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# United States Attorneys' Manual

## Antitrust Division

*Title 7*

1984 USAM (superseded)

FOR USE OF ADMINISTRATIVE OFFICER

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1985

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7-1.000 ORGANIZATION AND DIVISION OF RESPONSIBILITIES

7-1.100 DEPARTMENT OF JUSTICE RESPONSIBILITIES

"Competition" is the fundamental economic policy of the United States. The Department of Justice is responsible for promoting and maintaining competitive markets. The Antitrust Division is responsible for the coordination of the Department's efforts to enforce economic policy, and has jurisdiction for the statutes described in USAM 7-2.000, infra.

The Antitrust Division accomplishes its mission in two principal ways. First, as an enforcement agency, it prosecutes violations primarily under the Sherman and Clayton Acts. Second, it advocates competition before Congressional committees and federal regulatory agencies, articulating pro-competitive solutions for national economic problems. (The Division's competition-advocacy functions are not treated in this Manual, but are outlined in USAM 1-3.201.)

U.S. Attorneys' Offices should watch for manifestations of price-fixing, collusive bidding, or similar conduct. See USAM 7-1.200, infra. Upon findings of possible violations, the U.S. Attorney should consult with either the Director of Operations of the Antitrust Division, or the Chief of the Antitrust field office closest to the U.S. Attorney's district, to determine who should investigate and prosecute the case. Most antitrust investigations are conducted by the Antitrust Division's sections and field offices, which have specific expertise in particular industries and markets. However, it is sometimes more advantageous for the U.S. Attorney's Office to conduct the investigation and prosecution of a matter, particularly where localized price-fixing or bid-rigging conspiracies are involved.

The Antitrust Division may refer local price-fixing investigations to a U.S. Attorney. Such referrals are made by the Division's Director of Operations. Once a U.S. Attorney's Office accepts a referral, it will be primarily responsible for the investigation and prosecution of that case.

Pursuant to 28 C.F.R. §0.40, all antitrust investigations, whether initiated by or referred to a U.S. Attorney, are subject to supervision by the Assistant Attorney General for the Antitrust Division. This insures a consistent national policy on antitrust questions. As a result, the Division's approval is required at various stages of the investigation, as outlined in USAM 7-3.000, et seq., infra.

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7-1.200 ATTORNEY GENERAL'S POLICY STATEMENT

"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 efforts are 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/she 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 seven 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 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 essentially of 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."

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7-1.300 ORGANIZATION OF THE DIVISION

7-1.310 Office of the Assistant Attorney General

The Assistant Attorney General in charge of the Antitrust Division is the Division's chief representative and is responsible for leadership and oversight of all the Division's programs and policies. The Assistant Attorney General is assisted by four Deputy Assistant Attorneys General, of equal rank, and by the Director of Operations. The specific organizational units subordinate to each Deputy Assistant Attorney General are illustrated on the Division's organizational chart at USAM 7-1.320, p. 4.

7-1.320 Organizational Chart

See page 4.

7-1.330 Office of Operations

The Director of Operations has direct supervisory responsibility for the Division's investigation and litigation. The Director assigns investigations, cases, and other matters to particular Division sections or field offices based upon the commodity or service at issue, the geographical area involved, the type of violation, and the availability of resources. The Office of Operations also acts as the Division's chief liaison with the Federal Trade Commission and the States' Attorneys General. In addition, the Office of Operations arranges for the provision of FBI support services for investigations and processes all Freedom of Information Act requests relating to antitrust matters.

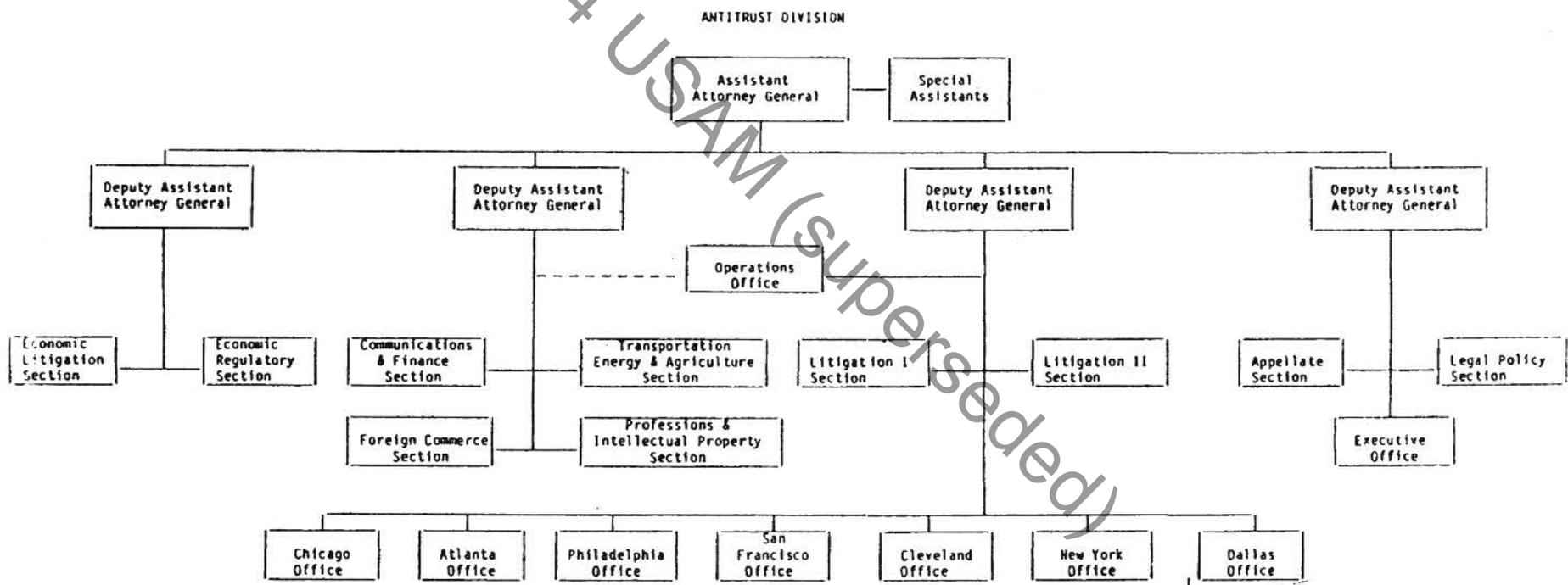
7-1.340 Washington General Litigating Sections

