

**TITLE 7**

**ANTITRUST DIVISION**

U.S. ATTORNEY'S MANUAL 1970

# TITLE 7

## ANTITRUST DIVISION

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**ORGANIZATION**

The Assistant Attorney General in charge of the Antitrust Division has the following assistants with the duties, responsibilities and authority hereinafter specified: (1) Deputy Assistant Attorney General; (2) Director of Operations; (3) Deputy Director of Operations; (4) Director of Policy Planning; (5) Assistant for Interagency Affairs; and (6) Special Assistant.

The Washington staff of the Antitrust Division is organized into the following sections: Administrative; Appellate; Economic; Evaluation; Foreign Commerce; General Litigation; Judgments; Public Counsel and Legislative; Special Litigation; Special Trial; and Trial.

There are temporary field offices located in some places outside of Washington as the operation of the Division requires; locations are determined by the Assistant Attorney General. These field offices are located in the cities indicated below and their operations, subject to such specific assignments as may be made to the Washington staff, cover the geographical areas listed:

New York (New York City): Connecticut, Maine, Massachusetts, New Hampshire, Northern New Jersey, New York, Rhode Island, and Vermont.

Middle Atlantic (Philadelphia): Alabama, Delaware, Florida, Georgia, Maryland, Mississippi, Southern New Jersey, North Carolina, Pennsylvania, South Carolina, Tennessee, and Virginia.

Great Lakes (Cleveland): Kentucky, Ohio, and West Virginia, and the Detroit, Michigan metropolitan area.

Midwest (Chicago): Arkansas, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan (outside of the Detroit metropolitan area), Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, South Dakota, Texas, and Wisconsin.

San Francisco (San Francisco): Alaska, Northern and Eastern Districts of California, Colorado, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming.

Los Angeles (Los Angeles): Southern and Central Districts of California, Arizona, and New Mexico.

When it becomes necessary for staff personnel to operate in Puerto Rico or other points outside the continental United States, except Hawaii, special assignments will be made by the Assistant Attorney General.

(a) The Deputy Assistant Attorney General is the deputy to

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the Assistant Attorney General and exercises the powers of the Assistant Attorney General, matters requiring the review or approval directed or authorized. Except as otherwise requested by the Assistant Attorney General, matters requiring the review or approval of the Assistant Attorney General are submitted to the Deputy Assistant Attorney General.

(b) The Director of Operations has direct supervision of the activities of the following sections and offices: General Litigation Section, Special Litigation Section, Special Trial Section, Trial Section, and the various field offices of the Division. (He also has supervision of such litigation activities, and of investigations looking to litigation, as may be conducted by the Judgments Section, the Public Counsel and Legislative Section, and the Foreign Commerce Section.) All pleadings, memoranda, reports and other legal documents requiring review which originate in any of these sections or field offices (including the litigating activities of Judgments, Public Counsel, and Foreign Commerce) are submitted to the Director of Operations, who reviews them and, where appropriate, transmits them to the Deputy Assistant Attorney General and the Assistant Attorney General, or other appropriate Division office, together with his approval or disapproval and his comments. He assigns investigations, cases, and other matters to these sections or field offices on the basis of the commodity or service involved, the geographical area involved, and the availability of manpower. He reports directly to the Deputy Assistant Attorney General and the Assistant Attorney General. The Director of Operations and the Director of Policy Planning have the primary responsibility for the assignment of attorneys and economists among the offices within their jurisdictions, subject to the approval of the Assistant Attorney General.

(c) The Deputy Director of Operations assists the Director of Operations in carrying out his functions, and exercises the powers of the Director in his absence or as may be otherwise directed or authorized.

(d) The Director of Policy Planning has direct supervision of the activities of the following sections: Appellate Section, Economic Section, Evaluation Section, Foreign Commerce Section, Judgments Section, and Public Counsel and Legislative Section. All significant recommendations, reports and other memorandum which originate in any of these sections are submitted to the Director of Policy Planning, who reviews them and, where appropriate, transmits them to the Deputy Assistant Attorney Gen-

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eral and the Assistant Attorney General, or other appropriate Division office, together with his approval or disapproval and his comments. He makes assessments of current enforcement activities, directs staff studies on policy questions, and furnishes recommendations relating to methods of achieving policy objectives and improving enforcement efforts. (In the case of litigation, and of investigations looking to litigation, conducted by the Judgments Section, the Public Counsel and Legislative Section, and the Foreign Commerce Section, direct supervision of such litigation is exercised by the Director of Operations.) He also supervises the activity of the Special Trial Section relating to advice to banking agencies and proposed bank cases. He reports directly to the Deputy Assistant Attorney General and the Assistant Attorney General.

(e) The Assistant for Interagency Affairs, on direction of the Assistant Attorney General, represents the Division on interagency governmental committees, serves as liaison with other Government agencies, and performs such other duties as may from time to time be assigned. He reports directly to the Deputy Assistant Attorney General and the Assistant Attorney General.

(f) The Special Assistant reports directly to the Assistant Attorney General and performs such duties as may from time to time be assigned to him. He has no supervisory or administrative responsibilities, but on direction of the Assistant Attorney General he transmits directives to and requests information or assistance from other members of the Division staff.

**Duties of Sections and Field Offices**

Each section and each field office is supervised by a Chief (except the Administrative Section which shall be supervised by the Executive Assistant), who has primary administrative responsibility for the operation of his respective office, including the duty of assigning work among the staff members, of reviewing the work to insure its competence and efficiency, of filing appropriate reports, and of insuring that investigations and litigation are conducted properly.

An Assistant Chief may be designated for each section and field office, who has the duty of assisting the Chief to the extent required, of handling major litigation in the office, of performing such administrative duties as may be delegated to him, and of acting for the Chief in case of his absence or disability.

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(a) The General Litigation Section, Special Litigation Section, Special Trial Section, Trial Section, and the field offices are responsible for the proper conduct of all investigations and the litigation of all cases assigned to them. They report directly to the Director of Operations or Deputy Director of Operations, except that in matters pertaining to advice to banking agencies and proposed bank cases the Special Trial Section reports directly to the Director of Policy Planning.

(b) The Administrative Section is supervised by the Executive Assistant who reports directly to the Deputy Assistant Attorney General and has general supervision over administrative matters in the Division, such as budget and other fiscal matters, mail, files, travel, clerical assistance, office and parking space, and the processing of appointments and promotions. The Executive Assistant has the primary responsibility regarding the appointment, assignments, and salaries of all personnel other than attorneys and economists, subject to the approval of the Assistant Attorney General.

The legal procedure unit is under the supervision of the Executive Assistant. It maintains a file of all pleadings and other legal papers filed in court in each case, a record of all documents filed in court during the course of each grand jury investigation, a record of each Civil Investigative Demand issued and of all Business Review letters.

(c) The Appellate Section is responsible for all matters involving appellate review, including briefing and procedure in the Supreme Court and courts of appeal, and for suits involving administrative orders and cases originating in courts of appeal. It reports directly to the Director of Policy Planning.

(d) The Economic Section is responsible for the planning, direction and conduct of professional economic research, including the investigation, analysis, and interpretation of economic data relating to all phases of antitrust enforcement. It provides advice and assistance on investigations and cases being handled in other offices at their request, and assigns economists to prepare charts, exhibits, and other data for use in litigation. It also prepares such industry or other economic studies as may be requested by the Director of Policy Planning, and is responsible for gathering and analyzing data on identical or suspected collusive bids to Federal and State procurement agencies. It is also responsible for the preparation of reports to Congress on identical bidding in public procurement as required by section 7 of Executive Order 10936. It reports directly to the Director of Policy Planning.

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(e) The Evaluation Section is responsible for conducting studies and making recommendations relating to enforcement policies, for investigating such problems of interagency relationships as may be assigned it from time to time by the Assistant Attorney General, and for reviewing from a policy standpoint investigations and cases, as requested by the Director of Policy Planning. It reports directly to the Director of Policy Planning.

(f) The Foreign Commerce Section provides liaison between the Division, the State Department and other agencies in connection with matters relating to foreign commerce, nationals or governments. It is apprised of and coordinates all matters in the Division relating to foreign commerce. The Chief is a delegate to the committee of experts on restrictive business practices of the OECD. The section, in conjunction with the Department of State, handles exchanges of views and information between the Department of Justice and foreign government agencies. It reports directly to the Director of Policy Planning.

(g) The Judgments Section is responsible for negotiating, in conjunction with the trial staff, consent judgments, for assistance in the preparation of litigated judgments, and for rendering advice on appropriate relief in proposed complaints. It is responsible for modification, interpretation, and enforcement of litigated and consent judgments after entry thereof in court. It also handles investigations looking to such enforcement except when the Director of Operations determines that the matter should be handled by a litigating section or a field office. Except as otherwise noted, it reports directly to the Director of Policy Planning. In the case of proposed judgments and proceedings in connection therewith, it reports to the Director of Operations as well as the Director of Policy Planning. In the case of grand jury proceedings, other investigations and litigation conducted by the section, it reports to the Director of Operations.

(h) The Public Counsel and Legislative Section has responsibility for the preparation of reports to Congress (except when primary responsibility is otherwise expressly assigned); liaison with other Government regulatory agencies on matters pending before such agencies; matters relating to surplus property disposal, alien property and small business; the handling of Federal Trade Commission penalty cases; matters of legislation and Congressional mail; and litigation involving transportation, public utilities, and corporations within the jurisdiction of administrative agencies. It reports directly to the Director of Policy Planning, except in the

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case of litigation and investigations looking to litigation conducted by the section it reports to the Director of Operations. Where representations are to be made to outside agencies of the Division's official position on a matter, this section (as well as all other sections and offices) first obtains the approval of the Assistant Attorney General to such representation.

*Sherman Act* (15 U.S.C. 1-7)

Declares illegal (a) contracts, combinations, or conspiracies in restraint of trade, (b) monopolizing, attempting to monopolize, combining or conspiring to monopolize any part of the interstate trade or commerce.

*Clayton Act* (15 U.S.C. 13, 14, 18, 19)

Prohibits price discrimination, exclusive dealing leases, sales, contracts, discounts, rebates, and the acquisition by one corporation of the stock or assets of another corporation engaged in commerce, where the effect of such actions may be substantially to lessen competition or to tend to create a monopoly.

Prohibits certain interlocking directorates.

Gives right to recover treble damages to persons injured by violation of antitrust laws. Gives United States right of action for actual damages.

*Robinson-Patman Act* (Sec. 2 15 U.S.C. 13-13a-15)

Attorney General prosecutes discriminations among competitors as to rebates, discounts, and unreasonably low prices to eliminate competition.

*Expediting Act* (15 U.S.C. 28)

May file a certificate in any civil action brought by the United States under the Sherman Act that case is of general public importance, whereupon a three-judge court shall hear and expedite case. Appeal of civil suits brought in any district court under any of said acts wherein the United States is complainant will lie only to the Supreme Court.

*Antitrust Civil Process Act* (15 U.S.C. 1311-1314)

Prior to institution of civil or criminal proceedings may serve a civil investigative demand upon any person under investigation for access to relevant documentary material.

*Atomic Energy Act* (42 U.S.C. 2011 et seq.)

Requires the Commission to report apparent antitrust violations to the Attorney General.

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Requires that Attorney General advise the Commission whether proposed licenses would tend to create or maintain a situation inconsistent with the antitrust laws.

Judicial review of AEC orders: To represent the United States in proceedings to review orders of the AEC.

*Connally Act* (15 U.S.C. 715i)

May institute civil and criminal proceedings to enjoin violations involving the interstate transportation of petroleum products.

*Defense Production Act*

Consultation with defense officials: Defense officials required to consult with the Attorney General for the purpose of eliminating factors which may tend to suppress competition, etc.

Joint Committee on Defense Production (a congressional committee established to study and review programs authorized under the act), to consult upon request with committee.

Surveys: To make or request the Federal Trade Commission to make surveys for the purpose of determining factors which may tend to eliminate competition, create or strengthen monopolies, injure small business, or otherwise promote undue concentration of economic power in course of administration of act.

Violations relating to hoarding of scarce materials, to direct institution of criminal proceedings.

Voluntary agreements and programs: To confer with defense officials, upon their request, concerning agreements and programs that would be exempt from the antitrust laws, and to approve the same.

*Federal Alcohol Administration Act* (27 U.S.C. 205 et seq.)

Provides for the regulation of interstate and foreign commerce in distilled spirits, wine, and malt beverages.

*Federal Aviation Act of 1958* (sec. 408(b) as amended; 49 U.S.C. 1378(b))

Requires the Civil Aeronautics Board to give notice to the Attorney General whenever the Board proposes to grant, without a hearing, an application for approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control involving an air carrier. This is a matter assigned to the Antitrust Division (28 CFR 0.40(b)).

*Federal Communications Act of 1934* (47 U.S.C. 151)

To direct U.S. attorneys in proceedings to collect civil penalties from common carriers by wire or radio who make unjust or

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unreasonable discriminations or preferences in charges, services, etc.

Judicial review of FCC orders, 47 U.S.C. 402a; 28 U.S.C. 2341 et seq.: To represent the United States in proceedings to review orders of the FCC.

*Federal Deposit Insurance Act* (12 U.S.C. 1828)

Shall make a report to the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, or the Federal Deposit Insurance Corporation on the competitive factors involved in any proposed merger, consolidation, acquisition of assets, or assumption of liabilities of any bank insured by the Federal Deposit Insurance Corporation.

Requires that future bank mergers not be consummated until 30 days after the date of approval by the appropriate banking agency under the Bank Merger Act. If the Justice Department does not institute a suit under the antitrust laws during this 30-day period, the merger may be consummated and thereafter be exempt from section 1 of the Sherman Act and the Clayton Act.

*Federal Maritime Commission* (46 U.S.C. 830)

Judicial review of FMC orders. To represent the United States in proceedings to review orders of the FMC.

*Federal Property and Administrative Services Act of 1949* (As Amended 40 U.S.C. 408)

Requires that antitrust advice be given by the Attorney General in connection with the sale of surplus government personalty having an acquisition cost of \$3 million or more, and the sale of surplus Government realty having an acquisition cost of \$1 million or more. This is a matter assigned to the Antitrust Division (28 CFR 0.40 (d)).

*Federal Trade Commission Act* (Sec. 6c, 6e, 16, 15 U.S.C. 46(c), 46(e), 49, 50, 56)

May, by application, require Commission to investigate and make recommendations for readjustment of business of corporation alleged to be violating antitrust laws.

May, by application, require Commission to investigate compliance by corporate defendant with decree entered in an antitrust suit.

To direct U.S. Attorneys in the recovery of forfeitures from corporations which fail to file annual or special reports to the Commission.

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The Solicitor General represents the Federal Trade Commission in Supreme Court proceedings. He has assigned to the Antitrust Division responsibility for preparation.

Certain laws authorize the Federal Trade Commission to request the Attorney General to file civil actions. These laws are the Federal Trade Commission Act (15 U.S.C. 41-58) and four acts ancillary thereto: Wool Products Labeling Act (15 U.S.C. 68-68j), Fur Products Labeling Act (15 U.S.C. 69-69j); Textile Fiber Products Identification Act (15 U.S.C. 70-70k); and Flammable Fabrics Act (15 U.S.C. 1191-1200, as amended by 81 Stat. 568 (1967)). The wool, fur, and textile acts forbid misbranding, and the "flammable" act forbids the importation or sale of wearing apparel and interior furnishing made of unduly flammable products. Each of the four acts provides that a violation thereof shall be an "unfair method of competition or unfair or deceptive practice in commerce under the Federal Trade Commission Act" (15 U.S.C. 68a, 69d, 70a, 1192). The Federal Trade Commission Act also authorizes the Commission, upon notice and hearing, to enter a cease and desist order against anyone who has used any "unfair method of competition or unfair or deceptive act or practice in commerce" (15 U.S.C. 45(b)). In addition, the Clayton Act, section 11 (15 U.S.C. 21) authorizes the Commission, upon notice and hearing, to enter a cease and desist order against any corporation which has violated the Clayton Act, Section 7 (15 U.S.C. 18).

Upon violation of a cease and desist order, under any of the above, the Commission is authorized to "certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought" (15 U.S.C. 56). One who violates a cease and desist order "shall forfeit and pay to the United States a civil penalty of not more than \$5,000 for each violation. Each separate violation of such an order shall be a separate offense, except in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense" (15 U.S.C. 45(1)).

In addition to its authority to enter cease and desist orders, the Commission has authority to order certain corporations to submit reports, and authority to order that written answers be submitted to specific questions; and, if compliance is not forthcoming, the Commission is authorized to request the Attorney General to apply to a district court for an order in the nature of mandamus commanding such corporation to comply (15 U.S.C. 46(b)).

