjects of joint investigations by the Criminal and Antitrust Divisions face two prosecution teams that are relying on different, and at times inconsistent, playbooks. The policies and practices of the criminal and antitrust divisions differ in several important ways. As a result, subjects of joint investigations face unique challenges, most notably an uncertain process and a need to satisfy two teams of prosecutors.

Antitrust and criminal division policies vary in several import respects, for example:

- The antitrust division has a leniency policy; the criminal division does not.
- Under the long-standing Principles of Federal Prosecution of Business Organizations, the criminal division can and does make use of non-prosecution agreements (NPAs) and deferred-prosecution agreements (DPAs) in certain cases. By contrast, the antitrust division typically avoids NPAs and DPAs and insists that all culpable entities, except for leniency recipients, plead guilty.
- The antitrust division's plea agreements normally provide non-prosecution protections to all executives except for a handful of individuals (referred to in pleas as "carve-outs"). The criminal division emphatically does not give such protections to individuals as a condition of its dispositions with corporations.

These differences mean that subjects of joint investigations will likely face a process that is far less certain and predictable than an investigation by a single DoJ division.

For example, the path to leniency with the antitrust division is fairly clear and predictable, based on guidelines that have evolved since the program's adoption in its current form in 1993. The benefits of acceptance into the programme are well known: if a company receives leniency, neither it nor its executives will be prosecuted, it will pay no criminal fine, and none of its executives will face prison terms.

In a recent speech, AAG Baer announced that the division intends to enforce more stringently the requirements for antitrust leniency applicants. He stated that leniency applicants "must recognise that the policy requires far more than a quick phone call to the division and a promise to cooperate". And while he did not identify rigid timetables, he did state that "a company that invests the time and the resources can typically satisfy the initial requirements for conditional leniency within a few months". Companies considering leniency should recognise that the antitrust division's greater insistence on speed in applications may increase their up-front costs. But the leniency programme's basic contours remain unchanged.

In addition to its leniency policy, the antitrust division has developed specific policies for the treatment of companies that plead guilty and their executives. The division rewards corporations that plead guilty and cooperate with significant fine reductions and non-prosecution protection for all but the most culpable, high-level executives.

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The criminal division's approach is different. In particular, the criminal division, like the US attorneys' offices and other DoJ litigating components, is guided by the familiar nine factors set out in the Principles of Federal Prosecution of Business Organizations, including timely disclosure and the company's willingness to cooperate, the seriousness and pervasiveness of the misconduct, the company's remedial efforts, and the adequacy of the prosecution of individuals responsible for the corporation's malfeasance, among others. Those nine factors are designed to allow some flexibility as to the type of resolution that criminal division prosecutors can reach in any particular investigation of a company. For example, the criminal division can reward exceptional cooperation by entering into NPAs or DPAs, rather than insisting on guilty pleas for all culpable entities (other than leniency recipients) as the antitrust division does; but the criminal division will not promise non-prosecution for executives in exchange for a guilty plea by a cooperating company as the antitrust division does. Navigating these differences will be a challenge for companies that are subject to joint investigations.

Among other things, in a joint investigation, a company cannot necessarily rely on the normal benefits afforded a leniency recipient. It cannot assume that one division's procedures will trump the other's. And it certainly cannot presume that the criminal division will accede to an antitrust division grant of leniency and refrain from taking its own enforcement actions; the criminal division is not bound by an antitrust division grant of leniency. AAG Baer recently reaffirmed this policy: "Our leniency policy is quite clear that it governs only the antitrust division's exercise of its prosecutorial discretion in connection with self-reported criminal violations and does not prevent other [DoJ] components from prosecuting offences other than Sherman Act violations." Therefore, the company must recognise that, if it wishes to negotiate a global disposition with the DoJ in a joint investigation, it will need to reach a resolution that is acceptable to both divisions.

Another challenge facing subjects of joint investigations is to ensure that staff from different divisions coordinate their work and thereby avoid competing and potentially inconsistent cooperation demands. Criminal and antitrust division teams may use different investigative strategies. The inconsistencies may arise from such factors as the different elements of the crimes they typically prosecute (Title 15 versus Title 18 offences) and differences in evidence-gathering procedures (such as different protocols for collecting electronic evidence). Subjects of joint investigations that are seeking to cooperate with the two divisions should engage with DoJ staffs proactively and ask them to set clear priorities and establish realistic and reasonable timetables and consistent procedures for production of attorney proffers, witnesses, and documents. In fact, this coordinated approach

is also in the government's interest and consistent with what is plainly a close and cooperative relationship in recent years between the criminal and antitrust divisions.

Along with challenges, joint investigations may provide subjects with opportunities for favourable treatment that might not be available in investigations by one division. For example, a joint investigation might make possible an NPA or DPA that would not be available in an investigation by the antitrust division alone, given its normal insistence that all cartel participants other than leniency recipients must plead guilty to Sherman Act charges. By avoiding a guilty plea to criminal antitrust charges, a company can preserve its ability to fully contest liability in any related civil antitrust actions.

If joint investigations become more commonplace, the divisions may develop standard policies and practices for such investigations. Until then, however, companies subject to joint investigations will have to contend with some uncertainty as the antitrust and criminal divisions work to harmonise their differing policies and practices. Thus, it is inevitable that a company facing a joint investigation will face more uncertainty than it would have if it had faced a single division's investigation.

Counsel defending subjects of criminal antitrust investigations have frequently needed expertise in general criminal law, not just antitrust law, given the antitrust division's common practice of joining antitrust charges with counts alleging violations of other criminal statutes. It is even more crucial today for counsel seeking to navigate a path through a joint investigation to have experience with and a deep understanding of general criminal law and criminal division policy and practice as well as those of the antitrust division.

Conclusion

It is unclear whether joint antitrust and criminal division investigations will become standard DoJ procedure. While the DoJ is unlikely to begin conducting joint investigations of heartland criminal antitrust conduct, any company involved in a potential market-manipulation scheme or other potential fraud scheme that involves some collusive behaviour should consider the possibility of a joint investigation as it formulates its defense strategy and assesses its risks. Also, it should appreciate the unique and difficult challenges of contending with two DoJ divisions that are plainly cooperating closely with one another, but also have different, and at times inconsistent, policies and practices. Finally, it should recognise

that it will not be able to successfully navigate a joint investigation without a deep understanding of both criminal and antitrust division policies and practices.

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