The Antitrust Division has two general litigating sections based in Washington: Litigation I and Litigation II. Each has responsibility nationwide for commercial activities affecting specified groups of commodities.

These two sections are primarily concerned with criminal and civil violations of antitrust laws that impact upon national or multi-regional markets. They handle significant mergers and acquisitions, major civil

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7-1.320 Organizational Chart

Approved: [Signature] Date: SEP 6, 1985  
FOR Attorney General

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investigations in which structural relief, such as divestiture, is anticipated, and conspiracies national in scope. U.S. Attorneys with inquiries related to such matters should contact the Office of Operations, which will in turn refer the inquiry to the appropriate litigation section.

7-1.350 Specialized Sections

The Division's remaining sections have somewhat more specialized duties. The Professions and Intellectual Property Section, for example, is responsible for investigating and prosecuting all violations of the antitrust laws that involve questions of patent, trademark, and copyright abuse. This section also has jurisdiction over the professions (including healthcare), drug commodities, labor, chemicals, newspapers and motion pictures.

Two sections--Transportation, Energy, and Agriculture Section and Communications and Finance Section--appear in proceedings before regulatory agencies to advocate competitive policies, investigate and litigate antitrust violations, and prepare reports to other federal agencies and to Congress on competitive issues. The Transportation, Energy and Agriculture Section, as its name implies, handles Division functions relating to energy, transportation, and all agricultural industries. The Communications and Finance Section is responsible for the fields of banking, finance, securities, and communications.

The Foreign Commerce Section is primarily responsible for the development of Division policy on issues of trade and international antitrust enforcement. The Section also monitors and participates in competition-related proceedings at the International Trade Commission, handles legislation relating to foreign competition, deals with international organizations concerning problems of competition, and coordinates the implementation of the Export Trading Company Act of 1982 on behalf of the Division.

The Economic Litigation Section and Economic Regulatory Section provide economic advice to the Assistant Attorney General and policy assistance to the Division's enforcement programs and competition-advocacy activities. Economists serve as economic and statistical expert witnesses in trial and regulatory proceedings and are assigned to all enforcement matters, participating in them from the initial investigative stage through final resolution.

Other specialized sections and offices include the Appellate Section, which handles all appeals arising from civil and criminal cases brought by

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the United States under the federal antitrust laws as well as all amicus filings before the Supreme Court in antitrust cases and Legal Policy Section, which prepares legal analyses of new or unusually difficult issues of antitrust law that arise in statutory enforcement of regulatory agency proceedings and is responsible for handling all legislative matters.

7-1.360 Field Offices

7-1.361 Responsibilities

At present, there are seven regional field offices of the Antitrust Division, located in Atlanta, Chicago, Cleveland, Dallas, New York, Philadelphia, and San Francisco. These offices are primarily responsible for violations (including those pertaining to mergers and monopolies) that have local or regional impact, and focus their attention particularly on prosecution of criminal activities that constitute per se violations of the Sherman Act.

It is expected that most antitrust complaints or problems coming to the attention of the U.S. Attorneys will fall within the jurisdiction of the Antitrust Division's field offices. For this reason, the field offices will ordinarily be the appropriate contact points for U.S. Attorneys on antitrust matters. The addresses of the field offices, and their areas of geographical responsibility, are identified at USAM 7-1.362, infra.

7-1.362 Addresses and Territories

Atlanta Field Office

75 Spring St., Rm. 1394, Richard B. Russell Bldg., Atlanta, Georgia 30303.  
Chief: John T. Orr. Phone: (404) 331-7100, FTS 242-7100.  
Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, Puerto Rico and the Virgin Islands.

Chicago Field Office (Midwest)

230 S. Dearborn Street, Rm. 3820, John C. Kluczynski Bldg.  
Chicago, Illinois 60404.  
Chief: Judy Whalley. Phone: (312) 353-7530, FTS-353-7530.  
Colorado, Illinois, Indiana, Iowa, Kansas, Western District of Michigan, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, and Wisconsin.

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Cleveland Field Office (Great Lakes)

995 Celebrezze Federal Building, 1240 E. 9th Street, Cleveland, Ohio  
44199-2089.

Chief: John A. Weedon. Phone: (216) 522-4070, FTS 942-4070.  
Kentucky, Eastern District of Michigan, Ohio, and West Virginia.

Dallas Field Office

Earle Cabell Federal Building, 1100 Commerce Street, Room 8C6, Dallas,  
Texas 75242-0898.

Chief: James A. Backstrom, Jr. Phone: (214) 767-8051, FTS-729-8051.  
Arkansas, Louisiana, New Mexico, Oklahoma, and Texas.

New York Field Office

26 Federal Plaza, Room 3630, New York, New York 10278-0096.

Chief: Ralph T. Giordano. Phone (212) 264-0390, FTS-264-0390.  
Connecticut, Maine, Massachusetts, New Hampshire, Northern New Jersey, New  
York, Rhode Island, and Vermont.