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*Fisheries Cooperative Marketing Act* (15 U.S.C. 522)

To enforce cease and desist orders issued by the Secretary of the Interior if interstate or foreign commerce is restrained or monopolized.

*Intercoastal Shipping Act* (46 U.S.C. 843)

To represent the United States in proceedings to review orders of the Federal Maritime Board.

*Interstate Commerce Act* (49 U.S.C. 1, et seq.)

To defend orders of the Interstate Commerce Commission determining whether any line of a railroad operated by electric power falls within exceptions to coverage of the Railway Labor Act, the Railroad Retirement Act, the Carrier Taxing Act, and the Railroad Unemployment Insurance Act.

Judicial review of ICC orders: To represent the United States in suits to defend orders of ICC (28 U.S.C. 2321-2).

*Natural Gas Act* (15 U.S.C. 717s)

May institute criminal proceedings upon receipt of evidence from Federal Power Commission indicating apparent violation of anti-trust laws.

*Panama Canal Act* (15 U.S.C. 31)

May institute suit to determine whether owner, etc., of vessel is doing business in violation of antitrust laws, in which event vessel will not be permitted to enter or pass through the Panama Canal.

*Small Business Act* (15 U.S.C. 636; 15 U.S.C. 638; 15 U.S.C. 639C; 15 U.S.C. 640)

After consultation with the Small Business Administrator on the antitrust aspects thereof, may approve findings by the Administrator that formation of a corporation by a group of small business concerns to obtain raw materials, equipment, or research and development, or facilities therefor, will contribute to the needs of small business.

After consultation with the Small Business Administrator on the antitrust aspects thereof, may approve agreements between small business concerns providing for a joint program of research and development if the Administrator finds such program will strengthen free enterprise and the economy.

After consultation with an official appointed by the President on the antitrust aspects thereof, may approve such voluntary agreements or programs among small business concerns in further-

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ance of objectives of the Small Business Act as have been requested by such official and found by him to be in the public interest as contributing to national defense.

*Unfair Competition Act* (Sec. 801, 15 U.S.C. 72)

To institute criminal proceedings involving importation of goods at substantially less than market value or wholesale price in country of export if done with intent to injure an industry or restrain trade in the United States.

*Webb-Pomerence Export Trade Act* (15 U.S.C. 65)

To take appropriate action for failure of export trade association to comply with recommendations of Federal Trade Commission.

*Wilson Tariff Act* (sec. 73, 15 U.S.C. 8)

May institute suit against unlawful combinations or conspiracies in restraint of trade between persons engaged in the importation of commodities into the United States.

*Reports Required by Statute*

The task of assembling information and preparing reports, which the Attorney General is required by the following statutes to submit to the Congress and the President, is assigned to the Antitrust Division (28 CFR 0.40(f)):

(a) *Defense Production Act of 1950*. Section 708 (e) as amended, requires an annual report dealing with the voluntary agreements and programs authorized by Section 708 of the Act.

(b) *Oil Compact Report*. S.J. Res. 35 of December 11, 1967 (81 Stat. 666), records congressional consent to the Interstate Compact to Conserve Oil and Gas, and Section 2 of such joint resolution requires an annual report on the effect of oil conservation controls on oil industry competition and price behavior.

(c) *Small Business Act*. Small Business Act of 1958, section 10 as amended, 75 Stat. 667 (1961), 15 U.S.C. 639(c), requires reports of "surveys of any activity of the Government which may affect small business, for the purpose of determining any factors which may tend to eliminate competition, create or strengthen monopolies, promote undue concentration of economic power, or otherwise injure small business."

(d) *Balance of Payments Act*. The act "to provide for exemptions from the Antitrust laws to assist in safeguarding the balance of payments position of the United States," 79 Stat. 672 (1965), 81 Stat. 165 (1967), 31 U.S.C. 931, authorizes the formation of anti-trust-immune voluntary agreements among banks and various

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other financial institutions, subject to the approval of the Attorney General, and Section 3 of the Act requires that the Attorney General report every 6 months on the performance of his responsibilities under the act.

*Executive Order 10936 of April 21, 1961 (Identical bids)*

Under section 7 Attorney General directed to report to President after consolidating the information received pursuant to this order for the purpose of making more effective the antitrust laws by insuring that the Attorney General has at his disposal all information on identical bids to governmental agencies which may tend to establish a conspiracy in restraint of trade and which may warrant further investigation with a view to preferring civil or criminal charges.

**INDUSTRY AND COMMODITY ASSIGNMENTS  
TO LITIGATION SECTIONS**

**General Litigation**

GERALD A. CONNELL, *Chief*  
Phone: 8-202-737-2441

Advertising	Jewelry
Aluminum	Laundry
Boatbuilding	Leather
Borax	Lumber
Buses	Metal fastenings
Clothing	Phonographic equipment
Cotton	Photographic equipment
Cutlery (household)	Printing
Dental supplies	Publishing
Drycleaning	Radio communication
Entertainment	Radio equipment
Food (other than beverages)	Railway equipment
Footwear	Real estate
Groceries and grocery supplies	Research instruments
Handtools	Restaurants
Hardware	Retail merchandising
Household furnishings	Salt
Household furniture	Scientific instruments
Industrial cleaning agents	Shipbuilding

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Soap and detergents	Toys
Television communications	Trading stamps
Television equipment	Vending machines
Textiles	Wood products
Tobacco	Wool

**Special Litigation**LEWIS BERNSTEIN, *Chief*BURTON R. THORMAN, *Assistant Chief*

Phone: 8-202-737-2425

Agricultural fertilizers	Mortuary
Aircraft manufacture	Office furniture
Armaments	Office machines
Bearings	Office supplies
Calcium chloride	Optical supplies
Chemicals, agricultural	Paper
Chemicals, industrial	Phosphate
Containers, paper	Plastics
Cosmetics	Potash
Drugs—Manufacture	Printing machinery
Drugs—Retail distribution	Printing supplies
Electronics	Professional services
Gases (other than petroleum)	Pulp and pulpwood
Gold	Rubber (crude and industrial products)
Health equipment	Satellites
Hearings aids	Silver
Hospital supplies	Sulfur
Ink	Timing devices
Machine tools	Tires
Medical supplies	Weapons
Missiles	

**Special Trial Section**CHARLES L. WHITTINGHILL, *Chief*SAMUEL Z. GORDON, *Assistant Chief*

Phone: 8-202-737-2471

Accessories, automobile	Brass
Athletic goods	Bronze
Automobiles	Construction machinery
Automotive parts and accessories	Containers, glass
	Containers, metal

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Copper	Sports
Farm implements	Sports equipment
Finance	Telegraph communication
Glass	Telegraph equipment
Lodgings	Telephone communication
Materials handling equipment	Telephone equipment
Mining machinery	Trucks
Motorcycles	Wire and cable

**Trial Section**CHAS. D. MAHAFFIE, *Chief*

Phone: 8-202-737-2475

Abrasives	Household appliances
Air-conditioning equipment	Insurance
Asbestos	Iron
Asphalt	Lead
Beer	Magnesium
Beverages, alcoholic	Musical instruments
Beverages, soft drink	Natural gas
Bicycles	Paints
Building contractors	Petrochemicals
Building subcontractors	Petroleum
Cement	Pigments
Ceramics	Plumbing
Clay	Refractory minerals
Coal	Sand
Concrete	Scrap metal
Ferroalloys	Steel
Fire protection equipment	Ticonium
Gravel	Tin
Gypsum	Titanium
Heating equipment	Zinc
Heavy electrical equipment	

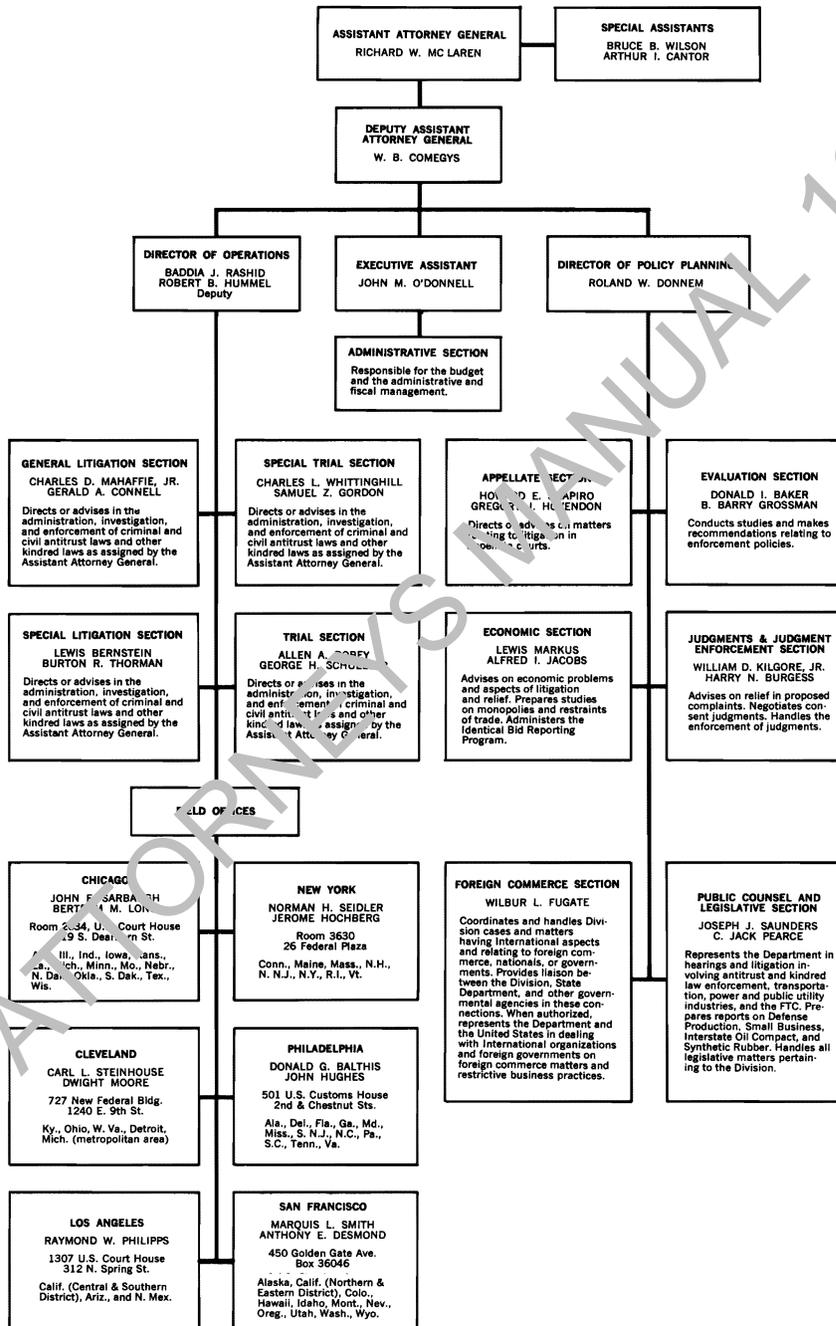
**Public Counsel and Legislative Section**JOSEPH J. SAUNDERS, *Chief*C. JACK PEARCE, *Assistant Chief*

Phone: 8-202-737-2515

Power and public utility industries (including electrical, gas, water, or nuclear power)	Air transportation
	Bus transportation
	Rail transportation

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## DEPARTMENT OF JUSTICE ANTITRUST DIVISION





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Taxi transportation  
Truck transportation

Water transportation

## ACTIONS AGAINST THE UNITED STATES

The United States is represented by attorneys of the Antitrust Division in suits to enjoin, set aside, suspend, or determine the validity of, final orders of the Interstate Commerce Commission; Federal Communication Commission; Atomic Energy Commission; and the Federal Maritime Commission. It is important that copies of the complaint or petition in these types of cases be immediately forwarded to the Antitrust Division, and that the Antitrust Division be notified of the date which the U.S. Attorney was served. Also, appeal papers served upon U.S. Attorneys in such cases should be forwarded to the Antitrust Division without delay.

## Attorney General's Statement to U.S. Attorneys

The effectiveness of antitrust enforcement can be substantially enhanced by utilizing the offices of the U.S. Attorneys to supplement the enforcement efforts of the Antitrust Division.

Among the many elements which are essential to an effective antitrust enforcement program are the detection and prosecution of local violations directly affecting the consumer. While all of our antitrust enforcement effort is ultimately directed to the benefit of the consuming public, price fixing violations in particular have a direct and immediate impact on the consumer in terms of the ultimate price that he must pay for goods and services. We must vigorously prosecute such collusive practices in our economy.

Experience indicates that in those areas where the Antitrust Division has field offices, the public becomes more antitrust conscious and consequently calls to our attention possible violations to a greater degree than in other areas. Since the Division maintains only six field offices, it is a fair assumption that many local price fixing violations never come to our attention.

Furthermore, the Antitrust Division does not have the resources to investigate and prosecute all local antitrust violations, and at the same time adequately pursue the other indispensable elements of its enforcement program.

In short, I am convinced that the effective and efficient enforcement of the antitrust laws requires the detection and prosecution of local price fixing violations in every geographical section of

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the country. The efforts of the Antitrust Division must be supplemented if this goal is to be achieved. Accordingly, I am assigning to the U.S. Attorneys, effective immediately, the additional responsibility for enforcing section 1 of the Sherman Act against offenses which are of essentially local character, and which involve price fixing, collusive bidding, or similar conduct. The U.S. Attorneys shall handle such investigations and proceedings as the Assistant Attorney General in charge of the Antitrust Division may specifically authorize them to conduct. To this end, each of you is being provided with this manual which sets forth the procedures to be followed in such matters.

You will receive appropriate guidance and help from the Antitrust Division. To the extent that your offices can fortify and supplement the work of the Antitrust Division, there will be a significant gain to the economy and to the consuming public. We depend upon your effective action.

FAMSEY CLARK,  
*Attorney General.*  
 June 12, 1967

### **Responsibilities of U.S. Attorneys in Enforcing Antitrust Laws**

The U.S. Attorneys in their respective areas of jurisdiction shall enforce Section 1 of the Sherman Act (15 U.S.C. 1) against offenses which are of essentially local character and which involve price-fixing, collusive bidding or similar conduct, through such investigations and proceedings as the Assistant Attorney General in charge of the Antitrust Division or his delegates may specifically authorize or direct them to conduct. The U.S. Attorneys shall report on such antitrust activities directly to the Director of Operations of the Antitrust Division or to his Deputy, subject to the operating procedures set forth below. All other proceedings, civil and criminal, under the antitrust statutes are instituted by the Antitrust Division.

### **Operating Procedures for U.S. Attorneys**

#### *1. Preliminary inquiries*

Upon request by the U.S. Attorney, the Director of Operations may authorize a preliminary inquiry without the necessity of approval by the Assistant Attorney General, after first obtaining clearance from the Federal Trade Commission. Clearance with the Federal Trade Commission is handled through established liaison

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channels between the Antitrust Division and the Federal Trade Commission. The Director of Operations may reassign preliminary inquiries to a section, to a field office, or to a U.S. Attorney. Preliminary inquiries may be closed by the Director of Operations, without securing approval of the Assistant Attorney General, when so recommended by the U.S. Attorney, unless a substantial policy decision is involved, in which case approval of the Assistant Attorney General is required. Prior to obtaining preliminary authority, complainants and voluntary informants may be interviewed, and public sources may be consulted; but no other persons or firms may be contacted, orally or in writing.

2. *FTC clearance*

The FTC and Antitrust Division have concurrent jurisdiction to enforce certain antitrust laws. Because of this overlapping jurisdiction a liaison procedure is followed whereby one agency informs the other that it proposes to conduct an investigation. Each agency determines whether the proposed investigation will conflict with any currently pending investigation or case. If there is no conflict, clearance is granted; but otherwise, clearance is denied and the reasons for denial are given. The FTC, however, cannot initiate criminal proceedings and will normally waive its clearance rights if the Department intends to initiate criminal action.

3. *Full investigation.*

At the conclusion of a preliminary inquiry, the U.S. Attorney shall submit a report of his findings to the Director of Operations, together with his recommendation as to whether the inquiry should be closed or whether it should be expanded into a full investigation (either through the FBI, civil investigative demand, grand jury, or his own personnel).

If the U.S. Attorney desires to conduct a full investigation through the FBI, such request shall be instituted in writing through the Director of Operations, and the request should be prepared in the manner set forth in Appendix to Directive.

The Civil Process Act (15 U.S.C. Secs. 1311-1314) allows the Department to serve a Civil Investigative Demand (CID) demanding the production of documentary material (1) which is relevant to an antitrust investigation, (2) in the possession of any legal entity other than a natural person, (3) which is under investigation. Although documents obtained pursuant to CIDs may be used in either civil or criminal proceedings, CIDs may not be served in investigations that contemplate only criminal action.

