

Antitrust Division Clarifies that Responses to CIDs are Useable in Other Investigations

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When conducting civil antitrust investigations, the Antitrust Division of the Department of Justice (DOJ) issues Civil Investigative Demands (CIDs) for relevant documents, information, and sworn testimony from parties and non-parties to the investigation. On September 10, Assistant Attorney General Makan Delrahim of the DOJ's Antitrust Division announced two uniform updates to its CID forms and deposition process:

1. All CIDs issued by the Antitrust Division (including CIDs for documentary material, written interrogatories, oral testimony, or any combination thereof) will now provide notice to all CID recipients that their documents, answers to interrogatories and/or testimony **may be used by the Department of Justice in other civil, criminal, administrative, or regulatory cases or proceedings.**
2. Antitrust Division attorneys taking oral testimony pursuant to a CID will ask the deponent questions on the record at the outset of every deposition to confirm that the deponent understands the ways in which the information he or she provides can be used by the DOJ. Individuals may refuse to answer any question that may tend to incriminate them, consistent with their Fifth Amendment rights.

The precise notice language to be included in all CIDs is as follows:

The information you provide may be used by the Department of Justice in other civil, criminal, administrative, or regulatory cases or proceedings. Individuals may refuse, in accordance with the rights guaranteed to them by the Fifth Amendment to the Constitution of the United States, to produce documents and/or answer any question that may tend to incriminate them.

The Update is “consistent with” longstanding DOJ policies

The DOJ noted that these updates “are consistent with long-standing division policies,” and that the purpose of the updated protocols is to promote transparency in the Division's antitrust probes. According to the DOJ's Antitrust Division Manual, CIDs are used by the DOJ to force parties to hand over information when voluntary requests “are judged to be inadequate or inappropriate for the division's needs.”

CIDs are broad in scope

The permissible scope of CIDs is broad, and, according to the Antitrust Division Manual, CIDs can be served “on any natural or juridical person, including suspected violators, potentially injured persons, witnesses, and record custodians, if there is ‘reason to believe’ that the person may have documentary material or information ‘relevant to a civil antitrust investigation.’”

The DOJ provides leniency in exchange for cooperation

Although CIDs are issued in the civil context, because information that is obtained in response to a CID can be used by the DOJ in a criminal case, CID recipients should be mindful of the Antitrust Division’s Leniency Program for criminal violations. The [Antitrust Division’s Leniency Program](#) provides a way for companies and individuals uncovering antitrust crimes to escape charges (or at least reduce potential penalties) in exchange for cooperating with the Division. Under the Leniency Program, if a company is under investigation for one antitrust conspiracy but is too late to obtain leniency for that conspiracy, it can receive substantial benefits and reduced penalties in connection with the first conspiracy by being the first to report on a separate conspiracy and fulfilling its cooperation obligations. Moreover, if a company uncovers potential criminal violations in connection with a CID response, it should consider whether it makes sense to seek leniency under the DOJ’s program. Criminal penalties associated with antitrust offenses are severe. Corporations can be fined up to \$100 million or up to twice the amount that the conspirators gained from the crime. 15 U.S.C. § 1; 18 U.S.C. § 3571(d). Individuals can be sentenced to as many as 10 years in prison. 15 U.S.C. § 1.

Key Takeaways

Being served with a CID from the Antitrust Division is a serious matter. Of note, even information obtained from a third party, i.e., not the direct target of the DOJ’s investigation, can be used in other cases or proceedings unrelated to the investigation for which the CID was issued. Keeping this in mind, companies must carefully review potentially responsive documents to assess whether they reveal any other potential criminal or civil violations and consider whether to take advantage of the DOJ’s Leniency Program when potential antitrust crimes are uncovered. Companies should also ensure that company witnesses understand the DOJ’s CID policies in advance of being deposed by DOJ attorneys.

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