Philadelphia Field Office (Middle Atlantic)

11400 U.S. Courthouse, 601 Market Street, Philadelphia, Pennsylvania  
19106.

Chief: John J. Hughes. Phone (215) 597-7405, FTS-597-7405.  
Delaware, Maryland, Southern New Jersey, Pennsylvania, and Virginia.

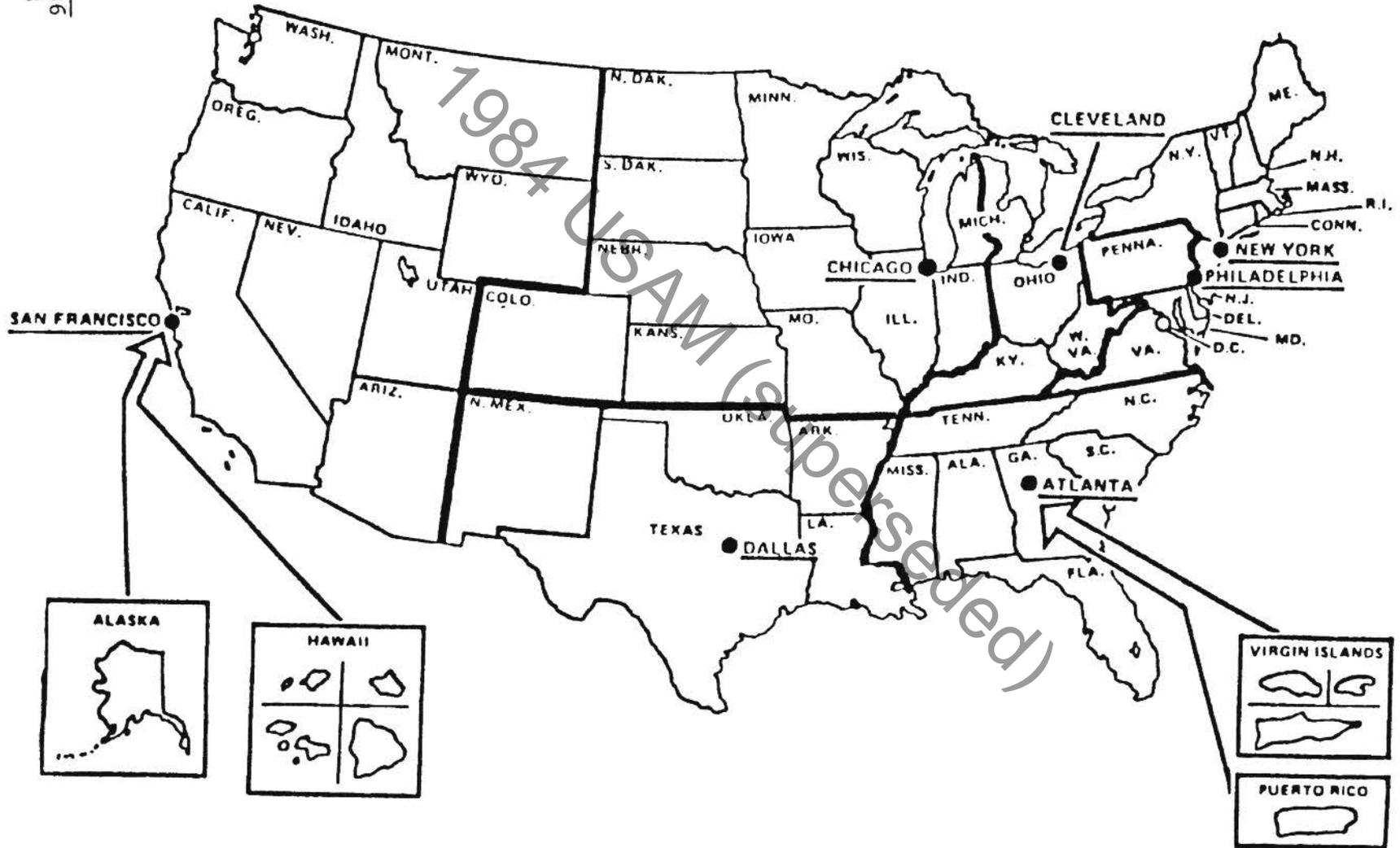
San Francisco Field Office

450 Golden Gate Avenue, Box 36046, San Francisco, California 94102.

Chief: Gary R. Spratling. Phone: (415) 556-6300, FTS-556-6300.  
Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah,  
Washington, and Wyoming.

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7-1.363 Field Offices Map

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7-2.000 STATUTES IN GENERAL

The principal statutes affecting the investigative and litigious activities of the Antitrust Division are as follows:

7-2.100 SHERMAN ACT, 15 U.S.C. §§1-7

This Act prohibits (a) contracts, combinations or conspiracies in restraint of trade, and (b) monopolization, attempts to monopolize, or combinations or conspiracies to monopolize interstate commerce or foreign trade. See USAM 7-5.000, *infra*. Violation of this Act is a felony. Violations of this Act occurring prior to January 1, 1985, carries a maximum fine of \$1 million for defendant corporations, and \$100,000 and a maximum prison sentence of three years, or both, for natural persons. Refer to the Criminal Fine Enforcement Act of 1984 and Comprehensive Crime Control Act of 1984 for increases in the maximum fines which may be imposed.

7-2.200 CLAYTON ACT, 15 U.S.C. §§14, 18, 19, and 20

This Act prohibits the acquisition by one corporation of the stock or assets of another corporation, where the effect of such action may be to substantially lessen competition or tend to create a monopoly. Anti-competitive tying and exclusive dealing contracts are also prohibited, as are certain interlocking directorates.

7-2.300 WILSON TARIFF ACT, 15 U.S.C. §§8-11

This Act prohibits combinations or conspiracies in restraint of trade involving the importation of commodities into the United States.