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The use of CIDs must be authorized by the Assistant Attorney General (see App. to Directive.)

Authorized investigations looking toward possible litigation may be closed when such action is recommended by the respective U.S. Attorney and approved by the Director of Operations and, unless the action is for lack of evidence, the Director of Policy Planning. All decisions to close a full investigation shall promptly be brought to the attention of the Assistant Attorney General and the First Assistant.

4. *Grand jury*

Authority to conduct an antitrust grand jury investigation requires the approval of both the Assistant Attorney General in charge of the Antitrust Division and the Attorney General. Requests for such authority shall be prepared in the form of memoranda from the Assistant Attorney General to the Attorney General, for the signature of the Assistant Attorney General, and shall be submitted to the Director of Operations who shall clear them with the Director of Policy Planning. These requests shall contain a description of the nature of the suspected violation, of the parties involved, of the interstate commerce affected, the principal evidence supporting the suspected violation, and a brief comment on the significance of the potential lawsuit (see App. to Directive.)

In view of the special Antitrust Immunity Statute (15 U.S.C. 32-33) care must be exercised by the U.S. Attorney to avoid improvident immunization of potential individual defendants. It is the general policy of the Antitrust Division to indict the highest culpable corporate officials that are involved from each company, as well as the corporation or other business entity. Therefore, clearance must be obtained from the Director of Operations to subpoena to testify an owner, executive officer or director of a probable corporate defendant or any other individual who may be a probable defendant. The request for clearance shall state the reasons supporting the request and whether other possible individual defendants from the same company are available for possible indictment.

Unsuccessful grand jury investigations shall not be terminated without approval of the Assistant Attorney General, except that the Director of Operations may terminate such investigation where termination is based upon lack of evidence or upon other considerations not involving a substantial policy question. A request for termination shall set forth the reasons therefor.

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5. *Indictment, information and complaint*

Authority to return an antitrust indictment or to file an antitrust information or an antitrust civil complaint requires the approval of the Assistant Attorney General in charge of the Antitrust Division and of the Attorney General. Such requests shall be prepared by the U.S. Attorney's office, addressed to the Director of Operations, and consist of:

(a) *The "fact memorandum"*.—It shall set forth in detail the facts developed in the course of the investigation, including facts pertaining to the involvement of interstate or foreign commerce, and a description of the evidence supporting and contradicting those facts. As to particularly disputable facts, specific mention should be made of the corroborating and the contradictory evidence. Unless the matter involves a per se violation, such as a horizontal price-fixing agreement, the fact memorandum should also contain comments on the legal issues involved and references to the pertinent authorities. It should also contain a summary of the evidence against each individual defendant proposed.

(b) *The proposed pleadings*.—These pleadings should generally follow, to the extent practicable, the establishment forms of which samples are attached in Appendices.

(c) *The proposed memorandum for the Attorney General*.—This should be a concise summary of the "fact memorandum" (see App. to Directive.)

(d) *The proposed press release*.—Immediately following the return of an indictment or filing of an information or complaint, the Director of Public Information issues a press release on behalf of the Attorney General. A proposed press release shall be sent to the Director of Operations for forwarding to the Director of Public Information, allowing sufficient time for revisions, for mimeographing, and for mailing copies of the release to the U.S. Attorney (see App. to Directive.)

No civil or criminal antitrust case may be terminated or dismissed in whole or in part without the approval of the Assistant Attorney General in charge of the Antitrust Division. The Assistant Attorney General must approve also all the decisions as to the Government's position with respect to any attempt by the defendants to plead nolo contendere, and also with respect to sentence recommendations. In the event companion criminal and civil cases are pending, settlement negotiations should not tie the disposition of one to the other.

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Sentence recommendations must never be discussed with defendants or defense counsel. Such recommendations must be cleared in advance with the Director of Operations and the Assistant Attorney General. A memorandum shall be sent to the Director of Operations setting forth the recommendations of the U.S. Attorney and his reasons therefor and request approval. Thereafter, the approved sentence recommendations may be submitted to the court upon its invitation.

**7. Briefs and motion papers**

All decisions concerning the nature and substance of motions and oppositions thereto, and all memorandum and briefs to be filed with a court which involve novel issues of antitrust laws or policy questions shall be submitted to the Director of Operations for approval by him and the Director of Policy Planning. However, all pretrial and post-trial briefs on the merits, or in cases where no pretrial brief is filed, a detailed pretrial staff memorandum, must be submitted to the Director of Operations and to the Director of Policy Planning. Final approval of such briefs and memorandum by the First Assistant is required. Two copies of all pleadings filed by all parties shall be forwarded to the Director of Operations.

**8. Mail**

All memorandum or other papers sent to the Antitrust Division in Washington for further action, i.e. requests for authority or for clearance, proposed briefs, proposed press releases, etc., shall be sent in original with one carbon copy.

**Price Fixing as a Violation of the Sherman Act**

The most frequent violations of Section 1 of the Sherman Act (15 U.S.C. 1) is price fixing. Illegal price fixing may consist not only of agreements among competitors to charge the same prices, but also of agreements not to reduce prices without prior notification of others; agreements to maintain specified discounts; and agreements to maintain specified price differentials between different quantities, types, or sizes of products. Frequently, but not always, price-fixing conspiracies include mechanisms for policing and enforcing adherence to fixed prices.

The courts have long held that price-fixing agreements, conspiracies, collusion, or any other arrangement or understanding among

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competitors which occur in or affect interstate commerce and which tamper with the determination of price are unlawful per se under the Sherman Act.<sup>1</sup> The same is true with respect to price fixing or price maintenance arrangements between suppliers and their dealers or distributors (vertical price-fixing arrangements), except to the very limited extent that price maintenance in strict compliance with the so-called fair trade statutes is permitted in some States.<sup>2</sup> (For further discussion of legal issues, see Sec. VIII).

Since price fixing is a per se violation of the Sherman Act, it is never a valid defense that prices were set at reasonable level, or that the fixing prices served some desirable end, or that it was necessary to fix prices to avoid some economic ill.<sup>3</sup> Objections should be made to the introduction of any evidence designed to prove such irrelevant factors.

<sup>1</sup> *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

<sup>2</sup> *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

<sup>3</sup> *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. General Motors Corp.*, 384 U.S. 127, 147 (1965).

### Pricing Policies and Tactics

#### 1. General considerations

In the case of most manufactured products and some raw materials, the individual producer or seller can exercise some discretion in determining the price of his wares. For obvious reasons most business firms seek to increase their degree of control over prices. Some methods which they employ to that end are old-fashioned, smoke-filled room conspiracies in violation of the Sherman Act. However, control may also be exercised through product differentiation and through many other ways which may or may not run afoul of the antitrust laws.

The tactics by which some degree of control over prices can be achieved vary with the nature of the commodity involved. Generally, individual sellers of standardized products encounter difficulties in maintaining independent price policies because of the strong influence exerted by competing producers. However, most competing manufactured products differ in quality, performance, style, or in other respects, which leads the consumer to prefer one product over another. Such buyer preference gives the individual seller an important degree of latitude in formulating his pricing policies without constant reference to the actions of his rivals.

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*2. Geographic pricing systems*

Sellers with some discretion over price policy have adopted a wide variety of pricing systems to give recognition to the influence of shipping costs. Some sellers maintain a uniform price at their plants to all buyers, regardless of their location; other sellers quote uniform delivered prices in all areas or within defined geographic zones; still others vary their prices in order to meet or undersell their rivals in all market areas in which they wish to do business. Some of these practices result in greatly limiting or eliminating price competition in the markets affected.

The most common types of geographic pricing may be summarized as follows:

(1) Unsystematic schemes of freight equalization in which the seller will reduce his price on particular transactions in order to meet or undersell a competitor who is located more advantageously;

(2) Single or multiple basing point systems in which the freight charged to individual buyers varies with the shipping costs from one or more basing points recognized by the industry. These basing points usually represent important production centers;

(3) Zone pricing in which the delivered prices paid by buyers are uniform within certain geographic areas but vary from area to area; and

(4) Uniform delivered prices in which all buyers pay the same prices wherever they are located in the United States.

The unilateral adoption by one firm of any of the geographic pricing systems may not, in itself, violate the antitrust laws. However, adoption of such systems by concerted action or agreement of two or more firms probably will constitute a violation.

*3. Collusion in bidding*

Identity in bid prices may be symptomatic of a lack of price competition but it is not always an indication of collusion by suppliers.<sup>4</sup> To assess any given instance of identical bidding, it is necessary to consider the general price behavior of the product affected, the pricing policies of the suppliers, the structure of the industry, and the nature of the product itself. Agreements among bidders on identical prices represent a primitive form of collusion.

<sup>4</sup> Identical bidding may be as consistent with normal market behavior as it is with collusion, because it may result from standardized products, the ready availability of market information, or other such circumstances.

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In the more sophisticated arrangements the low bids will be filed according to a plan of rotation among the various suppliers. In such situations, the pattern in bidding over a period of time will reflect different identical bidders in each successive procurement with the nonidentical bidder being the winner designated by the conspirators. The pattern may also show that the several bidders each obtain, over a period of time, a certain portion of the total business; or that the low bids create a pattern of geographical divisions of the market among the suppliers. Yet another form of business allocation may appear if the pattern of past bidding shows persistent avoidance by certain eligible vendors from bidding on projects of certain awarding authorities or owners but not on other projects. This pattern may indicate allocation of customers or of certain types of customers, e.g., governmental agencies.

In the present state of the law, evidence of identical bidding or of a pattern of bid rotation, in itself, would not suffice to prove price collusion among the suppliers. Rather, it will be necessary to prove also, be it by circumstantial evidence or directly, that the suppliers actually were in concert or agreement. Trade association meetings and credit meetings have often furnished the opportunity for entering into such collusive schemes.

#### *4. Price identity without collusion*

Price identity among sellers may or may not be due to illegal collusion or agreement. In some industries it has long been customary for competitors to set their prices according to those established by a so-called price leader, usually a firm dominant in the field. Unless an understanding to that effect among the competitors can be proven, the practice cannot be attacked under the Sherman Act. However, if several competitors change their prices to accord with those of the price leader before, at or about the same time as those new prices become known on the market, a strong suspicion is created that the competitors acted in collusion, and an investigation may prove it.

Price identity may also result from sales by two or more dealers on a product subject to the so-called fair-trade laws. As noted above, such laws exist in some States and should be narrowly construed. They do not permit horizontal pricing arrangements among competitors. (See pp. 149 to 155 of the "Report of the Attorney General's Committee to Study the Antitrust Laws.")

In some instances, identical bidding is the consequence of the exercise of price control by State or local governments. An ex-

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ample of this is the State regulation of the wholesale and retail prices at which milk may be sold in some 18 States.

**Examples of Price Fixing in Violation of the Sherman Act**

It may be of interest to illustrate some of the forms which price fixing has taken as evidenced by the practices declared to be illegal in antitrust cases. In *Addystone Pipe & Steel Co. v. United States*,<sup>5</sup> a number of vendors of cast-iron pipe entered into an agreement whereby, in bidding on contracts, one was to be designated to make the lowest bid while the others made no effort to win the contract in order that the one designated low bidder would win the contract at a higher price than would otherwise have been obtained. The agreement was found to violate the Sherman Act. Again, a group of plumbing and heating contractors who employed a common estimator for calculating the prices on all bids, was found guilty of price fixing.<sup>6</sup> In 1960 a number of cement producers and distributors in Memphis, Tenn., together with the Durable Building Materials Council of which they were members, were indicted for price fixing.<sup>7</sup> The defendant council published price sheets and circulated them among the members, who had agreed to bid identical prices to public awarding authorities; they also agreed to register the quoted prices with the council, prior to submitting the sealed bids to the awarding authority, or to check the prices previously registered by other dealers. Upon pleas of nolo contendere, fines totaling \$82,000 were assessed against the defendants in that case.

Eight large steel companies and two of their officers were indicted for eliminating price competition in the carbon-steel-sheet industry.<sup>8</sup> It was alleged that the defendants held meetings in hotels at which no minutes were kept, to establish and carry out the price-fixing agreements. They agreed not on the basic steel sheet price, but on the charges for extras in steel sheets of particular dimensions, gauge, quality or metallurgical content. The court accepted nolo contendere pleas and fined the corporate defendants with a total of \$400,000.

<sup>5</sup> 175 U.S. 211 (1899).

<sup>6</sup> *Las Vegas Merchant Plumbers Ass'n. v. United States*, 210 F. 2d. 732, cert. denied 348 U.S. 817 (1955..).

<sup>7</sup> *United States v. Durable Building Materials Council, Inc., et al.*, (W.D. Tenn., Cr. No. 9028 Cr., Filed Sept. 19, 1960).

<sup>8</sup> *United States v. United States Steel Corporation, et al.*, (S.D. N.Y., filed Apr. 7, 1964, 64 Cr. 344).

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Probably the most notorious price-fixing conspiracies in recent history involved the large manufacturers of electrical equipment. Twenty separate indictments were filed in 1960 against 29 manufacturers in that industry. Officials of the defendant companies met frequently at various places throughout the United States to agree upon prices to be charged various classes of customers and to divide the business among the companies in accordance with predetermined market shares. None of these criminal cases was tried since all of the defendants pleaded either guilty to the charges or entered nolo contendere pleas. Fines totaling \$1,924,500 were levied against the defendants in all 20 cases. Probably the most sophisticated of the conspiratorial techniques was the "phase of the moon" conspiracy in power switchgear assemblies. Beginning about November 1958 and continuing to October 1959, General Electric Co., Westinghouse Corp., and three other producing companies utilized a formula system to divide up sales of power switchgear assemblies to utility companies and to industrial concerns. This formula established the bidding order of each switchgear manufacturer by assigning a code number to each company which phased each company into the priority position every two weeks. Keyed into the company code numbers was the amount by which each company was to reduce the agreed upon book price in computing its bid price. If, for example, company number 1 was in the priority position, i.e. the position to be the low bidder, it would quote the lowest price at an amount off book price. Then the other companies in the order of their code numbers would quote amounts above the lowest quotation as specified in the formula. These differentials above the lowest price would be further concealed by minor additions or subtractions to eliminate the uniformity of the formula's differentials above the low bid.<sup>9</sup>

**Legal Issues in Price Fixing**

Section 1 of the Sherman Act condemns combinations, conspiracies, and contracts in restraint of trade. Since every contract restricts the activities of the parties to that contract, the Supreme Court in the *Standard Oil* case, 221 U.S. 1 (1911), enunciated a rule of reason doctrine. Under this doctrine only those combinations, conspiracies, and contracts which unreasonably restrain trade are unlawful. However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be

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unreasonable and thus illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. The Supreme Court first enunciated this per se rule in a price fixing case, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). That case also announced that contrary to normal conspiracy law, proof of an overt act is not a necessary element in establishing an illegal conspiracy under the antitrust laws. The act of conspiring itself is sufficient. See pages 12-24 and 36-42 of the "Report of the Attorney General's Committee to Study the Antitrust Laws."

Section 1 of the Sherman Act requires a plurality of actors for its violation. Since a corporation can only act through its officers, an illegal conspiracy cannot exist between a corporation and its officers. However, the corporation and the culpable officers are each liable whenever an illegal conspiracy is established. Whether or not agreements between a parent company and its subsidiaries and between two or more subsidiaries may be illegal raise problems of intraenterprise conspiracy. See pages 32 to 36 of the "Report of the Attorney General's Committee to Study the Antitrust Laws."

In order to establish a violation of the Sherman Act a restraint affecting or involving interstate trade and commerce must be shown. For the purposes of the Sherman Act, trade and commerce has been construed to include a multiplicity of economic activities such as the manufacture, sale and distribution of goods as well as services, banking, insurance, etc. As a general rule, where goods are regularly manufactured, distributed, and sold to customers throughout the United States, any restraint imposed may be deemed to involve interstate commerce. However, whether a given pattern of behavior falls within the concept of interstate commerce depends upon the particularities of each situation because "Commerce among the States is not a technical legal conception, but a practical one drawn from the course of business." *Swift & Co. v. United States*, 196 U.S. 375 (1905).

Sherman Act violations may also be proved even though all the transactions in a given case were purely intrastate in character. In *United States v. South-Eastern Underwriters Assn.*, 322 —U.S.—533 (1944) the court remarked that in passing the Sherman Act Congress meant "to go to the utmost extent of its constitutional power in restraining trust and monopoly agreements." The essence of the inquiry, then, is whether or not interstate commerce has been or would be affected. As pointed out in *Las*

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*Vegas Merchant Plumbers Assn. v. United States*, 210 F. 2d 732, the applicability of the Sherman Act may, so far as the interstate commerce requirement is concerned, turn on one or both of two theories: (1) That the acts complained of occurred within the flow of interstate commerce, or (2) that purely intrastate activities substantially affected interstate commerce.

