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LATIN AMERICAN COMPETITION FORUM

Session III: Unannounced Inspections in Antitrust Investigations

Contribution from the United States

3-4 September 2013, Lima, Peru

The attached document from the United States is circulated to the Latin American Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 3-4 September 2013 in Peru.

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LATIN AMERICAN COMPETITION FORUM

-- 3-4 September 2013, Lima (Peru) --

Session III: Unannounced Inspections in Antitrust Investigations

CONTRIBUTION FROM THE UNITED STATES

1. Introduction

1. The Department of Justice's Antitrust Division has exclusive jurisdiction over criminal enforcement of the federal antitrust laws, which includes investigating and prosecuting cartels involving price fixing, bid rigging and market allocation agreements. The unannounced inspection, known in the United States as search and seizure, is perhaps one of the most effective investigative tools available to the Antitrust Division to gather incriminating evidence in its criminal investigations.¹ Searches and seizures minimize the opportunity for document destruction and concealment, prevent the failure to produce responsive documents either deliberately or through inadvertence, and often spur a race for leniency.

2. Obtaining the Search Warrant

2. Antitrust Division attorneys and federal law enforcement agents, such as agents from the Federal Bureau of Investigation (FBI), may request search warrants of both business and non-business premises, subject to the limitations set forth in the Fourth Amendment of the United States Constitution, the Federal Rules of Criminal Procedure and applicable case law.²

¹ See U.S. Department of Justice, Antitrust Division Manual (5th ed. Nov. 2012) ("Division Manual") at Chapter III.F.5, available at: <http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf>.

² U.S. Const. amend IV (stating "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized"). The terms "probable cause" and "particularly describing" connote legal standards that must be met before a valid search warrant can issue. Each of these terms has generated a large body of case law, reflecting the case-by-case, fact-bound approach courts have taken in applying them. See also Fed. R. Crim. P. 41, available at: http://www.law.cornell.edu/rules/frcrmp/rule_41.

3. The process begins with an Antitrust Division attorney or law enforcement agent making an application for a search warrant to a federal magistrate judge in the judicial district where the property is located.³ The application typically consists of the search warrant for the federal magistrate judge to sign, and an affidavit, which states the factual basis establishing “probable cause” for the search warrant.⁴

4. The federal magistrate judge will authorize a search warrant if the search warrant affidavit establishes “probable cause,” defined by the United States Supreme Court as a “substantial basis,” to believe that a crime has been committed, that documents or other property evidencing the crime exist, and that such property to be seized is at the premises to be searched.⁵ It is not necessary to establish probable cause to believe that evidence of the crime may be destroyed or withheld if not seized by the search warrant. To establish probable cause, the Antitrust Division and law enforcement agents rely on information obtained from leniency applicants and cooperators, grand jury subpoenas and other voluntarily provided information. The affidavit is filed under seal with the court to prevent the disclosure of matters occurring before the grand jury, the identity of cooperators, or other facts the disclosure of which would hinder an on-going investigation.

5. In addition to establishing “probable cause” in the affidavit, the warrant must describe with particularity the property to be seized and the places to be searched.⁶ The degree of specificity with which the warrant must describe the property to be seized and the location to be searched may vary depending on the circumstances. When seeking business records, it is usually sufficient that the warrant describes records of a type usually maintained by the business at the business location.⁷

6. If the search warrant is authorized by the federal magistrate judge, the scope of the search is limited to the information and those locations that the search warrant establishes probable cause to search. Should the Antitrust Division or law enforcement agents learn that relevant evidence exists in other places outside the scope of the search warrant, for example in a home office or off-site computer server, a separate warrant will need to be obtained to search those areas.

3. Execution of the Search Warrant

7. Search warrants are executed by a team of law enforcement agents. Prior to the search, the Antitrust Division will brief all the law enforcement agents involved in the search, provide them with a copy of the search warrant and affidavit, explain the background facts giving rise to the search, review the description of the property to be seized, provide any other information that will assist them in conducting the search, and answer any questions the agents may have.

