

## DOJ Antitrust Division Warns Civil Investigative Demand Recipients Regarding Risk of Self-Incrimination

September 21, 2020

**The Department of Justice (“DOJ”) Antitrust Division recently updated its Civil Investigative Demand (“CID”) forms and deposition procedures to provide clear notice to CID recipients and deponents that the evidence they provide during the course of an investigation may be used by the DOJ in “unrelated” cases or proceedings.**

**This highlights the risk of “spin off” investigations—including criminal investigations—if a party produces evidence of other violations (such as communications or coordination among competitors) during an investigation.**

The Antitrust Division frequently issues CIDs during the course of its civil investigations, including routine merger reviews, to compel production of relevant information and documents from suspected violators, potentially injured persons, and neutral third parties. Under the Antitrust Civil Process Act, prior consent of the person producing material in response to a CID is not necessary for the Division to share CID materials with DOJ employees or agents outside the investigation or with the Federal Trade Commission (“FTC”). See 15 U.S.C. § 1313(c)-(d). Similarly, the Antitrust Division Manual, which provides additional guidance to Division staff, succinctly states, “[t]he Division’s use of CID material is not restricted to the pending investigation.”<sup>1</sup>

Notably, the same policies and practices apply to the FTC. Indeed, under the Federal Trade Commission Act, the FTC may share CID materials with not only employees within the agency, but also with officers and employees of federal and state law enforcement agencies who wish to use such material “for official law enforcement purposes.” 15 U.S.C. § 57b-2(b)(6). Within the FTC, investigative referrals are not limited to the Bureau of Competition, but may extend to the Bureau of Consumer Protection as well.

In an effort to increase transparency into this aspect of its investigative procedures, the DOJ Antitrust Division, in a press release issued on September 10, 2020, announced that it will add the following language to its CID forms:

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.<sup>2</sup>

The Division likewise explained that, going forward, staff attorneys taking depositions pursuant to a CID will ask questions to ensure deponents understand how their testimony may be used by the DOJ.

This announcement serves as a useful reminder that responding to a CID, even as a neutral third party, may have serious unanticipated consequences. Information provided during a merger investigation may result, for example, in a criminal investigation into potential Sherman Act, Section 1 hard-core violations, such as price fixing, market allocation, or bid rigging, if the facts suggest an investigation is warranted.

---

<sup>1</sup> DOJ, Antitrust Division Manual III-63 (5th ed.), <https://www.justice.gov/atr/file/761166/download> (last updated Jan. 13, 2020).

<sup>2</sup> DOJ, Antitrust Division Announces Updates to Civil Investigative Demand Forms and Deposition Process (Sept. 10, 2020), <https://www.justice.gov/opa/pr/antitrust-division-announces-updates-civil-investigative-demand-forms-and-deposition-process>.

# Davis Polk

Such concerns are not hypothetical. During the investigation of the Chicken of the Sea and Bumble Bee Foods merger, Division attorneys uncovered evidence of a price-fixing scheme in the packaged seafood industry.<sup>3</sup> While the merger was abandoned, the discovery led to a lengthy criminal investigation, culminating in charges against four executives and two companies.<sup>4</sup> Indeed, earlier this year, the former CEO and President of Bumble Bee was sentenced to over three years in prison for his role in the conspiracy.<sup>5</sup> In addition, other merger reviews have given rise to DOJ criminal investigations of alleged employee “no-poach” agreements between competing employers.

As a result, recipients of CIDs are encouraged to review their responses carefully prior to production and raise any concerns with their attorneys. The most significant risk is that a party produces some evidence of *other* antitrust violations—such as price fixing, market allocation, or no-poach agreements.

---

<sup>3</sup> DOJ, Civil Investigations Uncover Evidence of Criminal Conduct: Division Update Spring 2017, <https://www.justice.gov/atr/division-operations/division-update-spring-2017/civil-investigations-uncover-evidence-criminal-conduct> (last updated Mar. 28, 2017).

<sup>4</sup> DOJ, Cartels Beware: The Antitrust Division Prepares for Trial and Continues Criminal Investigations in Key Markets, <https://www.justice.gov/atr/division-operations/division-update-spring-2019/cartels-beware> (last updated Mar. 26, 2019).

<sup>5</sup> DOJ, Completed Trials: *United States v. Christopher Lischewski*, <https://www.justice.gov/atr/division-operations/antitrust-division-update-2020/completed-trials> (last updated June 23, 2020).

---

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your usual Davis Polk contact.

<b>Sheila R. Adams</b>	+1 212 450 3160	<a href="mailto:sheila.adams@davispolk.com">sheila.adams@davispolk.com</a>
<b>D. Jarrett Arp</b>	+1 202 962 7150	<a href="mailto:jarrett.arp@davispolk.com">jarrett.arp@davispolk.com</a>
<b>Arthur J. Burke</b>	+1 212 450 4352	<a href="mailto:arthur.burke@davispolk.com">arthur.burke@davispolk.com</a>
<b>Ronan P. Harty</b>	+1 212 450 4870	<a href="mailto:ronan.harty@davispolk.com">ronan.harty@davispolk.com</a>
<b>Jon Leibowitz</b>	+1 202 962 7050	<a href="mailto:jon.leibowitz@davispolk.com">jon.leibowitz@davispolk.com</a>
<b>Christopher Lynch</b>	+1 212 450 4034	<a href="mailto:christopher.lynch@davispolk.com">christopher.lynch@davispolk.com</a>
<b>Mary K. Marks</b>	+1 212 450 4016	<a href="mailto:mary.marks@davispolk.com">mary.marks@davispolk.com</a>
<b>Suzanne Munck af Rosenschold*</b>	+1 202 962 7146	<a href="mailto:suzanne.munck@davispolk.com">suzanne.munck@davispolk.com</a>
<b>Howard Shelanski</b>	+1 202 962 7060	<a href="mailto:howard.shelanski@davispolk.com">howard.shelanski@davispolk.com</a>
<b>Jesse Solomon</b>	+1 202 962 7138	<a href="mailto:jesse.solomon@davispolk.com">jesse.solomon@davispolk.com</a>

---

\* Ms. Munck is admitted to practice in California, and is practicing in DC under the supervision of the partners of the firm.

© 2020 Davis Polk & Wardwell LLP | 450 Lexington Avenue | New York, NY 10017

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's [privacy notice](#) for further details.