It should be noted that where price fixing or some other per se offense is concerned, a showing of the effects of the acts complained of is needed only to establish the interstate commerce element, and not to prove the restraint. Where, on the other hand, the acts are alleged to constitute an offense which is not per se illegal, effects may need to be shown to prove not only the effect on interstate commerce but also the unreasonableness of the restraint. Moreover, the effect needed to establish the interstate commerce element need not be actual, as in the case of the conspiracy never put into effect. In such case the vice of the conspiracy is the potential threat to competition contemplated by the conspiracy.

It is settled that, "to come within the purview of the Sherman Act, the restraint on commerce or the obstruction must be direct and substantial and not merely incidental and remote." *Spears Free Clinic & Hospital for Poor Children v. R. L. Cleerre*, 197 F. 2d 125. Thus, while it is often said that where price fixing or some other per se violation is charged, the amount of commerce involved is immaterial, it does not follow that a price-fixing conspiracy automatically affects interstate commerce where all the acts complained of are local in character. This is a question of fact. Hence there must be a specific showing of the effect of the conspiracy on interstate commerce. In this regard, the fact that the source of the restraint, or its application, is intrastate is irrelevant. "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sportswear Mfrs. Assn.*, 336 U.S. 460.

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**CONSENT JUDGMENTS**

Proposed consent judgments in antitrust cases are made public at least 30 days before they are entered in court.

The purpose of this policy is to provide opportunity for comment or criticism from persons or firms who are not parties to an action in which a consent judgment is involved.

Previously, the terms of consent judgments have not been made public until they were entered finally.

More than 70 percent of the Justice Department's civil antitrust cases have been terminated by consent judgments in the past. Generally, the defendant firm agrees in private negotiations to cease practices which the Government believes violate antitrust laws. This agreement then is made binding by the court.

Each proposed consent judgment is filed in court or made available upon request to interested persons as early as possible but at least 30 days prior to entry by the court.

Between the time the judgment is made public and its final entry, the Department receives and considers any written comments, views, or relevant allegations relating to the proposed judgment.

The Department may, in its discretion, disclose these views to the defendants and reserves the right to withdraw or withhold its consent if the views presented indicate that the proposed judgment is inappropriate, improper, or inadequate.

The Department also reserves the right to object to intervention by any party not named as a party by the Government.

**THE BUSINESS REVIEW PROCEDURE**

**Purpose and Background**

Although the Department of Justice is not authorized to give advisory opinions to private parties, for several decades the Antitrust Division has been willing to review proposed business conduct and state its enforcement intentions in certain circumstances. This originated with a "railroad release" procedure under which the Division will forego the initiation of criminal antitrust proceedings in certain cases. This procedure has subsequently expanded to encompass a "merged clearance" procedure under which the Division will state its present enforcement intention with respect to a merger or acquisition. No present reason appears for treating the two procedures separately and they are now combined in the Division's "Business Review Procedure."

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## Procedure

The following is a recent restatement of the "Business Review Procedure." It is generally consistent with past practice and is designed to remove ambiguities in areas where some recent misunderstandings have arisen:

1. A request for a business review letter must be submitted in writing to the Assistant Attorney General, Antitrust Division, Department of Justice, Washington, D.C. 20530.

2. The Division will consider only requests with respect to proposed business conduct, which may involve either domestic or foreign commerce.

3. A business review letter shall have no application to any party which does not join in the request therefor.

4. The requesting parties are under an affirmative obligation to make full and true disclosure with respect to the business conduct for which review is requested. Each request must be accompanied by all relevant data including background information, complete copies of all operative documents and detailed statements of all collateral oral understandings, if any. All parties requesting the review letter must provide the Division with whatever additional information or documents the Division may thereafter request in order to review the matter. In connection with any request for review the Division will also conduct whatever independent investigation it believes is appropriate.

5. No oral clearance, release or other statement purporting to bind the enforcement discretion of the Division may be given. The requesting party may rely upon only a written business review letter signed by the Attorney General, Deputy Attorney General, or Assistant Attorney General in charge of the Antitrust Division.

6. If the business conduct for which review is requested is subject to approval by a regulatory agency, no review request will be considered until after agency approval has been obtained.

7. After review of a request submitted hereunder, the Division may: state its present enforcement intention with respect to the proposed business conduct; decline to pass on the request; or take such other position or action as it considers appropriate. Ordinarily, however, the Division will state a present intention not to bring a civil action only with respect to mergers and acquisitions.

8. A business review letter states only the enforcement intention of the Division as of the date of the letter, and the Division remains completely free to bring whatever action or proceeding

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it subsequently comes to believe is required by the public interest. As to a stated intention not to bring a criminal action, however, the Division has never exercised its right to bring such an action where there has been full and true disclosure at the time of presenting the request.

9. Any requesting party may withdraw a request for review at any time. The Division remains free, however, to submit such comments to such requesting party as it deems appropriate. Failure to take action after receipt of documents or information, whether submitted pursuant to this procedure or otherwise, does not in any way limit or estop the Division from taking such action at such time thereafter as it deems appropriate. The Division reserves the right to retain documents submitted to it under this procedure or otherwise and to use them for all purposes of antitrust enforcement.

In business review letters, a copy of the Division's recent restatement of procedure should be attached and the face of the letter should recite that a copy is attached. In addition, any "no action" letter should always be phrased in terms of the Division's present intention—e.g., "the Division does not presently intend to institute criminal proceedings against the business conduct for which the request for a business review letter was made.

## MERCER GUIDELINES

### 1. *Purpose*

The purpose of these guidelines is to acquaint the business community, the legal profession, and other interested groups and individuals with the standards currently being applied by the Department of Justice in determining whether to challenge corporate acquisitions and mergers under section 7 of the Clayton Act. (Although mergers or acquisitions may also be challenged under the Sherman Act, commonly the challenge will be made under Sec. 7 of the Clayton Act and, accordingly, it is to this provision of law that the guidelines are directed.) The responsibilities of the Department of Justice under Section 7 are those of an enforcement agency, and these guidelines are announced solely as a statement of current Department policy, subject to change at any time without prior notice, for whatever assistance such statement may be in enabling interested persons to anticipate in a general way Department enforcement action under Section 7. Because the statements of enforcement policy contained in these guidelines must

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necessarily be framed in rather general terms, and because the critical factors in any particular guideline formulation may be evaluated differently by the Department than by the parties, the guidelines should not be treated as a substitute for the Department's business review procedures, which make available statements of the Department's present enforcement intentions with regard to particular proposed mergers or acquisitions.

2. *General enforcement policy*

Within the overall scheme of the Department's antitrust enforcement activity, the primary role of Section 7 enforcement is to preserve and promote market structures conducive to competition. Market structure is the focus of the Department's merger policy chiefly because the conduct of the individual firms in a market tends to be controlled by the structure of that market, i.e., by those market conditions which are fairly permanent or subject only to slow change (such as, principally, the number of substantial firms selling in the market, the relative sizes of their respective market shares, and the substantiality of barriers to the entry of new firms into the market). Thus, for example, a concentrated market structure, where a few firms account for a large share of the sales, tends to discourage vigorous price competition by the firms in the market and to encourage other kinds of conduct, such as use of inefficient methods of production or excessive promotional expenditures, or an economically undesirable nature. Moreover, not only does emphasis on market structure generally produce economic predictions that are fully adequate for the purposes of a statute that requires only a showing that the effect of a merger "may be substantially to lessen competition, or to tend to create a monopoly," but an enforcement policy emphasizing a limited number of structural factors also facilitates both enforcement decision making and business planning which involves anticipation of the Department's enforcement intent. Accordingly, the Department's enforcement activity under Section 7 is directed primarily toward the identification and prevention of those mergers which alter market structure in ways likely now or eventually to encourage or permit noncompetitive conduct.

In certain exceptional circumstances, however, the structural factors used in these guidelines will not alone be conclusive, and the Department's enforcement activity will necessarily be based on a more complex and inclusive evaluation. This is sometimes the case, for example, where basic technological changes are creating

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new industries, or are significantly transforming older industries, in such fashion as to make current market boundaries and market structure of uncertain significance. In such unusual transitional situations application of the normal guideline standards may be inappropriate; and on assessing probable future developments, the Department may not sue despite nominal application of a particular guideline, or it may sue even though the guidelines, as normally applied, do not require the Department to challenge the merger. Similarly, in the area of conglomerate merger activity, the present incomplete state of knowledge concerning structure-conduct relationships may preclude sole reliance on the structural criteria used in these guidelines, as explained in paragraphs 17 and 20 below.

### 3. *Market definition*

A rational appraisal of the probable competitive effects of a merger normally requires definition of one or more relevant markets. A market is any grouping of sales (or other commercial transactions), in which each of the firms whose sales are included enjoys some advantage in competing with those firms whose sales are not included. The advantage need not be great, for so long as it is significant it defines an area of effective competition among the included sellers in which the competition of the excluded sellers is, ex hypothesi, less effective. The process or market definition may result in identification of several appropriate markets in which to test the probable competitive effects of a particular merger.

A market is defined both in terms of its product dimension (line of commerce) and its geographic dimension (section of the country).

(1) *Line of Commerce.*—The sales of any product or service which is distinguishable as a matter of commercial practice from other products or services will ordinarily constitute a relevant product market, even though, from the standpoint of most purchasers, other products may be reasonably, but not perfectly, interchangeable with it in terms of price, quality, and use. On the other hand, the sales of two distinct products to a particular group of purchasers can also appropriately be grouped into a single market where the two products are reasonably interchangeable for that group in terms of price, quality, and use. In this latter case, however, it may be necessary also to include in that market the sales of one or more other products which are equally interchangeable with the two products in terms of price, quality, and

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use from the standpoint of that group of purchasers for whom the two products are interchangeable.

The reasons for employing the foregoing definitions may be stated as follows. In enforcing Section 7 the Department seeks primarily to prevent mergers which change market structure in a direction likely to create a power to behave noncompetitively in the production and sale of any particular product, even though that power will ultimately be limited, though not nullified, by the presence of other similar products that, while reasonably interchangeable, are less than perfect substitutes. It is in no way inconsistent with this effort also to pursue a policy designed to prohibit mergers between firms selling distinct products where the result of the merger may be to create or enhance the companies' market power due to the fact that the products, though not perfectly substitutable by purchasers, are significant enough alternatives to constitute substantial competitive influences on the production, development or sale of each.

(ii) *Section of the country.*—The total sales of a product or service in any commercially significant section of the country (even as small as a single community), or aggregate of such sections, will ordinarily constitute a geographic market if firms engaged in selling the product make significant sales of the product to purchasers in the section or sections. The market need not be enlarged beyond any section meeting the foregoing test unless it clearly appears that there is no economic barrier (e.g., significant transportation costs, lack of distribution facilities, customer inconvenience, or established consumer preference for existing products) that hinders the sale from outside the section to purchasers within the section; nor need the market be contracted to exclude some portion of the product sales made inside any section meeting the foregoing test unless it clearly appears that the portion of sales in question is made to a group of purchasers separated by a substantial economic barrier from the purchasers to whom the rest of the sales are made.

Because data limitations or other intrinsic difficulties will often make precise delineation of geographic markets impossible, there may often be two or more grouping of sales which may reasonably be treated as constituting a relevant geographic market. In such circumstances, the Department believes it to be ordinarily most consistent with the purposes of Section 7 to challenge any merger which appears to be illegal in any reasonable geographic market,

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even though in another reasonable market it would not appear to be illegal.

The market is ordinarily measured primarily by the dollar value of the sales or other transactions (e.g., shipments, leases), for the most recent 12-month period for which the necessary figures for the merging firms and their competitors are generally available. Where such figures are clearly unrepresentative, a different period will be used. In some markets, such as commercial banking, it is more appropriate to measure the market by other indicia, such as total deposits.

**Horizontal Mergers****4. Enforcement policy**

With respect to mergers between direct competitors (i.e., horizontal mergers), the Department's enforcement activity under Section 7 of the Clayton Act has the following interrelated purposes: (i) Preventing elimination as an independent business entity of any company likely to have been a substantial competitive influence in a market; (ii) preventing any company or small group of companies from obtaining a position of dominance in a market; (iii) preventing significant increases in concentration in a market; and (iv) preserving significant possibilities for eventual deconcentration in a concentrated market.

In enforcing Section 7 against horizontal mergers, the Department accords primary significance to the size of the market share held by both the acquiring and the acquired firms. ("Acquiring firm" and "acquired firm" are used herein, in the case of horizontal mergers, simply as convenient designations of the firm with the larger market share and the firm with the smaller share, respectively, and do not refer to the legal form of the merger transaction.) The larger the market share held by the acquired firm, the more likely it is that the firm has been a substantial competitive influence in the market or that concentration in the market will be significantly increased. The larger the market share held by the acquiring firm, the more likely it is that an acquisition will move it toward, or further entrench it in, a position of dominance or of shared market power. Accordingly, the standards most often applied by the Department in determining whether to challenge horizontal mergers can be stated in terms of the sizes of the merging firms' market shares.

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5. *Market highly concentrated*

In a market in which the shares of the four largest firms amount to approximately 75 percent or more, the Department will ordinarily challenge mergers between firms accounting for, approximately, the following percentages of the market:

<i>Acquiring firm</i>	<i>Acquired firm</i>
4 percent .....	4 percent or more.
10 percent .....	2 percent or more.
15 percent or more .....	1 percent or more.

NOTE:—Percentages not shown in the above table should be interpolated proportionately to the percentages that are shown.

6. *Market less highly concentrated*

In a market in which the shares of the four largest firms amount to less than approximately 75 percent, the Department will ordinarily challenge mergers between firms accounting for, approximately, the following percentages of the market:

<i>Acquiring firm</i>	<i>Acquired firm</i>
5 percent .....	5 percent or more.
10 percent .....	4 percent or more.
15 percent .....	3 percent or more.
20 percent .....	2 percent or more.
25 percent or more .....	1 percent or more.

NOTE:—Percentages not shown in the above table should be interpolated proportionately to the percentages that are shown.

7. *Market with trend toward concentration*

The Department applies an additional, stricter standard in determining whether to challenge mergers occurring in any market, not wholly unconcentrated, in which there is a significant trend toward increased concentration. Such a trend is considered to be present when the aggregate market share of any grouping of the largest firms in the market from the two largest to the eight largest has increased by approximately 7 percent or more of the market over a period of time extending from any base year 5–10 years prior to the merger (excluding any year in which some abnormal fluctuation in market shares occurred), up to the time of the merger. The Department will ordinarily challenge any acquisition, by any firm in a grouping of such largest firms showing the requisite increase in market share, of any firm whose market share amounts to approximately 2 percent or more.

8. *Nonmarket share standards*

Although in enforcing Section 7 against horizontal mergers

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the Department attaches primary importance to the market shares of the merging firms, achievement of the purposes of Section 7 occasionally requires the Department to challenge mergers which would not be challenged under the market share standards of paragraphs 5, 6 and 7. The following are the two most common instances of this kind in which a challenge by the Department can ordinarily be anticipated:

(a) Acquisition of a competitor which is particularly disturbing, disruptive, or otherwise unusually competitive factor in the market; and

(b) A merger involving a substantial firm and a firm which, despite an insubstantial market share, possesses an unusual competitive potential or has an asset that confers an unusual competitive advantage (for example, the acquisition by a leading firm of a newcomer having a patent on a significantly improved product or production process). There may also be certain horizontal mergers between makers of distinct products regarded as in the same line of commerce for reasons expressed in paragraph 3(i) where some modification in the minimum market shares subject to challenge may be appropriate to reflect the imperfect substitutability of the two products.

9. *Failing company*

A merger which the Department would otherwise challenge will ordinarily not be challenged if (i) the resources of one of the merging firms are so depleted and its prospects for rehabilitation so remote that the firm faces the clear probability of a business failure, and (ii) good faith efforts by the failing firm have failed to elicit a reasonable offer of acquisition more consistent with the purposes of Section 7 by a firm which intends to keep the failing firm in the market. The Department regards as failing only those firms with no reasonable prospect of remaining viable; it does not regard a firm as failing merely because the firm has been unprofitable for a period of time, has lost market position or failed to maintain its competitive position in some other respect, has poor management, or has not fully explored the possibility of overcoming its difficulties through self-help.

In determining the applicability of the above standard to the acquisition of a failing division of a multimarket company, such factors as the difficulty in assessing the viability of a portion of a company, the possibility of arbitrary accounting practices, and the likelihood that an otherwise healthy company can rehabilitate

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one of its parts, will lead the Department to apply this standard only in the clearest of circumstances.

