The United States Department of Justice ("DOJ") continues to actively investigate and prosecute violations of the U.S. antitrust laws. A company violating the U.S. antitrust laws can face severe penalties—significant fines for the company and prison sentences and fines for its employees. A recent example is the automobile parts industry, where the DOJ has been investigating price fixing, bid rigging, and other cartel activities for several years. To date, 20 companies and 17 individuals have pled guilty to violations of the U.S. antitrust laws and agreed to pay fines of more than $1.6 billion. In addition, the individuals (most of whom are foreign nationals) have agreed to prison sentences of up to two years. The DOJ’s investigation also prompted substantial civil litigation, with more than 50 antitrust lawsuits filed against these companies by their customers.

According to the DOJ, the investigation is far from over and is its largest investigation ever. The cases to date involved a variety of auto parts, including wire harnesses, instrument panel clusters, fuel senders, electronic control units, heater control panels, seatbelts, airbags, steering wheels, antilock brake systems, starter motors, compressors, and air conditioning systems. The investigation is also international in scope—many of the plea agreements have been by Japanese companies or their employees. At the same time, antitrust regulators in Japan, the European Union, and Canada are conducting parallel investigations.

The Corporate Leniency Policy is one of the principal reasons for the expansion of the auto parts and other antitrust investigations. Many times, a company being investigated will identify additional conduct during the course of its internal investigation.

The DOJ’s Corporate Leniency Policy\(^1\) provides a company the opportunity to report the conduct and gain immunity from prosecution for itself and its employees if it is the first to report the violation. Leniency means: 1) no charges filed against the company; 2) no charges filed against cooperating employees; 3) no fines and no jail; 4) eligibility for reduced civil damage exposure; and 5) confidentiality protecting the applicant’s identity and information. Leniency is available only to the first company to self-report and meet the conditions of the program. The second company (and any others that follow) will face severe sanctions.

Even though leniency may no longer be available in the original investigation, if it identifies and reports conduct in a second product, it may receive “amnesty plus”—leniency in the second product and a credit against any penalty in the original product. On the other hand, a company that does not report additional conduct can face increased criminal sanctions.

In conducting these investigations, the DOJ’s toolbox includes wiretaps, subpoenas, search warrants, and FBI investigators. In almost every instance, a company does not know that it is under investigation. The DOJ’s investigation is far from over, and companies should be prepared to respond if they receive a knock on the door.

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\(^1\) More information on the Corporate Leniency Policy can be found at http://www.justice.gov/atr/public/criminal/leniency.html.
Preparing an Investigation

Preparing Before an Investigation

Once an investigation starts, companies may be required to provide numerous documents or information in a short timeframe. Companies will also likely face many questions, not only from the government, but others inside and outside the organization. The five actions outlined below are a good start in preparing for an investigation.

1. **Write the Plan.** Have a written preparedness plan and protocol in place. This will ensure that employees from the reception desk to the plant manager to the executive offices know what to do and who to call when investigators appear unannounced at company headquarters.

2. **Know the Plan.** Ensure appropriate employees know the plan and protocol. Train employees on implementing the plan. Government investigations are not an everyday occurrence, so refresher training for current employees and training new employees on a regular basis are very important.

3. **Understand your Rights.** Ensure employees and management know their rights and responsibilities in a government inspection or interview. Consider working with legal counsel to train employees in advance about their rights and responsibilities.

4. **Understand the Government’s Powers.** The government’s powers to inspect and seize information can be very broad—and warrants or subpoenas are often equally broad. However, legal counsel may be able to negotiate and narrow the scope of the government’s requests or extend the deadline for providing the information.

5. **Identify Outside Advisors.** The plan should identify outside experts and advisors who should be contacted for assistance; e.g., media, public relations, information technology specialists, auditors, and law firms. Identifying your experts in advance is key. You will not have time to identify, contact, or interview prospective outside advisors the day of an inspection or raid.

