

Updates

September 14, 2020

DOJ Update Underscores Risks When Responding to Antitrust CIDs

The Antitrust Division (Division) of the U.S. Department of Justice (DOJ) announced an [update](#) to its Civil Investigative Demand (CID) forms and its investigative deposition process on September 10. When conducting civil investigations under the antitrust laws, the Division issues CIDs to obtain relevant documents, information, and sworn testimony. The update emphasized that any such materials produced to the Division may be used in other civil, criminal, or administrative cases.

Under the Antitrust Civil Process Act, the Division has always been able to use CID materials in other law enforcement proceedings. 15 U.S.C. § 1313(d). Some of the Division's criminal cases have started from civil investigations. For example, in the Division's [2017 Spring Update](#), titled "Civil Investigations Uncover Evidence of Criminal Conduct," it noted that its packaged seafood grand jury investigation began from a merger investigation that uncovered criminal conduct. That update also cited an obstruction of justice case that arose out of another merger investigation.

The same is also true for materials produced to the Federal Trade Commission (FTC) in response to CIDs issued by that agency. Documents, interrogatory answers, and deposition transcripts from the FTC's civil investigation can be provided to other federal law enforcement agencies in response to a written request. 15 U.S.C. § 57b-2(b)(6).

While not new, this update underscores the risks associated with antitrust CIDs. These risks are not limited to targets of the investigation; the Division and the FTC issue CIDs to neutral third parties as well. The Division noted that all of its CIDs will now include the following notice:

The information provided 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.

At the outset of CID depositions, Division attorneys will also make sure that the witness understands that the testimony can be used in other investigations and cases.

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. But the Division's [Leniency Program](#) provides a way for companies and individuals uncovering antitrust crimes to escape charges entirely in exchange for cooperating with the Division.

Takeaways

Receiving a CID from the Division or FTC is a serious matter. Even if the recipient is a neutral third party (and not the target) of the investigation, any evidence produced to the agencies can be used in investigations far beyond the one for which the CID was issued. Companies and individuals must review potentially responsive materials very carefully and take advantage of the Division's Leniency Policy where appropriate.

Authors

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