7-2.400 ANTITRUST CIVIL PROCESS ACT, 15 U.S.C. §§1311-1314

This Act provides that the Assistant Attorney General in charge of the Antitrust Division may, prior to institution of civil or criminal proceedings, authorize a civil investigative demand upon any entity under investigation for access to relevant documentary material.

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7-2.500 ANTITRUST PROCEDURES AND PENALTIES ACT, 15 U.S.C. §16

This Act requires that proposed consent judgments in government antitrust cases be filed with the district court and published in the Federal Register at least 60 days prior to the effective date of the judgment. The Department is also required to file and publish a competitive impact statement discussing, inter alia, the proposed judgment and any alternatives considered by the Department. A summary of the proposed judgment and competitive-impact statement, as well as a list of materials that the government will make available for public inspection, must be published in newspapers of general circulation in the district in which the case is filed, in the District of Columbia, and in such other districts as the court may direct. At the close of the 60 day period, the government must file with the court and publish in the Federal Register its response to any written comments respecting the proposed judgment.

7-2.600 EXPEDITING ACT, 15 U.S.C. §29

Further, the Expediting Act, 15 U.S.C. §29, is amended to provide that appeals of government civil antitrust cases lie with the courts of appeals rather than with the Supreme Court, unless the trial judge, on application of a party, finds that an immediate appeal to the Supreme Court is in the public interest.

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7-3.000 INVESTIGATIONS: PROCEDURES AND APPROVALS

Pursuant to 28 C.F.R. §0.40(a), the Assistant Attorney General in charge of the Antitrust Division has supervisory authority over all investigations involving possible violations of the antitrust laws, both criminal and civil. When a U.S. Attorney wishes to conduct an investigation of a possible antitrust violation, the U.S. Attorney must consult with the Antitrust Division to obtain investigatory authority. The initial investigation of a potential antitrust violation is called a preliminary inquiry.

The Antitrust Division's Director of Operations, Room 3214, Main Justice (FTS 633-3543), is the U.S. Attorney's primary contact within the Antitrust Division regarding investigation and litigation. U.S. Attorneys should also feel free to consult with the chiefs and assistant chiefs of the Division's field office in their geographic areas.

7-3.100 STANDARDS FOR APPROVING A PRELIMINARY INQUIRY

Generally, a preliminary inquiry will be authorized by the Antitrust Division if (a) the facts presented appear to support a legal theory of an antitrust violation, (b) the amount of commerce affected is not insubstantial, (c) the investigation will not duplicate other efforts of the Division, the Federal Trade Commission, or another U.S. Attorney, and (d) investigative resources are available to devote to the investigation.

Based on these general guidelines, a request for a preliminary inquiry is reviewed by the Director of Operations. If the request is approved and clearance is obtained from the Federal Trade Commission, see USAM 7-3.300, supra, preliminary inquiry authority is granted.

7-3.200 MAKING A REQUEST FOR PRELIMINARY INQUIRY AUTHORITY

Once a U.S. Attorney has developed a sufficient factual and legal basis to believe that a matter is appropriate for formal investigation, a short memorandum should be prepared describing the nature and scope of the activity. This memorandum should be addressed to the Director of Operations, Antitrust Division, Room 3214, Main Justice (FTS 633-3543), and should include the following general information:

A. The commodity or service to be investigated, e.g., electrical contracting;

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B. The alleged illegal practice (the specific practice should be outlined, if practicable, e.g., price-fixing, boycott, monopolization, etc., and not merely described as "restraint of trade");

C. The relevant statute (usually Section 1 of the Sherman Act, 15 U.S.C. §1);

D. The parties involved (the names and locations of companies and individuals involved);

E. The amount of commerce (if information is unavailable, then state a reasonable estimate); and

F. The geographic area involved, e.g., nationwide; Montgomery County, Maryland; Eastern Virginia, etc.

This detailed information is necessary not only for evaluating the request, but for obtaining FTC clearance and determining whether any section or field office of the Antitrust Division is investigating, or has investigated, the same activity.

After this basic information is set forth, the writer should prepare a short, factual summary of the information upon which the request is based. Special considerations, such as the existence of private litigation or any particular legal difficulties, should also be discussed, if they are known at the time.

When approved, the investigation is assigned by the Director of Operations to the office requesting it. If any difficulties develop with either the FTC clearance process or an issue relating to the investigation, the Director of Operations will consult with the U.S. Attorney to resolve the matter.

#### 7-3.300 FTC CLEARANCE PROCEDURE

All requests for authority to initiate new antitrust investigations must be cleared with the Bureau of Competition of the Federal Trade Commission, in accordance with a longstanding inter-agency agreement. The purpose of the agreement is to make sure that the two enforcement agencies, which have concurrent jurisdiction in certain areas, do not duplicate efforts by conducting similar or identical investigations.

The Office of Operations sends each request for a preliminary inquiry to the FTC for clearance. If the FTC has any questions concerning the

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request, the Office of Operations will consult with the U.S. Attorney to obtain for the FTC more detailed information concerning the request.

7-3.400 ASSISTANCE BY THE FEDERAL BUREAU OF INVESTIGATION

After the preliminary inquiry begins, the U.S. Attorney may wish to use FBI agents to conduct the investigation. The Assistant Attorney General for the Antitrust Division may request the assistance of the Director of the Federal Bureau of Investigation in antitrust investigations. The request generally includes a brief description of the matter and a statement of what the Antitrust Division wants the FBI to do. The U.S. Attorney's Office should prepare the request and send it to the Office of Operations, which will process it through the appropriate channels. Agents from the local FBI office will generally be assigned to the investigation, unless some special circumstances are present.