Responding to a Government Subpoena

If your company receives a subpoena from the Department of Justice Antitrust Division seeking documents in connection with an antitrust investigation, the company should consider the following five actions before responding.

1. **Inform Appropriate Company Personnel.** Receipt of a grand jury subpoena is a critical incident and needs to be acted upon immediately. The company should identify an employee, department, or member of management to whom all subpoenas should be directed.

2. **Preserve Documents.** All employees should be immediately instructed not to destroy, alter, or throw away any documents (both paper and electronic). Standard document retention/destruction policies should be immediately suspended upon the service of a subpoena.

3. **Retain Outside Counsel.** Do not attempt to respond to a subpoena without the assistance of an attorney. The subpoena may call for documents to which the government is not entitled. In addition, your attorney may be able to negotiate and narrow the terms of the subpoena or agree to a rolling production of documents based on priority.

4. **Determine and Interview Key Personnel.** This will affect the scope of the file search and determine, at least initially, the universe of information available to counsel.

5. **Identify a Records Custodian.** This person will oversee the search for and collection of documents and may be required to testify regarding the document production. The records custodian should maintain a log that records what was searched, the records that were produced, the source of such records, and other sources of potentially responsive documents that have come to light during the review.

Responding to a Search Warrant

If your company finds itself subject to an unscheduled visit from law enforcement or investigative personnel, the following five actions are recommended for responding to the unscheduled visit.

1. **Contact Investigations Coordinator.** A company should designate one person within each of its facilities to be responsible for coordinating a response in the event of a search warrant. The employee who makes initial contact with an investigator should immediately telephone the identified Investigations Coordinator. If the Investigations Coordinator cannot be reached, the employee should contact the highest-ranking executive available.

2. **Meeting the Agent.** The employee who makes initial contact with an investigator should obtain each investigator’s name, agency, office address, and telephone number, and request that the investigator remain in the reception area until the Investigations Coordinator or legal counsel arrives. Records should not be made available without the consent of management or the presentation of a search warrant. Search warrants
should be copied and sent to legal counsel. The Investigations Coordinator may ask the investigator to wait until counsel arrives before executing the warrant; however, the investigator may decline.

3 Establish the Scope of the Investigation. When determining the scope of the investigation, the Investigations Coordinator should try to determine the products covered by the investigation, the laws at issue, whether your company is a subject or target of the investigation, and the time period at issue. The investigator has no obligation to provide this information.

4 Cooperate with the Investigation. Do not alter, remove, or destroy records in any way. Provided that the investigator operates within the scope of the search warrant, employees should cooperate by showing the investigator all the documents and premises allowed by the search warrant. You do not, however, have to consent to a search outside of the search warrant’s scope and may raise objections to providing any documents that may be protected by attorney-client privilege or that you believe are outside the scope of the warrant.

5 Conclude the Visit. At the end of the investigation and before the investigator departs, the Investigations Coordinator should consider creating a list of all files and documents inspected; all locations of the files and documents requested by the investigator; all areas searched; and all items or documents seized. In addition, he or she should consider making notes of all oral explanations requested by and given to the investigator and any differences of opinions with the investigator regarding whether a document or area is within the scope of the search warrant, or is privileged.

A company cannot be too careful in its approach to government investigations. Even if a company has done nothing wrong, it is extremely important that responses to government inquiries be handled properly and involve appropriate legal counsel to protect the rights of the company and its employees. In addition, the company should initiate an internal investigation to assess its risk and liability. If corporate leniency is available, the opportunity may be fleeting because other companies will also be assessing their risk and whether to seek leniency, whether it is in the initial product or another product. Failure to respond properly can have serious legal consequences.

Anthony P. Aaron is a Partner at Ice Miller LLP. He regularly advises companies and individuals in responding to civil and criminal antitrust investigations brought by state attorneys general, Department of Justice and Federal Trade Commission, and advises clients on structuring activities in compliance with antitrust laws. Mr. Aaron can be reached at +1.317.236.2484 or anthony.aaron@icemiller.com.

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