**10. *Economies***

Unless there are exceptional circumstances, the Department will not accept as a justification for an acquisition normally subject to challenge under its horizontal merger standards the claim that the merger will produce economies (i.e., improvements in efficiency) because, among other reasons, (i) the Department's adherence to the standards will usually result in no challenge being made to mergers of the kind most likely to involve companies operating significantly below the size necessary to achieve significant economies of scale; (ii) where substantial economies are potentially available to a firm, they can normally be realized through internal expansion; and (iii) there usually are severe difficulties in accurately establishing the existence and magnitude of economies claimed for a merger.

**Vertical Mergers****11. *Enforcement Policy***

Which respect to vertical mergers (i.e., acquisitions backward into a supplying market or forward into a purchasing market), the Department's enforcement activity under Section 7 of the Clayton Act, as in the merger field generally, is intended to prevent changes in market structure that are likely to lead over the course of time to significant anticompetitive consequences. In general, the Department believes that such consequences can be expected to occur whenever a particular vertical acquisition, or series of acquisitions, by one or more of the firms in a supplying or purchasing market, tends significantly to raise barriers to entry in either market or to disadvantage existing nonintegrated or partly integrated firms in either market in ways unrelated to economic efficiency. (Barriers to entry are relatively stable market conditions which tend to increase the difficulty of potential competitors' entering the market as new sellers and which thus tend to limit the effectiveness of the potential competitors both as a restraint upon the behavior of firms in the market and as a source of additional actual competition.)

Barriers to entry resting on such factors as economies of scale in production and distribution are not questionable as such. But

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vertical mergers tend to raise barriers to entry in undersirable ways, particularly the following: (i) By foreclosing equal access to potential customers, thus reducing the ability of nonintegrated firms to capture competitively the market share needed to achieve an efficient level of production, or imposing the burden of entry on an integrated basis (i.e., at both the supplying and purchasing levels) even though entry at a single level would permit efficient operation; (ii) by foreclosing equal access to potential suppliers, thus either increasing the risk of a price or supply squeeze on the new entrant or imposing the additional burden of entry as an integrated firm; or (iii) by facilitating promotional product differentiation, when the merger involves a manufacturing firm's acquisition of firms at the retail level. Besides impeding the entry of new sellers, the foregoing consequences of vertical mergers, if present, also artificially inhibit the expansion of presently competing sellers by conferring on the merged firm competitive advantages, unrelated to real economies of production or distribution, over nonintegrated or partly integrated firms. While it is true that in some instances vertical integration may raise barriers to entry or disadvantage existing competitors only as the result of the achievement of significant economies of production or distribution (as, for example, where the increase in barriers is due to achievement of economies of integrated production through an alteration of the structure of the plant as well as of the firm), integration accomplished by a large vertical merger will usually raise entry barriers or disadvantage competitors to an extent not accounted for by, and wholly disproportionate to, such economies as may result from the merger.

It is, of course, difficult to identify with precision all circumstances in which vertical mergers are likely to have adverse effects on market structure of the kind indicated in the previous paragraph. The Department believes, however, that the most important aims of its enforcement policy on vertical mergers can be satisfactorily stated by guidelines framed primarily in terms of the market shares of the merging firms and the conditions of entry which already exist in the relevant markets. These factors will ordinarily serve to identify most of the situations in which any of the various possible adverse effects of vertical mergers may occur and be of substantial competitive significance. With all vertical mergers it is necessary to consider the probable competitive consequences of the merger in both the market in which the supplying firm sells and the market in which the purchasing

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firm sells, although a significant adverse effect in either market will ordinarily result in a challenge by the Department. ("Supplying firm" and "purchasing firm," as used herein, refer to the two parties to the vertical merger transaction, the former of which sells a product in a market in which the latter buys that product.)

12. *Supplying firm's market*

In determining whether to challenge a vertical merger on the ground that it may significantly lessen existing or potential competition in the supplying firm's market, the Department attaches primary significance to (i) the market share of the supplying firm, (ii) the market share of the purchasing firm or firms, and (iii) the conditions of entry in the purchasing firm's market. Accordingly, the Department will ordinarily challenge a merger or series mergers between a supplying firm, accounting for approximately 10 percent or more of the sales in its market, and one or more purchasing firms, accounting *in toto* for approximately 6 percent or more of the total purchases in that market, unless it clearly appears that there are no significant barriers to entry into the business of the purchasing firm or firms.

13. *Purchasing Firm's Market*

Although the standard of paragraph 12 is designed to identify vertical mergers having likely anticompetitive effects in the supplying firm's market, adherence by the Department to that standard will also normally result in challenges being made to most of the vertical mergers which may have adverse effects in the purchasing firm's market (i.e., that market comprised of the purchasing firm and its competitors engaged in resale of the supplying firm's product or in the sale of a product whose manufacture requires the supplying firm's product), since adverse effects in the purchasing firm's market will normally occur only as the result of significant vertical mergers involving supplying firms with market shares in excess of 10 percent. There remain, however, some important situations in which vertical mergers which are not subject to challenge under paragraph 12 (ordinarily because the purchasing firm accounts for less than 6 percent of the purchases in the supplying firm's market) will nonetheless be challenged by the Department on the ground that they raise entry barriers in the purchasing firm's market, or disadvantage the purchasing firm's competitors, by conferring upon the purchasing firm a

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significant supply advantage over unintegrated or partly integrated existing competitors or over potential competitors. The following paragraph sets forth the enforcement standard governing the most common of these situations.

If the product sold by the supplying firm and its competitors is either a complex one in which innovating changes by the various suppliers have been taking place, or is a scarce raw material or other product whose supply cannot be readily expanded to meet increased demand, the merged firm may have the power to use any temporary superiority, or any shortage, in the product of the supplying firm to put competitors of the purchasing firm at a disadvantage by refusing to sell the product to them (supply squeeze) or by narrowing the margin between the price at which it sells the product to the purchasing firm's competitors and the price at which the end-product is sold by the purchasing firm (price squeeze). Even where the merged firm has sufficient market power to impose a squeeze, it may well not always be economically rational for it actually to do so; but the Department believes that the increase in barriers to entry in the purchasing firm's market arising simply from the increased risk of a possible squeeze is sufficient to warrant prohibition of any merger between a supplier possessing significant market power and a substantial purchaser of any product meeting the above description. Accordingly, where such a product is a significant feature or ingredient of the end-product manufactured by the purchasing firm and its competitors, the Department will ordinarily challenge a merger or series of mergers between a supplying firm, accounting for approximately 20 percent or more of the sales in its market, and a purchasing firm or firms, accounting in toto for approximately 10 percent or more of the sales in the market in which it sells the product whose manufacture requires the supplying firm's product.

1. *Nonmarket share standards*

(a) Although in enforcing Section 7 against vertical mergers the Department attaches primary importance to the market shares of the merging firms and the conditions of entry in the relevant markets, achievement of the purposes of Section 7 occasionally requires the Department to challenge mergers which would not be challenged under the market share standards of paragraphs 12 and 13. Clearly the most common instances in which challenge by the Department can ordinarily be anticipated are acquisitions of

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suppliers or customers by major firms in an industry in which (i) there has been, or is developing, a significant trend toward vertical integration by merger such that the trend, if unchallenged, would probably raise barriers to entry or impose a competitive disadvantage on unintegrated or partly integrated firms, and (ii) it does not clearly appear that the particular acquisition will result in significant economies of production or distribution unrelated to advertising or other promotional economies.

(b) A less common special situation in which a challenge by the Department can ordinarily be anticipated is the acquisition by a firm of a customer or supplier for the purpose of increasing the difficulty of potential competitors in entering the market of either the acquiring or acquired firm, or for the purpose of putting competitors of either the acquiring or acquired firm at an unwarranted disadvantage.

**15. *Failing company***

The standards set forth in paragraph 9 are applied by the Department in determining whether to challenge a vertical merger.

**16. *Economies***

Unless there are exceptional circumstances, and except as noted in paragraph 14(a), the Department will not accept as a justification for an acquisition normally subject to challenge under its vertical merger standards the claim that the merger will produce economies, because, among other reasons (i) where substantial economies of vertical integration are potentially available to a firm, they can normally be realized through internal expansion into the supplying or purchasing market, and (ii) where barriers prevent entry into the supplying or purchasing market by internal expansion, the Department's adherence to the vertical merger standards will in any event usually result in no challenge being made to the acquisition of a firm or firms of sufficient size to overcome or adequately minimize the barriers to entry.

**Conglomerate Mergers**

**17. *Enforcement policy***

Conglomerate mergers are mergers that are neither horizontal nor vertical as those terms are used in sections I and II, respect-

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ively, of these guidelines. (It should be noted that a market extension merger, i.e., one involving two firms selling the same product, but in different geographic markets, is classified as a conglomerate merger.) As with other kinds of mergers, the purpose of the Department's enforcement activity regarding conglomerate mergers is to prevent changes in market structure that appear likely over the course of time to cause a substantial lessening of the competition that would otherwise exist or to create a tendency toward monopoly.

At the present time, the Department regards two categories of conglomerate mergers as having sufficiently identifiable anticompetitive effects as to be the subject of relatively specific structural guidelines: mergers involving potential entrants (par. 18) and mergers creating a danger of reciprocal buying (par. 19).

Another important category of conglomerate mergers that will frequently be the subject of enforcement action—mergers which for one or more of several reasons threaten to entrench or enhance the market power of the acquired firm—is described generally in paragraph 20.

As paragraph 20 makes clear, enforcement action will also be taken against still other types of conglomerate mergers that on specific analysis appear anticompetitive. The fact that, as yet, the Department does not believe it useful to describe such other types of mergers in terms of a few major elements of market structure should in no sense be regarded as indicating that enforcement action will not be taken. Nor is it to be assumed that mergers of the type described in paragraphs 18 and 19, but not covered by the specific rules thereof, may not be the subject of enforcement action if specific analysis indicates that they appear anticompetitive.

### 18. *Mergers involving potential entrants*

(a) Since potential competition (i.e., the threat of entry, either through internal expansion or through acquisition and expansion of a small firm, by firms not already or only marginally in the market) may often be the most significant competitive limitation on the exercise of market power by leading firms, as well as the most likely source of additional actual competition, the Department will ordinarily challenge any merger between one of the most likely entrants into the market and:

(i) Any firm with approximately 25 percent or more of the

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market;

(ii) One of the two largest firms in a market in which the shares of the two largest firms amount to approximately 50 percent or more;

(iii) One of the four largest firms in a market in which the shares of the eight largest firms amount to approximately 75 percent or more, provided the merging firm's share of the market amounts to approximately 10 percent or more; or

(iv) one of the eight largest firms in a market in which the shares of these firms amount to approximately 75 percent or more, provided either (A) the merging firm's share of the market is not insubstantial and there are no more than one or two likely entrants into the market, or (B) the merging firm is a rapidly growing firm.

In determining whether a firm is one of the most likely potential entrants into a market, the Department accord's primary significance to the firm's capability of entering on a competitively significant scale relative to the capability of other firms (i.e., the technological and financial resources available to it) and to the firm's economic incentive to enter (evidenced by, for example, the general attractiveness of the market in terms of risk and profit; or any special relationship of the firm to the market; or the firm's manifested interest in entry, or the natural expansion pattern of the firm; or the like).

(b) The Department will also ordinarily challenge a merger between an existing competitor in a market and a likely entrant, undertaken for the purpose of preventing the competitive "disturbance" or "disruption" that such entry might create.

(c) Unless there are exceptional circumstances, the Department will not accept as a justification for a merger inconsistent with the standards of this paragraph 18 the claim that the merger will produce economies, because, among other reasons, the Department believes that equivalent economies can be normally achieved either through internal expansion or through a small firm acquisition or other acquisition not inconsistent with the standards herein.

19. *Mergers creating danger of reciprocal buying*

(a) Since reciprocal buying (i.e., favoring one's customer when making purchases of a product which is sold by the customer) is an economically unjustified business practice which confers a competitive advantage on the favored firm unrelated to

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the merits of its product, the Department will ordinarily challenge any merger which creates a significant danger of reciprocal buying. Unless it clearly appears that some special market factor makes remote the possibility that reciprocal buying behavior will actually occur, the Department considers that a significant danger or reciprocal buying is present whenever approximately 15 percent or more of the total purchases in a market in which one of the merging firms (the selling firm) sells are accounted for by firms which also make substantial sales in markets where the other merging firm (the buying firm) is both a substantial buyer and a more substantial buyer than all or most of the competitors of the selling firm.

(b) The Department will also ordinarily challenge (i) any merger undertaken for the purpose of facilitating the creation of reciprocal buying arrangements, and (ii) any merger creating the possibility of any substantial reciprocal buying where one (or both) of the merging firms has within the recent past, or the merged firm has after consummation of the merger, actually engaged in reciprocal buying, or attempted directly or indirectly to induce firms with which it deals to engage in reciprocal buying, in the product markets in which the possibility of reciprocal buying has been created.

(c) Unless there are exceptional circumstances, the Department will not accept as a justification for a merger creating a significant danger of reciprocal buying the claim that the merger will produce economies, because, among other reasons, the Department believes that in general equivalent economies can be achieved by the firms involved through other mergers not inconsistent with the standards of this paragraph 19.

20. *Mergers which entrench market power and other conglomerate mergers*

The Department will ordinarily investigate the possibility of anticompetitive consequences, and may in particular circumstances bring suit, where an acquisition of a leading firm in a relatively concentrated or rapidly concentrating market may serve to entrench or increase the market power of that firm or raise barriers to entry in that market. Examples of this type of merger include: (i) A merger which produces a very large disparity in absolute size between the merged firm and the largest remaining firms in the relevant markets, (ii) a merger of firms producing

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related products which may induce purchasers, concerned about the merged firm's possible use of leverage, to buy products of the merged firm rather than those of competitors, and (iii) a merger which may enhance the ability of the merged firm to increase product differentiation in the relevant markets.

Generally speaking, the conglomerate merger area involves novel problems that have not yet been subjected to as extensive or sustained analysis as those presented by horizontal and vertical mergers. It is for this reason that the Department's enforcement policy regarding the foregoing category of conglomerate mergers cannot be set forth with greater specificity. Moreover, the conglomerate merger field as a whole is one in which the Department considers it necessary, to a greater extent than with horizontal and vertical mergers, to carry on a continuous analysis and study of the ways in which mergers may have significant anticompetitive consequences in circumstances beyond those covered by these guidelines. For example, the Department has used Section 7 to prevent mergers which may diminish long-run possibilities of enhanced competition resulting from technological developments that may increase interproduct competition between industries whose products are at present relatively imperfect substitutes. Other areas where enforcement action will be deemed appropriate may also be identified on a case-by-case basis; and as the result of continuous analysis and study the Department may identify other categories of mergers that can be the subject of specific guidelines.

**21. *Failing company***

The standards set forth in paragraph 9 are normally applied by the Department in determining whether to challenge a conglomerate merger, except that in marginal cases involving the application of paragraph 18(a) (iii) and (iv) the Department may deem it inappropriate to sue under Section 7 even though the acquired firm is not failing in the strict sense.

## APPENDIX TO DIRECTIVE

Memorandums seeking authority to initiate a preliminary inquiry shall give, in the first paragraph, before any discussion, the following information in summary form:

- (1) Commodity or title.
- (2) Illegal practices. (Spell out the specific practices or violations involved e.g., price fixing, boycott, territorial allocation, monopolization, etc., not merely "restraint of trade".)
- (3) Relevant statutes.
- (4) Parties involved or the potential defendant companies (state full name of company).
- (5) Area involved.

As a guide, the memorandum should look like this:

Date: — .  
File: 60-122-0

To: Director of operations.

From: Chief, Special Litigation Section.

Subject: Chemicals, sodium silicate. Request for preliminary inquiry.

It is requested that authority be granted to conduct a preliminary inquiry in the following matter:

Commodity: Chemicals, sodium silicate.

Illegal practices: Vertical and horizontal price fixing at the wholesale level.

Relevant statutes: Section 1 of the Sherman Act.

Companies involved: X Corporation; Y Corporation; Z Association of Wholesale Distributors.

Area: Boston Metropolitan Area.

In accordance with the attached staff memorandum (general discussion follows):

The following is set forth as a guide to obtain a more uniform method of captioning matters. In matters other than mergers, the first word of the subject description should be the product classification and should coincide with the product classification number. A further breakdown of this classification may be helpful to distinguish it from the other investigations involving the general product classification and should be included in the description. As an example:

Subject: Airplane parts — wing struts. 60-228-0

In connection with acquisitions or mergers, please caption your memorandum with the name of the acquiring (or surviving) company first, as follows:

Subject: Aluminum Company of America, acquisition of 60-0-37-  
Rome Cable Corp.

or

Certain-Teed Products Corp., Gustin-Bacon  
Manufacturing Co., merger. 60-0-37-

Thereafter, all subsequent memorandum should be captioned in the same manner.

