

Obstruction is top problem, says Phelan

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The head of the Washington, DC criminal enforcement section of the Department of Justice's antitrust division said bad choices at a dawn raid can haunt a company later.

"I think the number one issue has to be obstruction," Lisa Phelan said yesterday. "I cannot tell you how many dawn raids we have done where we found out later that someone – before, during or after – was trying to destroy or move documents" from the office to a personal space that would not be covered by the warrant.

She noted the US prohibition on obstruction of justice now makes it a crime to remove or destroy documents even in anticipation of an investigation. For example, if a cartel is under investigation in another jurisdiction, a US subsidiary intentionally making documents unavailable puts itself at risk even if it has not been told it specifically must retain documents.

"It used to be ongoing known investigations, but now the language is broader, so I would suggest you proceed very carefully," Phelan said. Congress also made the penalties for obstruction significantly harsher, including up to 10 years in prison for each act of obstruction.

The law was rewritten after the Enron scandal, she said, to maximise its capture of situations where evidence might be withheld. After the energy company collapsed, its auditing firm Arthur Andersen was convicted of obstruction. Although the Supreme Court overturned the conviction, the accountancy company had already lost its licence upon becoming a felon.

Phelan said obstruction of justice is a fact-specific crime with specific elements the government must prove, but said those considering removal of documents from the premises expected to be searched should “get some legal advice and think about it”.

Quoting an old saying, she said, “The cover-up is often worse than the crime. There’s a lot of truth to that.”

Even if the company itself is not implicated in the obstruction of justice, the loss of evidence can disadvantage its efforts to obtain immunity or leniency in the cartel prosecution. Phelan said companies and their counsel should warn employees in training programmes, and again when the government serves a subpoena or search warrant, not to impede the investigation.

“It just makes things worse” to move or destroy documents, she said. If the company wants to cooperate with the government, it may not get full credit in the leniency programme because it no longer has evidence to hand over.

The search warrant itself typically will indicate the industry, products or services of concern in the investigation, Phelan said. “But they don’t have to sit around guessing. I encourage all company or outside counsel to be in touch with us quickly,” she added.

A 28-year veteran of cartel investigations, Phelan said she often is the point of contact in the Washington, DC office while dawn raids are occurring simultaneously around the country. She encouraged the company’s lawyers to come talk to staff.

While search warrants can be a clue the government already has a strong cooperating witness and knows about some aspects of the cartel, she said, there can be opportunities to enhance the investigation if a company being searched chooses to cooperate. The antitrust division tries to keep the scope of the warrant relatively narrow and does not seek every document in which it might be interested.

Phelan said the second biggest problem is related to legal representation of the company and its employees. On the day of the raid, she said, counsel often calls claiming to represent every person in the company.

“We’re not going to accept blanket representation,” she said. “You can’t represent every person without a conflict” of their interests.

In-house and outside counsel need to give thought to representation in advance of a dawn raid and determine what they will do if a government investigation becomes known to them, Phelan said. “That would make that day go more smoothly for everyone.”

Phelan spoke as part of the American Bar Association antitrust section’s “Ask Me Anything” series on cartels. The teleconference was moderated by McGuireWoods partner J Brent Justus.