8. Antitrust Division attorneys are not present during the search.⁸ However, Antitrust Division attorneys remain available by phone to answer questions the law enforcement agents may have about the scope of the search or the legal representation of individuals.

³ Fed. R. Crim. P. 41(b).

⁴ Division Manual at Chapter III.F.5 (Search Warrants).

⁵ *Jones v. United States*, 362 U.S. 257, 271 (1960).

⁶ According to Federal Rule of Criminal Procedure 41(e)(2)(A), the search warrant should be executed within a specified time no longer than 14 days and during the daytime, unless the judge for good cause expressly authorizes execution at a another time. Daytime is defined as between the hours of 6:00 a.m. and 10:00 p.m. according to local time in Fed. R. Crim. P. 41(e)(2)(B).

⁷ See Division Manual at Chapter III.F.5 (Search Warrants).

⁸ *Id.*

9. The search is typically conducted between the hours of 6:00 a.m. and 10:00 p.m., as any nighttime searches must be justified by a showing of good cause with the court.⁹ The on-site execution of a search is governed by the search warrant, which as noted above, describes with particularity the property to be seized and the location to be searched.

10. During the course of a search, law enforcement agents have the authority to seize any property detailed in the search warrant, including original paper documents, electronic documents and computer hardware and software.¹⁰ Electronic documents, however, may be copied rather than seized.¹¹ Law enforcement agents must leave a verified inventory report of property seized and a copy of the search warrant at the search site.¹²

11. To ensure thoroughness, law enforcement agents typically serve a subpoena for documents or other physical evidence on the target of the search.¹³ The subpoena includes a request for documents subject to the search warrant in order to obtain documents maintained at other locations or that were not seized at the search location.

12. During the course of the search, law enforcement agents may also seek to conduct voluntary interviews of individuals present at the search site.¹⁴ Simultaneous with the search, law enforcement agents and Antitrust Division attorneys at other locations may also conduct unannounced voluntary “drop-in” interviews of other individuals believed to have information about the cartel. Both voluntary and “drop-in” interviews can result in useful admissions by individuals.

13. Notably, the power to search premises is limited by the attorney-client privilege. If the Antitrust Division believes that privileged documents may have been inadvertently seized during the search, or if the counsel for the subject claims that to be so, procedures are followed to ensure that the Antitrust Division investigative staff and law enforcement agents are not exposed to privileged documents.¹⁵ One such procedure is to designate a “privilege team” of law enforcement agents and attorneys not involved in the investigation to protect the attorney-client privilege and to ensure that the investigative team is not exposed to privileged material.

⁹ Fed. R. Crim. P. 41(e)(2)(A)(ii). The Division will rarely seek permission to conduct a nighttime search. *See* Division Manual at Chapter III.F.5 (Search Warrants).

¹⁰ *See* Division Manual at Chapter III.F.5 (Search Warrants) (citing the United State’s Department of Justice’s Criminal Division Manual on “Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations”).

¹¹ Fed. R. Crim. P. 41(e)(2)(B).

¹² Fed. R. Crim. P. 41(f)(1).

¹³ Division Manual at Chapter III.F.5 (Search Warrants). Compliance with a subpoena is compulsory provided it is “reasonable” in scope and not unduly burdensome. In contrast to search warrants, probable cause is not a prerequisite to the issuance of a subpoena although certain federal district courts within the United States require that the subpoena seek “relevant information.” *See* Division Manual at Chapter III.F.4.a (Subpoenas *Duces Tecum*).

¹⁴ *See* Division Manual at Chapter III.F.5 (Search Warrants).

¹⁵ *Id.*

4. Potential Challenges

14. Challenges to the use of evidence obtained by a search warrant can be made under the Federal Rules of Criminal Procedure and may be based on the validity of the warrant or the manner of its execution.