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Where the matter is not an authorized preliminary inquiry but a complaint, or is not subject to product classification, it may further be identified as such.

As an example:

Subject: Appliances — Toasters, complaint of Jules Verne. 60-419-0  
or merely

Complaint of Sam Jones. 60-0

If you anticipate that a preliminary inquiry will produce a significant number of memorandum or correspondence, please request a new file number for that particular investigation when you receive authority to conduct a preliminary inquiry. This is especially desirable in newspaper, insurance, milk, gasoline, fuel oil, or merger items, since these are very active areas of inquiry.

### Memoranda Requesting the FBI to Conduct Antitrust Investigations

The purpose of this memorandum is to point out certain essentials in memoranda requesting the FBI to conduct Antitrust investigations. High quality requests for FBI investigations will lead to high quality investigative results.

No particular order or headings are necessary in a request. The headings used below are intended merely to emphasize and explain the essential information to be included in a request, and are not intended to be a form which must be followed. Of course, such requests should also include any additional information which the nature and facts of the particular case require.

#### I. *Heading*

Each request should have a descriptive heading or title by which the investigation can be readily identified. [For example, "Re: Blank Investigation — (Specify Segment of Industry)."]

#### II. *Introductory Paragraph*

A summary statement setting forth the nature of the investigation and the product or industry involved is helpful to persons handling the memorandum. They can, by a mere reading of the opening paragraph, obtain an idea of the investigation without the necessity of reading the entire memorandum.

#### III. *Description of the Product or Industry Involved*

The request should contain a general description of the industry or product involved in the investigation. Particular care should be exercised to differentiate the particular industry or product from similar industries or products in order to define the scope of the investigation requested. Special reference should also be made to those technical details concerning which an investigator must be informed if he is to make an intelligent investigation. For example, if the investigation concerns a product such as "phenolic resins", the product, its uses, its differentiation from other plastic materials, and its importance in the industry should be set forth so that the agent will not

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have to consult an encyclopedia for a treatise on the subject. In addition, it is usually helpful to inform the FBI as to the annual dollar volume of business in the industry, the number of concerns engaged in the industry and their relative size, and the method of distribution of the product from the manufacturer to the ultimate consumer, so that the agent appreciates the economic importance of the industry and investigation.

### IV. *Nature of the Allegations (Probable Violation)*

Define as specifically as possible the nature of the probable violation of the Antitrust laws in order to inform the Bureau of the major objective of the investigation. This does not necessitate the citations of decisions to support the Division's position, nor does it require an extensive statement of the legal problems or points in all of their ramifications.

(1) If the agent is informed of the elements of the probable violation, he will be in a better position to recognize and correctly evaluate the material and information obtained in the early stages of the investigation, and it will assist him in setting a course for the subsequent part of the investigation which is most likely to produce the desired results. In short, if the agent is aware of the elements constituting a violation, he is better able to determine on which phase of the investigation he should concentrate his efforts.

(2) If the investigation involves price fixing, care should be taken to point up the particular point in the distribution of the product at which the price fixing is believed to occur. For instance, if the investigation involves price fixing among manufacturers, is the price involved the factory price at which each sells, or does it relate to the fixing of resale prices, or both?

(3) The probable violation should be stated so far as possible, in well recognized terminology—such as “boycott,” “price fixing,” “division of fields or sales territory”; however, as pointed out in (2) above, care must be taken to describe adequately, so far as possible, the particular manner in which the alleged violation is being carried out.

### V. *Background and Results of Investigation to Date*

(A) The memorandum should indicate generally the basis upon which the Division predicates the investigation. The following are examples of the reasons for including such information:

(1) If the complainant or complainants are members of the industry (such as a group of wholesalers complaining about the activities of manufacturers), this information would be of value to the agent since he may wish to recontact the complainants;

(2) If the Division has copies of agreements containing provisions which appear to be illegal and one of the reasons for the investigation is to determine the activities being carried on under such agreements, it would be helpful to the agent if the pertinent provisions or a summary thereof were set forth;

(3) In the event the investigation was an outgrowth of another case or if a related case is pending, some explanation of the distinction and relationship should be made so that the Bureau will clearly understand the scope and objective of the instant investigation. Similarly where the investigation involves companies that are already under investigation or defendants in a pending suit brought by the Division, FTC, or any other Government agency,

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this fact must be pointed out to the agent so that he clearly understands the distinction between the investigation which he is conducting and the prior one.

(B) To prevent duplication of work, such as the reinterviewing of persons previously interviewed, it is important that a clear statement be made of the scope and extent of any preliminary investigations which have been conducted by the Division prior to the request. If subpoenas are outstanding or contemplated, this fact should be mentioned, together with the names of companies and individuals named in such subpoenas.

VI. *Investigation To Be Conducted*

One of the major prerequisites to obtaining a complete and satisfactory investigation is the manner in which the memorandum designates the particular type of information desired. The requests must be phrased as specifically as the information known at the time of the drafting of the memorandum will permit. Further, the requests should be made in positive and unequivocal language. While it is oftentimes difficult (because of lack of information) to be specific, the following matters should be considered when drafting requests:

(1) The function of the Bureau is to gather facts—not conclusions. We should, therefore, phrase our requests in such a way as to produce facts rather than conclusions. For example, the Division has recently discovered patent licenses under which the parties (A and B, both large manufacturers), agreed that if either obtained patent rights from a third party and by the terms of the acquisition was precluded from granting such rights to the other party, then the party obtaining the patent rights would not itself use the invention. The basis was laid for the suppression of patents if the occasion arose. The memorandum to the Bureau should not request the Bureau in broad terms to determine whether or not patents or inventions have been “suppressed” but such requests should be:

(a) Obtain a list of all patent licenses and patent rights relating to X machine which have been obtained by A from any person or concern (other than B) during the period from 1935 to date;

(b) Obtain a list of all patents or patent rights granted by A to B relating to X machine during the period from 1935 to date;

(c) Obtain a list of all models on X machine manufactured by A company during the period from 1935 to date and indicate the patent or patents claimed by the company as covering each model. The same questions should be asked of B.

(d) Obtain also, of course, any communication in which reference is made to the suppression of patents, or which suggest that there has been such suppression.

When the above information is obtained, the attorneys examining such information can determine whether or not any patents or inventions have been “suppressed,” which is a legal conclusion.

(2) The memorandum must contain the exact name and address of the individuals to be interviewed, and of the concerns or individuals whose files are to be examined.

(3) The memorandum should enumerate in one, two, three order the particular information desired. If, for example, the Division desires to determine whether or not a particular trade association has been engaged in price fixing activities through the medium of trade association meetings, the memorandum should contain a specific request for the agent to determine the number of

## TITLE 7: ANTITRUST DIVISION

meetings held by the Association, the persons present, the minutes of such meetings, if available, or, if not available, the substance of the statements made at such meetings.

(4) The requests should be stated in affirmative language; for example, if a list of patents or patent licenses is desired, phrase the request "Obtain a list," etc. It is recognized, of course, that one cannot foresee and specifically request copies of every significant document which may be found. However, there are certain documents, such as agreements between competing concerns, which must be obtained and examined before any investigation is finally concluded, and to insure getting copies make such a request in the manner indicated above.

(5) If, as in the investment banking case, a definite number of agents are desired to perform a certain job, state the number desired and also give an estimate of the time needed to perform the work.

(6) Where certain statistical information is desired in a particular form, it may be advisable to attach a questionnaire to the request which the agent could use (or present to subject company) to obtain a complete set of the figures desired.

(7) Where there is an unusual urgency about the investigation this fact should be pointed out together with a statement of the time by which the Division desires the information.

Frequently, certain concerns and individuals are suspected of engaging in certain activities but at the time of the drafting of the memorandum no facts are available to confirm the belief. This should be mentioned in the memorandum as a means of warning the agent to be on the alert for information indicating such activities.

If it is believed that the secretaries to company officials might be a fertile source of information, or if there is reason to believe that the files containing information relative to the conspiracy are kept in some place other than the general files, it would be helpful to the FBI if these matters were mentioned in the memorandum. It might also be helpful in certain cases to advise the Bureau that a conspiracy to fix prices, or other illegal activity, will probably not be found in a single letter, in order to forewarn the agent that the evidence of the conspiracy must be spelled out from several sources including the letters of salesmen and other employees of the company.

VII. *Interviews and File Searches*

(A) If the memorandum to the FBI requests that certain individuals be interviewed in connection with the investigation, it should contain the following information:

(1) The name, address, and business activity of each individual to be interviewed;

(2) Whether the individual to be interviewed is a complainant, informant, or a possible defendant in any action which may be filed;

(3) A summary of the information already obtained from that individual, or information already obtained about the activities of that individual;

(4) A detailed explanation of the type of information to be elicited through the interview, and where possible the specific questions to be asked of the person interviewed.

(B) If the memorandum to the FBI requests that the files of certain

## TITLE 7: ANTITRUST DIVISION

individuals or concerns be examined in order to obtain copies of relevant documents, it should contain the following information:

(1) The specific categories of files to be examined, if known; for example, files containing interoffice memoranda, files containing policy bulletins issued by officials of the company, correspondence files, etc.

(2) A list of specific documents to be obtained. For example, if specific correspondence is desired, give the date of the correspondence and the names of the addressor and addressee. Likewise, in the case of specific contracts, give the date of execution of the contract and the names of the contracting parties.

(3) A description of the types of documents desired (contracts, correspondence, telegrams, etc.) and a detailed statement of the various subject matters concerning which documents are to be obtained.

The FBI has requested that in those cases where the Bureau is to make a search of the files of any concern, letters be addressed to each of the companies whose files are to be searched. The letters should accompany the memorandum to the FBI. The following is a suggested form for such letters:

[Name of Company]

[Address]

Chicago, Ill.

GENTLEMEN: In connection with an investigation by this Department of alleged violations of the Federal antitrust laws in the \_\_\_\_\_

\_\_\_\_\_ industry, it is requested that you make available for examination by the bearer, an agent of the Federal Bureau of Investigation, such of your files as he may request.

Your cooperation in this investigation will be very much appreciated.

Sincerely yours,

*Assistant Attorney General.*

VIII. *Conclusion (Closing Paragraph)*

(A) The name of the attorney in charge of the case and the office in which he is located should be mentioned, together with a statement that the attorney (or other attorney on the case) is available for consultation if the agents desire to contact him. It is the responsibility of the attorney handling the case to be prepared to discuss the matter with the agent at any time he is desired.

(B) A statement should be included informing the Bureau where the Division's material on the case is located, and an offer made to make such material available in the event the agent desires to examine it.

While the length of the memorandum to the FBI is, of course, no criterion of its merit, it is believed that the transmittal of full and complete information to the FBI will aid in the obtaining of a full and complete investigation. Hence, it is suggested that it is better to err on the side of giving too much information, rather than to err in giving too little information.

In some instances members of the staff prepare factual memoranda for their section chiefs with the view of subsequently attaching such memoranda to the request to the FBI as the statement of the facts in the case. Consequently, at the time of the preparation of the memorandum to the FBI, all that has to be done is to set forth any additional information known and to enumerate the task which the Division desires the FBI to perform. This has been found to be an expeditious procedure.

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## TITLE 7: ANTITRUST DIVISION

**Memoranda Requesting Civil Investigative Demands**

Printed forms (AT-100) have been prepared and are available from the Administrative Section for serving Civil Investigative Demands as provided by the Antitrust Civil Process Act.

Each Civil Investigative Demand shall be prepared in quadruplicate. The original should be on the white paper form and the carbon copies on the blue tissue. The original and one copy shall be served on the respondent, one copy shall be retained for the case file and one copy shall be retained in the legal procedure unit.

All Civil Investigative Demands will be assigned a serial number by the legal procedure unit. This number will be assigned after the CID has been signed by the Assistant Attorney General and before it leaves the Antitrust Division. Normally the CID will be routed from the Office of the Assistant Attorney General to the legal procedure unit and then back to the originating office. If greater expedition is required, it may be hand-carried to the legal procedure unit. In any event, one copy shall be left with the legal procedure unit and the number shall be assigned before service.

When a CID is submitted to the front office for signature it should be accompanied by a brief memorandum explaining the character of the investigation, what the investigation arises out of, and what documents are sought.

In filling out the CID the same standards and principles should be followed as would apply to the drafting of a subpoena to be issued out of the district court in a grand jury investigation or a pending case. Adequate time for compliance should be allowed, and if the time is unusually short the reason should be explained in the accompanying memorandum. The attorneys assigned to the case should be named as "custodians" or "deputy custodians." The name and office address of the attorney or attorneys should be inserted. The word "custodian" or "deputy custodian" should be typed in the form.

The documents specified in the schedule attached to and incorporated in the CID should be as limited as the objectives of the investigation will permit. Keep in mind that the purpose of the CID is to ascertain the facts concerning a suspected violation of law and not to secure all the documents in the preparation or presentation of a civil case. There may be much background material that is appropriate to the presentation of a case or that may properly be secured by discovery under FRCP that is unnecessary at the investigatory stage. Thus, it will not ordinarily be important to secure copies of the charter, articles of incorporation and by-laws of a corporation. Similarly, the period of time for which documents are sought should be limited to the period thought to be reasonably relevant to the investigation.

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## TITLE 7: ANTITRUST DIVISION

## Office of the Attorney General

WASHINGTON, D.C.

July 15, 1963

## TITLE 28—JUDICIAL ADMINISTRATION

## Chapter I—DEPARTMENT OF JUSTICE

ORDER No. 298-63

REGULATIONS RELATING TO DOCUMENTARY EVIDENCE PRODUCED PURSUANT  
TO THE ANTITRUST CIVIL PROCESS ACT

By virtue of the authority vested in me by section 4(b) of the Antitrust Civil Process Act, chapter I of title 28 of the Code of Federal Regulations is amended by adding a new part 49:

## PART 49—ANTITRUST CIVIL PROCESS ACT

Sec.

49.1 Purpose.

49.2 Duties of Custodian.

49.3 Examination of material.

49.4 Deputy Custodians. .

AUTHORITY: Section 4(c), Antitrust Civil Process Act, 76 Stat. 550, 15 U.S.C. 1313(c).

§ 49.1 *Purpose.* These regulations are issued in compliance with the requirements imposed by the provisions of section 4(c) of the Antitrust Civil Process Act, Public Law 87-664, 76 Stat. 550, 15 U.S.C. 1313(c). The term used in this part shall be deemed to have the same meaning as similar terms used in that act.

§ 49.2 *Duties of custodian.* (a) Upon taking physical possession of material delivered pursuant to a Civil Investigation Demand issued under section 3(a) of the act, the antitrust document custodian designated pursuant to section 4(a) of the act (subject to the general supervision of the Assistant Attorney General in charge of the Antitrust Division), shall, unless otherwise directed by a court of competent jurisdiction, select, from time to time, from among such material, the material the copying of which he deems necessary or appropriate for the official use of the Department of Justice, and he shall determine from time to time, the number of copies of any such material that are to be reproduced pursuant to the act.

(b) Copies of material in the physical possession of the Custodian pursuant to a Civil Investigation Demand may be reproduced by or under the authority of an officer or employee of the Department of Justice designated by the Custodian. Material for which a Civil Investigation Demand has been issued but which is still in the physical possession of the person upon whom the demand has been served, may, by agreement between such person and the custodian, be reproduced by such person, in which case the custodian may require that the copies so produced be duly certified as true copies of the original of the material involved.

§ 49.3 *Examination of material.* Material produced pursuant to the act, while in the custody of the custodian, shall be for the official use of officers and employees of the Department of Justice in accordance with the act, but such material shall, upon reasonable notice to the custodian, be made available for examination by the person who produced such material or his duly authorized representative during regular office hours established for the Department of Justice. Examination of such material at other times may be authorized by the Assistant Attorney General or the custodian.

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§ 49.4 Deputy custodians. Deputy custodians may perform such of the duties assigned to the custodian as may be authorized or required by the Assistant Attorney General.

These regulations shall be effective upon the filing of this order with the Office of the Federal Register.

ROBERT F. KENNEDY  
Attorney General.

UNITED STATES DEPARTMENT OF JUSTICE  
ANTITRUST DIVISION  
WASHINGTON 25, D.C.

TO \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

}

CIVIL INVESTIGATIVE  
DEMAND NO. \_\_\_\_\_

This civil investigative demand is issued pursuant to the provisions of the Antitrust Civil Process Act, 76 Stat. 548-552, Title 15 United States Code Secs. 1311-1314, in the course of an inquiry for the purpose of ascertaining whether there is or has been a violation of the provisions of Title 15 United States Code Secs. \_\_\_\_\_ by conduct of the following nature:

.....  
.....