7-3.500 ASSISTANCE FROM THE ANTITRUST DIVISION

The discussion of investigating and proving price-fixing and bid-rigging violations, see USAM 7-5.000, infra, provides an overview of antitrust investigative techniques. In addition, the Antitrust Division, through the Office of Operations and the local field office, see USAM 7-1.362, supra, for a listing of field offices, can provide advice regarding investigative techniques and evidentiary issues unique to antitrust matters.

The Antitrust Division's Economic Litigation Section and Economic Regulatory Section can also provide economic analysis of particular issues, as well as statistical assistance, if the investigation requires it. Requests for assistance by Division economists may be made to the Economic Litigation Section and Economic Regulatory Section, but such requests should always be coordinated through the Office of Operations.

7-3.600 ISSUING CIVIL INVESTIGATIVE DEMANDS

The Antitrust Civil Process Act, 15 U.S.C. §1314, empowers the Antitrust Division to issue pre-complaint compulsory process in civil investigations. Under the Act, the Assistant Attorney General in charge of the Antitrust Division, whenever he/she has reason to believe that a person may be in the possession of information relevant to a civil antitrust investigation, may issue a Civil Investigative Demand (CID) to a person requiring the production of documents, answers to written interrogatories, or oral testimony. CIDs may be directed to any natural

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person, corporation, partnership or other legal entity during a civil investigation of a past or present violation or during a civil investigation of an incipient violation, such as a proposed merger. CIDs may be issued to subjects of the investigation and to third parties with relevant information.

Use of CIDs is restricted to the pre-complaint phase of civil investigations. Occasionally, investigations which initially contemplate possible civil enforcement action will uncover evidence of criminal violations necessitating investigation by grand jury. In this situation, the Division's authority to use CIDs in that investigation ceases. Of course, any evidence previously collected by CID may be presented to the grand jury. 15 U.S.C. §1313(d)(1).

Because CIDs can only be issued in civil antitrust investigations, it is unlikely that U.S. Attorneys would use them often. All inquiries regarding the possible issuance of CIDs should be made to the Office of Operations, which can provide CID forms and detailed information concerning their approval and use.

7-3.700 ANTITRUST GRAND JURY INVESTIGATIONS

Pursuant to 28 C.F.R. §0.40(a), the Assistant Attorney General in charge of the Antitrust Division must authorize any grand jury investigation of possible antitrust violations. Consultation with the Office of Operations or the local field office is desirable at the time the U.S. Attorney's Office is formulating a request for grand jury authorization.

7-3.710 Requesting a Grand Jury Investigation

If, at the conclusion of a preliminary inquiry, the U.S. Attorney believes that there is sufficient evidence to proceed to the grand jury, the U.S. Attorney should request authority to conduct a grand jury investigation from the Assistant Attorney General in charge of the Antitrust Division. The request should be in the form of a memorandum detailing the results of the preliminary inquiry, the information obtained from an informant or the material from the FBI investigation. The request for grand jury authority should specify, to the extent possible: (a) the companies, individuals, industry and commodity involved in the investigation; (b) the estimated amount of commerce involved on an annual basis; (c) the geographic area involved and judicial district where the investigation will be conducted; and (d) the estimated amount of time that

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the investigation will take. The memorandum should then summarize all evidence that has been developed during the course of the preliminary inquiry or other investigation. Generally speaking, the length of the grand jury request memorandum depends upon the complexity of the facts and the amount of material developed in the investigation.

The grand jury request memorandum is sent to the Office of Operations and reviewed by the Director of Operations. The Director of Operations then submits it to the Assistant Attorney General, who approves or disapproves the request. If the request is approved, the U.S. Attorney will be advised to begin the grand jury investigation.

7-3.720 Requests for Immunity

It is the general policy of the Antitrust Division to use compulsion orders pursuant to 18 U.S.C. §6001 *et seq.*, whenever granting immunity to witnesses before an antitrust grand jury. Only in special circumstances will the Antitrust Division use another procedure for obtaining witness immunity.

7-3.721 Division Procedures for Processing Immunity Requests

All requests for immunity of witnesses in antitrust grand juries must be reviewed by the Director of Operations, and approved by the Assistant Attorney General in charge of the Antitrust Division, who must personally issue the immunity-authorization letter for the witness. Requests for immunity should be forwarded to the Office of Operations at least two weeks before the date the authorization letter is needed.

The U.S. Attorney's Office should submit two copies of Form OBD-111-A to the Office of Operations, together with a memorandum stating the status of the investigation and the reasons for requesting immunity for the witness. This memorandum should include the following information: (a) a description of the witness' present position and of any other positions held during the period of the investigation; (b) a description of the testimony of the witness' superiors and subordinates, if such individuals have previously testified; (c) a statement of any proffer by the witness or counsel or an indication of whether arrangements have been made for such a proffer; (d) an explanation of why the witness should be given immunity including age, health and personal problems, and equity considerations; and (e) additional information as to how the witness' cooperation can further the investigation.

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In antitrust investigations, unlike many federal criminal investigations, some of the direct participants in the alleged conspiracy are among those who are likely to be immunized during the investigation. In those situations, full and complete proffers of the proposed testimony of active participants in the conspiracy should be obtained prior to the grant of immunity.

The U.S. Attorney's memorandum should attach a proposed letter of authorization addressed to the U.S. Attorney, from the Assistant Attorney General in charge of the Antitrust Division, empowering the U.S. Attorney to apply to the court for an immunity order. The text of the letter should be as follows:

Dear \_\_\_\_\_:

Pursuant to the authority vested in me by 18 U.S.C. §6003(b) and 28 C.F.R. §0.175(b), you are authorized to apply to the United States District Court for the District of \_\_\_\_\_ for an order (or orders) pursuant to 18 U.S.C. §§6002-6003 requiring (name of witness or witnesses) to give testimony or provide other information in the above matter and in any further proceedings resulting therefrom or ancillary thereto.

