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FTC Targets Contractual Restrictions on Voluntary Cooperation



The staff of the Federal Trade Commission (FTC) Bureau of Competition issued a [statement](#) on June 15, 2023, sternly criticizing the use of confidentiality and nondisclosure agreements that "impede" the FTC's ability to conduct voluntary interviews with market participants in antitrust investigations. According to the Bureau of Competition, such contracts can "chill" employees' willingness to speak with agency staff. This Update dissects the recent statement and suggests best practices for responding to voluntary interview requests from government agencies.

According to the Bureau of Competition, investigation targets cannot contractually prevent, limit, or hinder employees from speaking with agency staff. The Bureau of Competition argues that such provisions are "contrary to public policy and therefore unenforceable." Several federal agencies have taken a similar stance, including the U.S. Securities and Exchange Commission (SEC), National Labor Relations Board (NLRB), and Federal Aviation Administration (FAA).

The Bureau of Competition further warns that attempts to obstruct its investigations and enforcement actions may be viewed as conduct that "can potentially rise to the level of a criminal violation." It promises to refer violations to the U.S. Department of Justice (DOJ) through its criminal liaison unit, which has been highly active since its inception last year.

However, it is important to recognize that the statement does not address: (1) counseling employees to inform corporate counsel if the Bureau of Competition reaches out to them directly; (2) reminding employees that they may decline the interview; (3) helping employees prepare for voluntary interviews; or (4) highlighting the potential drawbacks of agreeing to such interviews. Instead, the Bureau of Competition's focus is squarely on *contractual limitations* that "impair or prohibit the ability to communicate freely with an administrative agency."

To help navigate voluntary interview requests, companies should consider the below best practices.

Offer an internal notification process. Employees may be surprised and anxious when agency staff requests to speak with them about an ongoing investigation. In all likelihood, the employee has little experience interacting with federal agencies. The employee will have questions about the process but may not know where to turn. This is especially true when the agency is seeking company information from an individual employee. Companies should consider establishing a procedure that enables employees to notify their supervisor and corporate counsel so they can escalate questions about their options and next steps.

Clarify that employees can (but need not) participate. The FTC and other federal agencies typically view contractual restrictions on employees' participation in voluntary interviews as unenforceable. It is also important to highlight that declining to participate in a voluntary interview can lead to a more burdensome compulsory process down the road, such as subpoenas and depositions. Depending on the circumstances, a brief voluntary conversation can be a better way to engage with regulators. On the other hand, companies should not swing too far in the other direction by suggesting to employees that the interview is required or that refusing to participate will negatively affect their job performance.

Ensure that agencies have the right employee. Agencies must make their best guess when identifying the employee(s) best suited to address their questions. But they don't always get it right. Interviewing an employee who is not knowledgeable about important subjects is a poor use of agency and employee resources. Corporate counsel should engage with agency staff to confirm the nature and scope of their investigation. This can help the company ensure that the interviewee is able to address agency staff's questions. Failure to identify the right interviewee may result in additional interview requests and wasted resources. Sometimes, it will be most efficient for more than one employee to participate so the full range of subjects can be covered in a single call.

Help employees understand the process. For most employees, an interview with a federal agency is far from business as usual. The process can be intimidating, and a few helpful reminders will go a long way toward alleviating any anxiety. First, the interview is voluntary, and the employee can end the conversation at any time. Second, agency staff values the employees' time and expertise. Staff relies heavily on such interviews to understand the market and competitive dynamics. Without voluntary cooperation, their investigations would be less comprehensive, and agencies would be less informed about the market. Third, at this stage, employees are not required to discuss any information that they do not wish to share.

Stay on point. Investigators will come prepared with a long list of questions about the employee, their company, and the market. In the interest of efficiency, it is important to listen carefully to staff's questions. Veering onto tangential topics is rarely helpful to anyone involved. Adequately addressing staff's questions starts with active listening. If unfamiliar jargon enters the conversation, or if the employee is confused, they should ask for clarification.

Cover common questions. FTC Bureau of Competition and DOJ Antitrust Division interviews often focus on competitive and market dynamics. The flavor will differ depending on whether the company is a competitor, customer, or target of the investigation. The employee should at minimum be prepared to cover the following subjects:

- How the products or services at issue are used.
- Companies they view as competitors.
- Barriers to enter the market.
- Recent entry or exit from the market.
- Recent competitive negotiations, wins, and losses.
- Likely response to a 5-10% price increase on products or services at issue.
- Concerns with the proposed transaction or conduct under investigation.

By following these best practices, companies can ensure that their employees are well-prepared for efficient voluntary interviews with FTC Bureau of Competition staff and other regulatory agencies.

The authors wish to acknowledge Summer Associate Brittany Hinson's contributions to this Update.

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