You are a person under investigation and are hereby required to produce, to make available for inspection and copying or reproduction, and to deliver to a custodian named herein, at your principal place of business, designated above, the documentary material in your possession, custody or control

.....  
described on the attached schedule, on the \_\_\_\_\_ day of \_\_\_\_\_,

19\_\_\_\_ at \_\_\_\_\_ A.M.  
\_\_\_\_\_ P.M.

For the purposes of this investigation, the following are designated as custodians or deputy custodians to whom said documentary material shall be made available and delivered: \_\_\_\_\_

.....  
Inquiries concerning compliance should be directed to \_\_\_\_\_

Your attention is directed to the provisions of Title 18 United States Code Sec. 1505 as amended which makes obstruction of this investigation a criminal offense and which is printed in full on the reverse side hereof.

Issued at Washington, D.C. this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

\_\_\_\_\_  
Assistant Attorney General.

“§ 1505. Obstruction of proceedings before departments, agencies, and committees

“Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness in any proceeding pending before any department or agency of the United

**TITLE 7: ANTITRUST DIVISION**

States, or in connection with any inquiry or investigation being had by either House, or any committee of either House, or any joint committee of the Congress; or

“Whoever injures any party or witness in his person or property on account of his attending or having attended such proceeding, inquiry, or investigation, or on account of his testifying or having testified to any matter pending therein; or

“Whoever, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part with any civil investigative demand duly and properly made under the Antitrust Civil Process Act willfully removes from any place, conceals, destroys, mutilates, alters, or by other means falsifies any documentary material which is the subject of such demand; or

“Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which such proceeding is being had before such department or agency of the United States, or the due and proper exercise of the power of inquiry under which such inquiry or investigation is being had by either House, or any committee of either House or any joint committee of the Congress—

“Shall be fined not more than \$5,000 or imprisoned not more than five years, or both.”

**Certificate of Compliance with Civil Investigative Demand**

All of the documentary material described on the attached schedule which is in the possession, custody or control of the person to which this civil investigative demand is directed has been produced and made available to a custodian named therein.

Date \_\_\_\_\_ Signature \_\_\_\_\_  
 \_\_\_\_\_ Title \_\_\_\_\_

**Memorandum for the Attorney General**

Re: Recommendation for grand jury investigation relating to violations of antitrust laws in the manufacture, sale, and distribution of class rings, diplomas, graduation announcements and invitations, yearbooks, and yearbards.

The Middle Atlantic Office of the Antitrust Division has received information of the existence of a conspiracy among the companies listed below in the sale and distribution of class rings to schools in the State of Georgia, and possibly other neighboring States, in violation of section 1 of the Sherman Act:

<i>Manufacturer</i>	<i>Principal office</i>
Josten's, Inc. (Josten's) .....	Owatonna, Minn.
L. G. Balfour Co. (Balfour) .....	Attleboro, Mass.
John Roberts Manufacturing Co., Inc. (Roberts) .....	Norman, Okla.
Herff Jones Co. (Herff) .....	Indianapolis, Ind.

Class rings symbolize a student's graduation from or attendance at a  
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particular institution of learning and, ordinarily, are made of precious metal, with or without colored center stones, and generally bear the name of and the emblems associated with the school, together with the year of the student's graduation class. In 1964, total sales of class rings by all manufacturers in the United States were approximately \$50 million; total class ring sales by the alleged conspirators were in excess of \$40 million. Sales of class rings to schools in Georgia, which are manufactured in States other than Georgia and shipped into that State in interstate commerce, are substantial.

Peter Leveaux, Director of College Sales for Roberts, informed the Division that his firm, in cooperation with Herff and representatives of Josten's and Balfour, agreed on and submitted collusive bids to the University of Georgia for a 3-year class ring contract to be awarded on April 26. Prior to the award, Leveaux advised the University officials of the collusion and the bids have now been canceled.

Full details of the meetings and telephone conversations effectuating the conspiracy have been supplied this Division by Leveaux in either sworn or signed statements. Such statements are corroborated by transcriptions of tape recordings made by Leveaux of his telephone conversations with other conspirators. The recordings were made without any solicitation from the Department and prior to the time it had any knowledge or information about this matter. Leveaux's statements are further corroborated by the fact that when the bids were opened by University of Georgia officials they were found to contain the prices which Leveaux had, prior to the opening, stated would be found therein.

Information in our possession further indicates that price fixing and bid rigging with respect to class rings have been prevalent in Georgia for many years. In this connection, we have specific information that the class ring prices bid to Georgia Tech University in December 1965 were collusively arrived at by the four companies. Leveaux, who personally participated in this bid rigging, has submitted a sworn statement to this effect.

With the exception of Roberts, the companies involved, in addition to manufacturing class rings and other educational jewelry, manufacture or distribute the following products relating to high school and college graduations: diplomas, yearbooks, graduation invitations and announcements, and awards. At least some of these products and possibly all are handled by the same representatives of the companies in Georgia. In view of this factor, it is not unlikely that the companies have engaged in a conspiracy with respect to some or all of these products and this matter should be fully explored before the grand jury.

Accordingly, it is recommended that authorization be granted to conduct in the Northern District of Georgia a grand jury investigation of persons and companies engaged in the manufacture, sale, and distribution of class rings, diplomas, yearbooks, graduation invitations and announcements, and awards.

EDWIN M. ZIMMERMAN,  
*Acting Assistant Attorney General,  
Antitrust Division.*

Approved:  
*Nicholas de B. Katzenbach*  
Date: 5/12/66

June 1, 1970

## TITLE 7: ANTITRUST DIVISION

## Memorandum for the Attorney General

October 12, 1965.

Re: Two proposed indictments against manufacturers of concrete pipe.

Attached for your approval are two separate indictments involving concrete pipe, to be returned by the grand jury in the District Court in Newark, N.J. Each indictment charges a conspiracy to fix prices and allocate jobs in violation of section 1 of the Sherman Act.

Concrete pipe is used in the construction of systems to convey water and sewage. It is primarily used for the conveyance of drinking water, drainage and irrigation waters, and for sanitation purposes. State and local governments and private utilities are the principal purchasers, through general contractors, of concrete pipe. The general contractors obtain price quotations from the concrete pipe manufacturers which they use in figuring their bid to governmental agencies and private utilities.

The first indictment charges that Lock Joint Pipe Co. and Martin Marietta Corp. conspired to fix prices and allocate jobs in the sale of certain types of concrete pipe east of the Rocky Mountains (except in the States of Texas, Louisiana, and Mississippi), in violation of section 1 of the Sherman Act. The indictment charges that the conspiracy began about 1955 and continued until at least April 1962. The aggregate sales of such concrete pipe by these companies for the years 1958 through 1962 were approximately \$23 million.

Martin Marietta succeeded to the concrete pipe business of American-Marietta Co. in October 1961. The conspiracy had been in existence for over 6 years at that time and the evidence shows that Martin Marietta thereafter participated in the conspiracy until April 1962. Since Martin Marietta is therefore itself clearly liable as a culpable conspirator, its predecessor, American-Marietta, is not made a defendant. A different situation is present as to the other business unit which participated in the conspiracy. International Pipe and Ceramics Corp. (Interpace), is the company which was created when Lock Joint Pipe Co. merged with another corporation on September 27, 1962. Under applicable State statutes Lock Joint is probably still liable for its participation in the conspiracy from 1955 to April 1962. Interpace is liable for the obligations of its constituent corporation, Lock Joint, and such obligations probably include liability for prior criminal violations of the anti-trust laws. Although Interpace came into existence only after the conspiracy ended, both Interpace and Lock Joint are named as defendants since it is not clear that the court will hold both companies indictable, and the Department should not take the chance of having guessed wrong as to which company should be indicted.

The first indictment also names three individuals as defendants. They are Allan M. Hirsh, Jr., Grover M. Hermann, and Paul Maloney. Hirsh was president of Lock Joint during the period of the conspiracy and is presently chairman of the board of directors and chief executive officer of Interpace. He is 57 years old. Hermann was chairman of the board of directors of American-Marietta and Martin Marietta during the period of the conspiracy. He retired as chairman in May 1965 and is 72 years of age. Maloney was national sewer and pipe sales manager for Lock Joint during the time of the conspiracy and is still employed by Interpace.

Several witnesses from each of the two companies involved in the conspiracy testified about the overall conspiracy to allocate business and rig bids

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and about rigging of specific bids. There is an abundance of direct and explicit testimony of conspiratorial activity. Three witnesses testified that Maloney personally rigged numerous specific bids on behalf of Lock Joint over a period of approximately 6 years. He was the number three man in Lock Joint so his indictment is clearly warranted although others, including his counterpart in Marietta, are immune from indictment because their testimony was required before the grand jury to develop evidence of the overall conspiracy. I also believe that Messrs. Hirsh and Hermann should be indicted, although some members of the staff did not recommend their indictment, for the following reasons:

(1) Messrs. Hermann and Hirsh are legally responsible for the bid rigging conspiracy. Two witnesses who participated in a conspiratorial meeting at the Hotel Pierre in New York City in October 1956 testified that (a) Messrs. Hermann and Hirsh were present at the meeting; (b) the meeting was called for the specific purpose of deciding whether the conspirators were to continue to allocate bids on a 50-50 basis or whether Marietta should be given a greater share of the jobs being rigged; (c) in view of the nature of the decision to be made at the meeting it was felt necessary to have the top officials of the two companies present at the meeting to make the final decision on the matter; (d) it was agreed at the meeting to continue to allocate the business 50-50; and (e) after the meeting the lower echelon conspirators continued to rig jobs on the 50-50 basis so agreed to. The same two witnesses testified that they attended another meeting held at the Hotel Pierre on January 30, 1958; that Messrs. Hermann and Hirsh were present; that the purpose of the meeting was again to decide whether Marietta should get more than 50 percent of the jobs being rigged; that it was again agreed that the 50-50 formula should be continued in rigging future bids, and that after the meeting the lower echelon conspirators continued to rig bids on that basis. All of the witnesses testified that they continued to rig bids until April 1962 and that neither Hermann nor Hirsh nor anyone else told them to stop rigging bids until at least April 18, 1962. Under these circumstances Hermann and Hirsh are personally liable for the conspiracy since they authorized and participated in a conspiracy which continued well into the period of the statute of limitations although they did not personally commit overt acts within the period of said statute. *Hyde v. United States*, 225 U.S. 347, 358-370 (1912); *United States v. Compagna*, 146 F. 2d 524, 527 (2d Cir. 1945); *United States v. Witt*, 215 F. 2d 584 (2d Cir. 1954).

(2) Messrs. Hermann and Hirsh are morally responsible for the bid rigging conspiracy. Mr. Hermann was the chairman of the board of American-Marietta when he attended the Hotel Pierre meetings; Mr. Hirsh was president of Lock Joint at the time of these meetings. They personally approved the bid rigging activities of their subordinates and approved continuance of such conspiratorial activity in the future. They are therefore morally responsible for the bid rigging their subordinates carried on well into the period of the statute of limitations, indeed for over a year after jail sentences were imposed in the electrical cases in Philadelphia. The following passage from the Supreme Court's opinion in *Hyde* seems sound as a matter of justice as well as a matter of law:

Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no

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situation to claim the delay of the law. As the offense has not been terminated or accomplished he is still offending. And we think, consciously offending, offending as certainly, as we have said, as at the first moment of his confederation, and consciously through every moment of its existence. ★ ★ ★ As he has started evil forces he must withdraw his support from them or incur the guilt of their continuance. Until he does withdraw there is conscious offending and the principle of the cases cited by defendants is satisfied (225 U.S. at 369-370).

(3) As a matter of antitrust policy I believe we should name the highest corporate officials we can legally name in indictments for per se offenses. Firstly, such a policy will result in maximum deterrence of antitrust violations for it puts corporate officials under pressure to discontinue as soon as possible all violations in which they have participated or which they have authorized, rather than allowing them to close their eyes to any violations pursuant to which they have not committed specific overt acts within the past 5 years. Secondly, a common reaction of large corporations to antitrust indictments covering a minor portion of their business is to issue a press release saying "the corporation" believes in the antitrust laws though some minor official inadvertently may have violated the law. That will certainly occur here unless we indict Hermann and Hirsh, for the total commerce involved is about 2 percent of Lock Joint's sales and less than one-quarter of 1 percent of Marietta's sales. I think it is important from the standpoint of longrun effective antitrust enforcement that the public know that the chief executive officers of companies with over a billion dollar and \$100 million sales personally participated in the alleged conspiracies.

The second indictment charges that Lock Joint, Interpace, Martin Marietta, Kerr Concrete Pipe Co., and North Jersey Concrete Pipe Co. Inc., engaged in a conspiracy to fix prices and allocate jobs in the sale of a different type of concrete pipe in the northern New Jersey area in violation of section 1 of the Sherman Act. The indictment charges that the conspiracy began about August 1960 and continued to at least April 1962. In 1961 alone the proposed defendants had sales of this type of concrete pipe in northern New Jersey aggregating approximately \$7 million. Witnesses from each of the companies to be indicted have admitted that they fixed prices and allocated orders on behalf of their respective companies. No individuals from these proposed corporate defendants are recommended for indictment since the principal persons involved, other than Maloney, testified before the grand jury and obtained immunity. Maloney is not recommended for indictment since he is named in the first indictment and it is doubtful a court would impose a greater punishment for two convictions than for one conviction. Although this indictment involves a local price-fixing conspiracy substantial quantities of the basic ingredients used in the manufacture of concrete pipe come from outside the State of New Jersey, thus satisfying jurisdictional requirements. You may recall that one of the reasons criminal prosecution was felt desirable when the grand jury was empaneled was that our information indicated that Lock Joint and Martin Marietta engaged in similar conspiracies in every major metropolitan area east of the Rockies; the grand jury investigation showed there were such conspiracies and that the indictment is therefore desirable as a vehicle for getting penal sanctions imposed on both companies commensurate with the fact that they have engaged in numerous similar conspiracies throughout the country.

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The defendants in *United States v. The American Oil Company et al.*, criminal No. 153-65 (D. N.J.) have filed a motion to dismiss that indictment on the ground that the grand jury was improperly empaneled in that systematic and deliberate discrimination against women was practiced in empaneling the grand jury. This motion will probably be argued some time in October. The instant grand jury was empaneled in the same way and a similar motion will likely be filed in the proposed cases if indictments are returned. However, I recommend filing indictments in this matter rather than informations to assure that the grand jury transcript is available to us at trial. If such motions are decided against us we can always file informations at that time.

I recommend the attached indictments be approved as quickly as possible to allow their prompt consideration by the grand jury.

DONALD F. TURNER,  
*Assistant Attorney General,*  
*Antitrust Division.*

Approved:  
Nicholas de B. Katzenbach  
*Attorney General*  
Date: 12/23/65

June 1, 1970

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U.S. ATTORNEYS MANUAL 1970

**TITLE 7: ANTITRUST DIVISION**  
**United States District Court**  
**for the Southern District of Ohio**  
**Eastern Division**

UNITED STATES OF AMERICA,  
*v.*  
 COLUMBUS BOWLING PROPRIETOR'S  
 ASSOCIATION, Defendant.

Criminal No. 9167  
 Returned: November 20, 1968

INDICTMENT

The Grand Jury charges:

I  
 DEFENDANT

1. Columbus Bowling Proprietor's Association (hereinafter "the Association") is hereby indicted and made a defendant herein. The Association is a corporation organized and existing under the laws of the State of Ohio, and has its principal office in Columbus, Ohio. Said defendant is a trade association of commercial bowling establishments in Franklin County, Ohio.

II  
 CO-CONSPIRATORS

2. Various associations, companies and individuals not made defendants herein participated as co-conspirators with the defendant in the offense charged herein and performed acts and made statements in furtherance thereof. These include but are not limited to those commercial bowling establishments, and their proprietors which, during all or part of the period covered by this indictment, have been members of the defendant Association.

III  
 DEFINITION OF TERMS

3. The term "open bowling" refers to the unscheduled occasional bowling done by the individual bowler who is charged on a per game basis.

4. The term "league bowling" refers to organized competitive bowling done by leagues, consisting of several teams, which enter into contractual agreements with a particular bowling establishment to bowl for a certain number of consecutive weeks (called a "season") at a particular day and hour each week for a fixed fee per three games bowled per individual.

5. The term "tournament bowling" refers to prearranged contests in which participants or teams compete against each other in a series of elimination contests for cash, trophies or other prizes.