Sincerely,

(name)

Assistant Attorney General  
Antitrust Division

7-3.800 COMPLETING THE INVESTIGATION AND RECOMMENDING CIVIL OR CRIMINAL SUITS

As the U.S. Attorney develops evidence that may establish a violation of the antitrust laws, he/she should begin to determine what type of case, or cases, will be recommended, and how the investigation might be concluded. This should be done in consultation with the Director of Operations or other contacts within the Antitrust Division.

Three tasks are usually undertaken at the conclusion of the investigation. First, the U.S. Attorney and the staff determine whether

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to proceed by criminal or civil case and select the defendants to be recommended for prosecution. Second, the U.S. Attorney and the staff may, at their discretion, afford counsel for the potential defendants with an opportunity to present their views of a potential case to the prosecutors. Finally, the U.S. Attorney and the staff prepare a fact memorandum, pleadings, a proposed press release, and other papers relevant to a full consideration of the case. The memorandum of fact should be received by the Director of Operations at least two full weeks before the case is scheduled for filing.

Once these functions have been completed, the Director of Operations and other reviewers will assess the merits of the case. At the conclusion of the reviewing process, the Assistant Attorney General in charge of the Antitrust Division makes the final decision whether to seek an indictment or to file suit or to decline prosecution.

7-3.810 Recommending a Criminal Indictment

If a matter is being conducted before a grand jury, the U.S. Attorney or the staff should consult regularly with the Director of Operations concerning the status of the investigation.

The Antitrust Division, of course, follows the Department's general practice of informing individuals, under certain circumstances, that they are targets of the investigation and of advising them of the opportunity to appear voluntarily before the grand jury. No similar opportunity to appear before the grand jury extends to corporate entities. However, the U.S. Attorney ordinarily should advise counsel for the corporate entities if indictment is being contemplated.

Often, counsel for corporate and individual targets of the investigation requests the opportunity to present arguments against indictment to the Director of Operations or other Antitrust Division officials. Although counsel does not have any absolute right to be heard by the Office of Operations, the Director, at his/her discretion, will ordinarily meet with counsel, but only after counsel has already met and discussed the issues with the U.S. Attorney.

After listening to the views of counsel and, if appropriate, allowing the individual "targets" of the investigation the opportunity to appear before the grand jury, the U.S. Attorney should submit a final fact memorandum to the Office of Operations.

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7-3.820 Preparation of Fact Memorandum

The fact memorandum should be prepared by the U.S. Attorney's staff as a full statement of the factual and legal basis of its investigation. While its official purpose is to serve as a vehicle for consideration of the case in the review process, it also provides the opportunity for a systematic analysis of the case, including identification of the problems or of the gaps that may still exist in the case.

The memorandum should be forwarded to the Director of Operations, accompanied by all pleadings (indictments and informations) in the matter, a draft press release, and a list of counsel, if any, who request a meeting with the Office of Operations.

7-3.830 Criminal Case Fact Memoranda

The following is a suggested organization of information in the fact memorandum that has proved useful in antitrust case fact memoranda. It is set out here for use, as appropriate, in cases recommended by U.S. Attorneys.

7-3.831 Table of Contents

If the fact memorandum is more than 50 double-spaced pages in length, a table of contents is helpful in linking the various headings and subheadings in the memorandum with the corresponding page numbers.

7-3.832 Summary of Offense

The first section of the memorandum should summarize the highlights of the case in a page or two, discuss the evidence in context and set forth the general framework of the case. The summary section should include at least the following elements:

- A. The statute violated;
- B. The judicial district in which the proposed indictment would be returned, and, if appropriate, the expiration date of the grand jury;
- C. The number of proposed corporate and individual defendants. If the proposed defendants are few in number, they may be listed at this point together with the company affiliation and position of individual

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defendants; if the number is fairly large, the names and other information should be set forth in a separate section immediately following the summary;

D. The duration of the conspiracy;

E. The product involved;

F. The area involved in the conspiracy, describing the specific geographic area;

G. The level of product distribution--manufacturers, wholesalers, retailers;

H. A brief summary of the evidence indicating how the conspiracy was formed or carried out;

I. The amount of commerce affected on an annual basis; and

J. A reference to any other problems the U.S. Attorney perceives, such as the statute of limitations, interstate commerce, multiple conspiracy issues, etc.

#### 7-3.833 Proposed Defendants

The proposed corporate defendants should be listed and described. The proposed individual defendants should be listed, together with their company affiliation and positions held during the conspiratorial period.

#### 7-3.834 Summary of the Evidence

This section should set forth in detail the evidence establishing the violation. To the extent practicable, the evidence should be set forth in chronological order.

#### 7-3.835 Summary of the Evidence Against Each Proposed Defendant

In a separate section, the evidence against each proposed corporate and individual defendant should be separately summarized. Likewise, other factors that have been considered and that may be significant in making defendant-selection decisions should be described, including a personal

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profile detailing such information as age, state of health, personal or business hardship, etc.

7-3.836 Persons and Companies Not Recommended for Indictment

In a separate section, the fact memorandum may list the persons and companies that were subjects of the investigation but that are not being recommended for indictment. The evidence against each should be summarized, and the reasons why indictment is not being recommended set forth. Relevant factors, such as the extent of cooperation, age, state of health, personal or business hardship, etc., should be described.

7-3.837 Assessment of Companion Civil Action or Federal Damage Action

If applicable, arguments should be set forth bringing a companion civil suit or a federal damage action. If a damage action is recommended, the memorandum should describe, in detail, the damage theory and estimate the amount of damages.