15. In addition to challenging the validity or execution of the warrant, a searched entity or individual may also file a motion to return the property seized during the search.¹⁶ This motion is filed in the federal district court where the search was conducted. If the motion is granted by the court, the seized property must be returned and may not be used as evidence at any hearing or trial.

16. A defendant may also seek to suppress the use of the seized property as evidence during trial. This motion cannot be made until after an indictment, which is the formal accusation of a crime.¹⁷ This motion is filed in the federal district court where the trial will occur. If the motion is granted by the court, the seized property cannot be offered into evidence at trial.

5. International Cooperation and Coordination

17. The Antitrust Division has coordinated numerous searches and seizures with other competition agencies around the world. The advantages of this investigative tool substantially increase when they are coordinated across multiple jurisdictions.

18. As soon as the Antitrust Division begins working with an amnesty applicant and that applicant states that they have also approached another jurisdiction(s), the Antitrust Division asks for a waiver to discuss their application and the substance of the information provided. If granted a waiver, the Antitrust Division contacts the other jurisdiction(s). The jurisdictions typically discuss things such as the scope of the conduct, what effects the conduct may have had in each jurisdiction, what evidence is likely to exist in each jurisdiction, future plans for investigating the matter and investigative strategies. From that point forward, regular communication and coordination regarding investigative steps (which may include other investigative tools beyond searches and seizures, such as drop-in interviews, service of subpoenas, consensual monitoring and wiretapping) and ideal timing for searches is essential. The Antitrust Division will then attempt to coordinate a plan to go overt simultaneously (at least within a certain time period, accounting for time differences) in order to avoid the premature disclosure of an investigation and the possible destruction of evidence.

19. Even if the amnesty applicant does not provide a waiver, the Antitrust Division may still contact the other jurisdiction(s) to coordinate investigative steps if this can be done without disclosing the identity of the amnesty applicant or sharing any information obtained from the amnesty applicant.¹⁸

¹⁶ Pursuant to Federal Rule of Criminal Procedure 41(g), “a person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move for the property’s return. The motion must be filed in the district where the property was seized. The federal district court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the federal district court must return the property to the aggrieved party, but may impose reasonable conditions to protect access to the property and its use in later proceedings.” Fed. R. Crim. P. 41(g).

¹⁷ Pursuant to Federal Rule of Criminal Procedure 41 (h) “a defendant may move to suppress in the court where the trial will occur, as [Federal Rule of Criminal Procedure] 12 provides.” Fed. R. Crim. P. 41 (h); *see also* Fed. R. Crim. P.12(b)(3)(C), *available at*: http://www.law.cornell.edu/rules/frcrmp/rule_12.

¹⁸ *See also*, International Competition Network’s Anti-Cartel Enforcement Manual, Chapter 1 – Searches, Raids and Inspections, Section 5.2 – Coordination with other Agencies (May 2009).

20. The effectiveness of coordinated searches is illustrated by the successful cooperation and coordination of the high-profile air transportation and marine hose investigations. In the air transportation investigation, the Antitrust Division cooperated with authorities on five continents in order to coordinate the executions of search warrants on multiple locations in the United States and abroad. In the marine hose investigation, while the Antitrust Division and the FBI conducted searches in multiple locations in the United States, United Kingdom and European antitrust agencies searched locations in Europe.¹⁹

6. Conclusion

21. The unannounced inspection, or search and seizure, is an effective investigative tool used by the Antitrust Division for gathering incriminating evidence in its criminal enforcement. Although searches and seizures require significant effort, both in obtaining and executing the search warrants, the benefits of this investigative tool, particularly in the international context, are immense.

¹⁹ See “The Evolution of Criminal Antitrust Enforcement,” speech by Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, before the National Institute on White Collar Crime (February 25, 2010), available at: <http://www.justice.gov/atr/public/speeches/255515.htm>.