IV  
 TRADE AND COMMERCE

6. Bowling is one of America's most popular family recreations and sporting activities. Each year, many millions of Americans spend hundreds of millions of dollars in the nearly 10,000 commercial bowling establishments throughout the United States. In September 1966, the defendant Association

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included 35 member establishments, controlling 956 bowling lanes representing approximately 87 percent of the commercial bowling establishments in Franklin County (Columbus), Ohio. At the present time, the defendant Association has 33 members with 894 bowling lanes representing approximately 81 percent of the commercial bowling establishments. Each year bowlers spend in excess of \$3,500,000 in the establishments of the defendant Association's members.

7. Approximately 80 percent of the commercial bowling establishments in the United States belong to the Bowling Proprietors' Association of America, Inc. (BPAA) which is an incorporated national trade association of bowling proprietors and bowling proprietors' associations throughout the United States (hereafter referred to collectively as "BPAs"). BPAs, including the defendant Association, and their members are an integral part of the BPAA. The BPAA is controlled and operated by its board of directors and officers which are BPA-member proprietors, elected by member proprietors through the State and local BPAs which finance the BPAA through the collection and transmittal of dues from its membership. All BPAs are bound by the constitution and rules of the BPAA. Membership in the BPAA and BPAs is not divisible; a member must belong to the BPAA and his respective State and local BPAs. Membership by commonly owned establishments is treated as a single package; all must become and remain members or none of such commonly-owned establishments can become and remain members. Disciplinary actions taken against members by State and local BPAs are reviewable by the BPAA.

8. BPAA provides members with information, direction and advice on all aspects of the bowling business by means of bulletins, publications, and other communications to its affiliated BPAs, and by BPAA field representatives who visit the local BPAs from time to time. BPAA conducts national promotions for the benefit of BPA establishments such as joint promotions with nationally distributed name brand products which contain certificates entitling the consumer, patronizing a BPA establishment, including those of the Association, to a free game of open bowling for every two games purchased at the established price.

9. Tournament bowling is sponsored and/or conducted by individual bowling establishments, proprietors, bowler associations, bowling equipment manufacturers, and commercial or social organizations. Participants pay entry fees, a stipulated part of which is the fee charged per game bowled by the participant. Among other things, tournaments are intended to stimulate the interest in bowling regionally and throughout the country. Tournaments are conducted on a national, regional, and local basis by the BPAA and State and local BPAs. BPAA approval of local tournaments of member BPAs makes participating bowlers eligible for BPAA prizes and awards. The national tournaments attract hundreds of thousands of participants, amateur and professional, from broad sections of the country. The national tournaments include qualifying rounds in various regions of the country leading to the determination of the participants in the finals. The conduct and promotion of such tournaments is an interstate business involving a continuous and substantial flow of goods, entry fees, prize money, promotional, and administrative material, participants, and commercial mass media communications across State lines.

10. The BPAA conceives, directs and coordinates national bowling tourna-

## TITLE 7: ANTITRUST DIVISION

ments for the benefit of its BPA members. The BPAA national tournaments are among the most lucrative and desirable for bowlers. BPAA regulations limited participation in the national tournaments to only those bowlers patronizing bowling establishments which are BPA members in good standing. It is important to local bowling establishments in attracting league bowlers to be able to offer to its patrons eligibility in such tournaments. Local and State BPAs, including the defendant Association, conduct the essential elimination and qualification rounds of bowlers from BPA leagues to determine which contestants qualify for the State, regional, and national tournament finals. During the period of time covered by this indictment, various qualifying and final rounds which were an integral part of the aforesaid national tournaments, were conducted in the establishments of the Association members.

11. The cost of constructing and equipping a modern commercial bowling establishment ranges from \$250,000 to over \$1 million. Such an establishment represents a substantial investment in automatic pinsetting machinery, lanes, balls, pins, shoes, other accessory bowling equipment. The articles involved in the initial investment and continuing maintenance of a modern bowling establishment are shipped in interstate commerce to Ohio.

12. Most sales of basic bowling equipment involved in the initial construction of a bowling establishment are made on long range credit terms arranged directly by and with interstate equipment manufacturers. The amount and continuance of installment payments in interstate commerce to such manufacturers is directly dependent on the number of games bowled and the success of the commercial bowling establishment. As to those items of bowling equipment which are leased in interstate commerce, substantial and continuing rental payments are made to the lessors. The amounts of rental payments are directly related to the number of games bowled, and the price charged per game. Interstate commerce is directly affected by the volume of business done and the price charged in the defendant Association member establishments.

13. The defendant Association members make regular and substantial purchases from manufacturers located outside the State of Ohio of various items of bowling equipment and accessories necessary to the continuing operation of the commercial bowling establishment, such as bowling pins. These are purchased to replenish those worn out by their continuing use by bowlers and the volume of such purchases is determined by the amount of business done at the commercial bowling establishment.

## V

## OFFENSE CHARGED

14. Beginning sometime prior to 1960 and continuing at least through August 3, 1967, the exact dates being to the grand jury unknown, the defendant and co-conspirators have engaged in an unlawful combination and conspiracy in restraint of the aforesaid interstate trade and commerce in bowling in violation of section 1 of the Act of Congress of July 2, 1890, as amended (15 U.S.C. 1), commonly known as the Sherman Act.

15. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among defendant and co-conspirators, the substantial terms of which have been and are:

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(a) To establish, fix, maintain, and stabilize the prices of open, league, and tournament bowling;

(b) To eliminate competition among defendant Association members by prohibiting and preventing price inducements, the giving of prizes, awards, or trophies or other forms of promotion not approved by the defendant Association.

16. For the purpose of effectuating and carrying out the aforesaid combination and conspiracy, the defendant and co-conspirators by agreement, understanding, and concert of action did the things which, as hereinbefore alleged, they combined and conspired to do.

## VI

## EFFECTS

17. The aforesaid combination and conspiracy has had among others the following effects:

(a) Prices charged for open, league, and tournament bowling have been fixed, stabilized, and maintained at arbitrary and artificial levels;

(b) Bowlers have been deprived of the benefit of free and open competition in bowling; and

(c) Defendant and co-conspirators have suppressed and eliminated competition among themselves.

## VII

## JURISDICTION AND VENUE

18. The combination and conspiracy alleged in this indictment has been carried out in part within the Southern District of Ohio, Eastern Division, within 5 years preceding the return of this indictment.

Dated:

A true bill.

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**United States District Court  
Eastern District of Michigan  
Southern Division**

UNITED STATES OF AMERICA, Plaintiff,  
v.  
SCOTT PAPER CO. and CHEMOTRONICS, INC.,  
Defendants.

CIVIL ACTION,  
No. 32049  
Equitable Relief Sought

(Filed November 29, 1968)

**COMPLAINT**

The United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendants named herein and alleges as follows:

**I**

**JURISDICTION AND VENUE**

1. This complaint is filed and this action is instituted against the defendants under Section 15 of the Act of Congress of October 3, 1914, 15 U.S.C. 25, as amended, commonly known as the Clayton Act, in order to prevent and restrain the violation by the defendants, as hereinafter alleged, of Section 7 of said Act, 15 U.S.C. 18, and under Section 4 of the Act of Congress of July 2, 1890, 15 U.S.C. 4, as amended, commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the defendants, as hereinafter alleged, of Section 1 of said Act, 15 U.S.C. 1.

2. Both defendants transact business and are found within the Eastern District of Michigan, Southern Division.

**II**

**THE DEFENDANTS**

3. Scott Paper Co. (hereinafter referred to as "Scott"), is made a defendant herein. Scott, a corporation organized and existing under the laws of the State of Pennsylvania, maintains its principal office in Philadelphia, Pa. Scott is a major manufacturer of consumer paper products (such as toilet tissues, paper towels and wipers, paper and plastic cups, food wraps, sanitary napkins, and cable products), and industrial products such as converting paper, printing paper, fine and specialty papers, cardboard specialties, stereo-type dry mats, and plastic foam. In 1967, Scott's sales totaled approximately \$623 million.

4. Chemotronics, Inc., (hereinafter referred to as "Chemotronics"), is made a defendant herein. Chemotronics, a corporation organized and existing under the laws of the State of Michigan, is engaged in scientific research and development of new products and processes and in marketing or otherwise capitalizing upon the said products or processes developed. Chemotronics maintains its office and facility at Ann Arbor, Mich.

**III**

**DEFINITION OF TERMS**

5. Polyurethane foam, as used herein, shall mean a plastic material similar to latex foam rubber, made from, among other things, either polyester or polyether resin. In its natural or unreticulated state, each cell of polyurethane foam has skeletal walls bridged by membranes sometimes referred to as

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## TITLE 7: ANTITRUST DIVISION

windows. Unreticulated polyurethane foam may be of a rigid type, such as insulation material, or a flexible type, such as powder puff material.

6. Reticulated polyurethane foam, as used herein, shall mean polyurethane foam in which the windows have been substantially or entirely eliminated. Said product is porous and useful for many applications such as the following: air filters for automobiles, lawn mowers, and other internal combustion engines; filters for furnaces, air conditioners and humidifiers; "peel goods" such as clothing and drapery interliners and rug underliners; powder puffs; shoe polish applicators; liners for gasoline tanks for racing cars and airplanes; and, in a compressed foam, as an acoustical absorber.

## IV

## TRADE AND COMMERCE

7. Polyurethane foam products have been produced and sold for many years; as the ingredients used to produce the foam have become cheaper, the manufacture and sale of polyurethane foam has increased in recent years. About 1956, Scott developed a process of reticulating (eliminating the windows of) polyurethane foam by running the product through a caustic soda solution. Through its inventor, Volz, Scott applied for a patent in June of 1956 which ultimately issued March 2, 1965, as U.S. Patent No. 3,171,820 (hereafter referred to as the "Scott patent"). This patent covers both this process for reticulating polyurethane foam and the resulting product. As the trade discovered the advantages of reticulated polyurethane foam, Scott's sales of the product increased substantially each year.

8. Certain other concerns also attempted reticulation but abandoned it. In 1963 Chemotronics developed a new method of reticulation, employing a combustion or explosion process. Through its inventor, Geen, Chemotronics applied for patents which issued on March 23, 1965, as U.S. Patents No. 3,175,025 and 3,175,030 (hereafter referred to as the "Chemotronics patents") which apply to reticulated cellular materials and to the bonding of pieces of thermoplastic material by the combustion process. Beginning in 1964 Chemotronics reticulated polyurethane foam of other manufacturers on a fee basis. After such reticulation, the product was sold in competition with Scott's product. The product made by the combustion process is superior to the product made by the caustic soda process for some uses.

9. From its plant near Philadelphia, Pa., Scott regularly did and does manufacture and ship reticulated polyurethane foam to customers located in other States of the United States and in foreign countries. Said foam moves in interstate and foreign trade and commerce in a regular, continuous, and uninterrupted flow.

10. From 1964 until about November 1965, Chemotronics at its plant in Ann Arbor, Mich., regularly received unreticulated polyurethane foam from customers in other States of the United States, reticulated said product and shipped the reticulated polyurethane foam to customers in other States of the United States. During this period of time, said foam moved in interstate trade and commerce in a regular, continuous, and uninterrupted flow.

11. Prior to November 1965, Scott advised Chemotronics that it regarded Chemotronics' reticulated product as an infringement of the Scott product patent claims. Chemotronics denied the contention and raised substantial questions as to the validity of Scott's product claim and as to whether Chemotronics' product infringed them.

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12. Prior to November 1965, Chemotronics negotiated with several companies, other than Scott, with the object of selling rights to its patents and know-how or setting up reticulation plants for other foam manufacturers. It received at least one offer from another producer which it valued at \$3 million.

13. In 1965, the only two concerns of significance reticulating polyurethane foam in this country were Scott and Chemotronics. The approximate total 1965 sales of reticulated polyurethane foam in the United States were as follows:

Company selling	Dollar amount	Percent of total
Scott .....	\$3,276,000	93.2
Bernel Foam Products Co., Inc. (reticulation by Chemotronics) .....	120,000	3.4
American Rubber and Plastics Corp. (reticulation by Chemotronics) .....	100,000	2.8
Spar Co., Inc. ....	20,000	0.6
<b>Total .....</b>	<b>\$3,516,000</b>	<b>100.0</b>

In 1965, Scott was the dominant producer of reticulated polyurethane foam. Since November of 1965, Scott has been and still is the only significant producer of said product in the United States.

## V

## VIOLATIONS ALLEGED

14. In or about November 1965, Scott and Chemotronics, in violation of section 1 of the Sherman Act, entered into, and have maintained in effect up to the date of the filing of this complaint, a contract in unreasonable restraint of the aforesaid trade and commerce in reticulated polyurethane foam, the substantial terms of which are:

(a) Chemotronics granted to Scott an exclusive license with the right to issue sublicenses under the Chemotronics patents and under Chemotronics' U.S. patent applications relating to the manufacture, treatment, and fabrication of reticulated cellular materials;

(b) Chemotronics agreed not to engage in the reticulation of polyurethane foam for any concern other than Scott; and

(c) Chemotronics agreed to conduct further research for Scott relating to the manufacture, treatment, and fabrication of reticulated cellular material and products manufactured therefrom, and not to conduct similar research for any other person.

15. In or about November 1965, Scott acquired from Chemotronics, in violation of Section 7 of the Clayton Act, an exclusive license under the Chemotronics patents and under Chemotronics' U.S. patent applications relating to manufacture, treatment, and fabrication of reticulated cellular materials.

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This acquisition may lessen competition substantially and tend to create a monopoly in the aforesaid trade and commerce in reticulated polyurethane foam.

### VI EFFECTS

16. The aforesaid violations have had, among others, the following effects:
- (a) Actual and potential competition between Scott and other sellers of reticulated polyurethane foam has been eliminated;
  - (b) Scott has acquired exclusive control over the U.S. patents covering the commercially practical methods of manufacturing reticulated polyurethane foam;
  - (c) Scott has acquired exclusive access to valuable existing technology and to potentially valuable future technology relating to reticulated polyurethane foam;
  - (d) Potential reticulators of polyurethane foam have been foreclosed from using the Chemotronics patented process or from obtaining valuable technology from Chemotronics;
  - (e) Scott has significantly diminished the likelihood that others would challenge the validity of the Scott patent; and
  - (f) Purchasers of reticulated polyurethane foam have been denied the benefits of free and open competition.

### RELIEF SOUGHT

Wherefore, the plaintiff requests the following relief:

1. That the contract described in paragraph 14 of this complaint, and all practices and understandings related thereto, be adjudged and declared to be unlawful and in violation of Section 1 of the Sherman Act.
2. That the acquisition described in paragraph 15 of this complaint be adjudged and declared to be unlawful and in violation of Section 7 of the Clayton Act.
3. That each of the defendants, and all persons, firms, and corporations, acting in their behalf or under their direction or control be permanently enjoined and restrained from engaging in, carrying out, or renewing any contract, arrangement, practice, or understanding, or claiming any rights thereunder, having the purpose or effect of continuing, reviving, or reserving the aforesaid violations of the Sherman Act or Clayton Act, or any contract, arrangement, practice, or understanding having like or similar purpose or effect.
4. That the court require the defendants Scott and Chemotronics to grant to each bona fide applicant therefor a reasonable royalty, nondiscriminatory license under all existing patents relating to the manufacture, treatment, and fabrication of reticulated foam, as well as complete production know-how relating thereto; and to grant on the same basis, licenses under any U.S. patent issuing within the next 5 years based upon the U.S. patent applications specified in the contract and described in paragraph 14 of this complaint.
5. That the plaintiff have such other relief as may be deemed proper.

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6. That the plaintiff recover cost of this suit.

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**Department of Justice**

(For immediate release, Wednesday, Apr. 26, 1967)

A Federal grand jury today indicted three service station associations and four of their executives on a charge of illegally fixing the retail price of gasoline in two northern California counties.

Attorney General Ramsey Clark said the indictment, returned in U.S. District Court in San Francisco, asserted a violation of section 1 of the Sherman Antitrust Act.

The defendants are: The California Shell Dealers Association, Inc., and its president, John A. Mullins of San Leandro, Calif.; the Southern Alameda County Retail Petroleum Dealers Association, and its president and vice president, Joseph Chandler and John Macchitelli, both of Fremont, Calif.; and the Santa Clara County Shell Dealers Association, and its president, Earl C. Schweizer of Santa Clara, Calif.

The indictment said that beginning in the fall of 1966, the defendants illegally raised and fixed the retail prices of gasoline in Alameda and Santa Clara Counties.

The defendants also have eliminated the giving of trading stamps and eliminated the posting of large price signs at stations, the indictment said. In addition, it was asserted that the defendants have harassed stations which continued to give stamps or post price signs.

These violations, the indictment said, have eliminated retail gasoline discounts and suppressed competition in the service station field.

The charge carries these maximum penalties: For an individual, 1 year in prison and a \$50,000 fine; for an association, a \$50,000 fine.