7-3.838 Civil Actions Generally

In fact memoranda recommending the filing of civil cases alleging violations of Section 1 of the Sherman Act, the memoranda should follow the same basic pattern as described for criminal cases.

7-3.900 PROCEDURES FOR REVIEW OF CASE RECOMMENDATIONS

After drafting the fact memorandum, pleadings (see USAM 7-4.200, infra, for a sample format), and a press release (see USAM 7-3.910, infra), the package is sent to the Director of Operations for review.

Upon review, and after consultation with the U.S. Attorney, the Director of Operations will submit his/her recommendation to the Assistant Attorney General, through the Deputy Assistant Attorney General for Litigation. The reviewing Deputy may simply agree with Operations' recommendation, or write a separate memorandum expressing differing views or clarifying certain issues. The entire package is then reviewed by the Assistant Attorney General.

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Only in rare circumstances, where significant and novel issues arise, will counsel for the potential defendants be provided with an opportunity to make a presentation to the Assistant Attorney General.

When a final decision is made by the Assistant Attorney General, the U.S. Attorney will be informed immediately. The approval papers, signed pleadings, and any other additional information that will be required for filing will be sent to the U.S. Attorney.

When the case is filed, the U.S. Attorney's Office should inform the Office of Operations of that fact immediately so that Operations may authorize issuance of the press release. The U.S. Attorney's Office also should inform Operations of the docket number and the judge assigned to the case.

These procedures employed by the Division are subject to modification in specific investigations. As a general matter, however, the Antitrust Division is committed to a planned and consistent pattern of action.

7-3.910 Sample Press Release

All press releases are issued through the Department's Office of Public Affairs. The following press release format is generally employed by the Antitrust Division:

A federal grand jury in Philadelphia, Pennsylvania, today returned a felony indictment charging five corporations and two individuals with conspiring to fix prices and to allocate customers for the sale of widgets in southeastern Pennsylvania.

Attorney General \_\_\_\_\_ said the indictment, charging a violation of Section 1 of the Sherman Act, was filed in U.S. District Court in Philadelphia.

Named as defendants were:

- Company X, Camden, New Jersey;
- Company Y, Philadelphia, Pennsylvania; and its President, John Jones;
- Company Z, Boston, Massachusetts;
- A Corporation, Norristown, Pennsylvania; and its President, John Smith; and
- Widgets Company, Reading, Pennsylvania.

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\_\_\_\_\_, Assistant Attorney General in charge of the Antitrust Division, said the indictment charge that, beginning in 1968 and continuing to 1983, the defendants and coconspirators conspired to fix prices and allocate customers for the sale of widgets in southeastern Pennsylvania.

Widgets are used for the manufacture of buildings and in automobiles. According to the indictment, virtually all widgets sold in southeastern Pennsylvania are sold by the corporate defendants. Total sales of the defendant companies in this geographic area in 1982 totalled \$9 million.

The investigation was conducted by \_\_\_\_\_, United States Attorney for the \_\_\_\_\_ District of \_\_\_\_\_, with the assistance of the Federal Bureau of Investigation.

The maximum penalty upon conviction of a violation of the Sherman Act is a fine of \$1 million for a corporation, and a fine of \$100,000 and 3 years imprisonment for an individual.

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7-4.000 LITIGATION: PROCEDURES AND PLEADINGS

Pursuant to 28 C.F.R. §0.40(a), the Assistant Attorney General in charge of the Antitrust Division has supervisory authority over all antitrust suits brought by the Department. While the U.S. Attorney's office handling the particular cases will be responsible for all pre-trial and trial activities, consultation with the Antitrust Division is required when issues of antitrust policy or decisions relating to the disposition of the litigation are involved.

7-4.100 CONSULTATION ON MOTIONS AND OTHER PLEADINGS

Once an antitrust case is filed, the U.S. Attorney's Office will handle all pre-trial and trial issues as it would in any other litigation. Whenever an issue arises that involves novel problems of antitrust law or poses policy questions directly affecting the Antitrust Division's mission, the Director of Operations should be consulted. If the issue is discussed in a brief or other pleading, the pleading should be reviewed and approved by the Director of Operations prior to submission. If time does not permit formal submission to the Office of Operations, the U.S. Attorney should contact the Director by telephone in order to obtain clearance.

7-4.200 SAMPLE INDICTMENT FORMATS

The following indictment format is consistent with Antitrust Division practice and court holdings on the sufficiency of antitrust indictments and should be employed in antitrust criminal cases.

7-4.210 Sample Indictment--Price-Fixing

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA     )  
  )  
  ) Criminal No.  
  )  
  ) Filed:  
\_\_\_\_\_;                                    )  
\_\_\_\_\_;                                    )  
\_\_\_\_\_; and                                )  
\_\_\_\_\_;                                    )  
  ) Defendants.                            )

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INDICTMENT

The Grand Jury charges:

I

DEFENDANTS

1. Each of the corporations named below is hereby indicted and made a defendant herein. During all or part of the period covered by this indictment, the defendants engaged in the business of selling widgets in the United States. Each of the corporations is organized and exists under the laws of the State indicated and has its principal place of business in the city indicated:

<u>Defendant Corporation</u>	<u>State of Incorporation</u>	<u>Principal Place of Business</u>
_____	_____	_____
_____	_____	_____

2. Each of the individuals named below is hereby indicted and made a defendant herein. During all or part of the period covered by this indictment, each of the defendants was employed by the designated defendant corporation in the capacity indicated:

<u>Individual</u>	<u>Defendant Company</u>	<u>Position Held</u>
_____	_____	_____
_____	_____	_____

3. Whenever in this indictment reference is made to any act, deed or transaction of a corporation or company, such allegation shall be deemed to mean that such corporation or company engaged in such act, deed or transaction by or through its officers, directors, agents, employees or representatives while they were actively engaged in the management, direction, control or transaction of its business or affairs.

