

# The Patriot Act: Bugs, Wiretaps & Antitrust Enforcement



**The Patriot Act amendments, signed by President Bush on March 9, enable bugs and wiretaps if there's probable cause of Sherman Act violations**

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The purpose of this material is to alert you to new and developing legal and business issues. The contents are not intended to provide legal advice to specific cases or particular legal matters. We expect you will want to consult directly with your own legal counsel if you feel an issue discussed affects you.

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# Background

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- **When President Bush signed the USA PATRIOT Improvement and Reauthorization Act of 2005 (“Patriot Act amendments”) into law on March 9, 2006, the civil liberties of people targeted in terrorism investigations were strengthened. That was not the case, however, for corporate executives under investigation for antitrust crimes. Until now, the DOJ has used bugs and wiretaps mainly to gather evidence against suspected mobsters, drug lords, and terrorists. The Patriot Act amendments enable the government to bug boardrooms and wiretap CEO phone conversations if there’s probable cause that Sherman Act violations are being committed; a development that raises several complex and difficult issues.**

# Sherman Act Violations are Both Criminal and Civil

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- **The Patriot Act amendments add antitrust violations to the list of crimes which can be investigated with bugs and wiretaps. 18 U.S.C. § 2516(1)(q).**
- **Sherman Act sections 1 and 3 prohibit “unreasonable restraints of trade,” while Section 2 prohibits monopolization and attempts to monopolize. The criminal provisions of the Sherman Act do not differentiate among the various types of behavior that could violate the Act, and Congress has never parsed the Act into separate criminal and civil parts based on the type or degree of conduct. Every Sherman Act violation is theoretically criminal.**

# Past Practice is No Guarantee of Future Enforcement Action

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- The Antitrust Division has, for many years, been judicious in limiting criminal enforcement to hard core, clandestine conduct such as price fixing, bid rigging and customer, territorial or market share allocation schemes.
- The government's enforcement discretion, however, has not always been limited in this fashion. In the past, for example, the government has pursued criminal cases against companies for alleged attempted monopolization and vertical resale price maintenance. See *United States v. Empire Gas Corp.*, 393 F. Supp. 903 (W.D. Mo. 1975); *In re Cuisinarts Food Processors Antitrust Litigation*, 1980-81 CCH Trade Cases, ¶ 63752.

# Implications for Counsel

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1. **The passage of the Patriot Act amendments extends a powerful set of tools to Antitrust enforcers for intercepting wire, oral and electronic communications when investigating all suspected Sherman Act violations, not just hard core, *per se*, clandestine conduct such as price fixing, bid rigging and customer, territorial or market allocation.**
2. **Once alerted to a client's involvement in an antitrust investigation, you should assume that the Division has intercepted incriminating conversations of some type, whether through a bug or a phone tap.**
3. **Furthermore, you should not assume that just because your client's missteps were not "hard-core" criminal antitrust violations, such as price fixing and market division, the government will not have relevant electronic evidence of other possible competition problems. The government may be permitted to use evidence from a wiretap even if it is relevant to a different crime than the crime for which the prosecutors had probable cause to begin intercepting. If, for example, the government initiates a wiretap believing that the conspirators are discussing price fixing, but the wiretap reveals, in reality, they are conspiring to monopolize a market, the interceptions can continue since every Sherman Act violation can be prosecuted criminally.**

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**Mr. Wegener is a member of the Advisory Board for the Bureau of National Affairs *Antitrust and Trade Regulation Report* [BNA ATRR], the world's leading weekly antitrust and trade regulation publication, and *The Antitrust Counselor*, a key monthly publication for those who advise clients in these important areas. He is a frequent speaker and writer on government regulation of the marketplace and the business and litigation aspects of distribution and marketing. Based on a survey of practicing attorneys, Mr. Wegener is listed by the prestigious American Research Corporation as a "Leading Attorney" in antitrust and trade regulation law.**