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II

COCONSPIRATORS

4. Various persons and firms, not made defendants herein, participated as coconspirators in the offense charged herein and performed acts and made statements in furtherance thereof.

III

TRADE AND COMMERCE

5. Widgets are made from various metal products. They are produced in a variety of standard sizes, diameters, lengths and thicknesses for use by the electrical and construction trades in various applications, including air conditioning, refrigeration, and lighting systems. During the period covered by this indictment, widgets were sold by defendant corporations primarily to electrical wholesalers.

6. During all or part of the period covered by this indictment, each of the defendant corporations sold and shipped substantial quantities of widgets in a continuous and uninterrupted flow of interstate commerce to customers located in states other than the states in which the widgets were manufactured. In 1980, total sales of widgets throughout the United States by the defendant corporations were in excess of \$75 million.

7. The activities of the defendants and coconspirators, which are the subject of this indictment, were within the flow of, and substantially affected, interstate commerce.

IV

OFFENSE CHARGED

8. Beginning at least as early as 1979 and continuing thereafter until May 1983, the exact dates being unknown to the Grand Jury, the defendants and coconspirators engaged in a continuing combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. §1).

9. The aforesaid combination and conspiracy consisted of an agreement, understanding and concert of action among the defendants and coconspirators, the substantial terms of which were to raise, fix, and maintain the price of widgets.

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10. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and coconspirators did those things which they combined and conspired to do, including:

(a) Meeting to discuss and establish new price levels for widgets;

(b) Agreeing to use the same price lists for wholesale widget-sales throughout the United States; and

(c) Agreeing among themselves both to sell widgets at list price and to refuse to discount widgets to any customers.

V

EFFECTS

11. The aforesaid combination and conspiracy had the following effects, among others:

(a) Prices of widgets sold by the defendant and co-conspirator companies were raised, fixed and maintained at artificial and noncompetitive levels;

(b) Buyers of widgets were deprived of the benefits of free and open competition in the purchase of widgets; and

(c) Competition among the defendant and co-conspirator companies in the sale of widgets was restrained, suppressed, and eliminated.

VI

JURISDICTION AND VENUE

12. The aforesaid combination and conspiracy was carried out, in part, within the Eastern District of Pennsylvania within the five years next preceeding the return of this indictment.

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A TRUE BILL

DATED:

\_\_\_\_\_  
FOREPERSON

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

\_\_\_\_\_  
United States Attorney

\_\_\_\_\_  
Director of Operations  
Antitrust Division

\_\_\_\_\_  
Assistant United States Attorney  
(Address)

7-4.220 Sample Indictment--Bid-Rigging

In place of ¶¶ 5 through 7 of the format for price-fixing indictments, the "Trade and Commerce" section of a bid-rigging indictment generally sets out the particulars of the bidding process and its relationship to the state and federal regulations and funding that are affected. The following format is generally used:

III

TRADE AND COMMERCE

5. Public highways, including the highways which are the subject of this indictment, are part of a nationwide network of inter-connecting highways over which motor vehicles move in a continuous and uninterrupted stream of interstate commerce from one state to another. A substantial amount of the nation's population and goods moves in interstate commerce over these highways via motor vehicle transportation.

6. During the period covered by this indictment, the \_\_\_\_\_ State Department of Transportation invited highway-construction contractors to submit sealed, competitive bids on highway-construction projects. Such bids were submitted during highway-lettings which customarily occurred monthly in (state capital). The State of \_\_\_\_\_ awarded contracts to the lowest responsible bidder following the opening of the sealed bids by the State Department of Transportation.

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7. During the period covered by this indictment, there was a State of \_\_\_\_\_ law which governed the award of highway-construction projects by the \_\_\_\_\_ State Department of Transportation. That statute provides irrelevant part:

Art. 6674(h). Competitive Bids

All contracts proposed to be made by the State Highway Department for the improvement of any highway constituting a part of the State Highway System or for materials to be used in the construction or maintenance thereof shall be submitted to competitive bids.

8. During the period covered by the indictment, the \_\_\_\_\_ State Department of Transportation required each bidder on a state highway project, including the projects which are the subject of this indictment, to submit a signed affidavit as part of its bid which stated in relevant part:

The undersigned, as bidder, declares that the only person or parties interested in this proposal as principals are those named herein; that this proposal is made without collusion with any other person, firm, corporation or other entity.

9. During the period covered by this indictment, the \_\_\_\_\_ State Department of Transportation, in considering bids for a \_\_\_\_\_ (State) highway-construction project, was governed by \_\_\_\_\_ Highway Department 1972 Standard Specifications for Construction of Highways, Streets, and Bridges which, in part, provides in §2.12:

Disqualification of Bidder

Any or all proposals will be rejected if there is reason for believing that collusion exists among the bidders, and all participants in such collusion will not be considered in future proposals for the same work.

10. During the period covered by this indictment, there was a substantial flow of equipment and other essential materials from suppliers and manufacturers outside of the State of \_\_\_\_\_ for sale to highway-contractors in the State of \_\_\_\_\_ for use in the construction of public highways, including the highway-contractors which are the subject of this indictment.

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11. The activities of the defendants and coconspirators, which are the subject of this indictment, were within the flow of, and substantially affected, interstate commerce.

\* \* \* \* \*

The charging paragraphs of a bid-rigging indictment also differ from a price-fixing pleading since the bid-rigging charge should list which project or projects were the subject of the conspiracy.

IV

OFFENSE CHARGED

12. Beginning at least as early as April, 1980, and continuing thereafter at least until October, 1981, the exact dates being unknown to the Grand Jury, the defendants and coconspirators engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

13. The aforesaid combination and conspiracy consisted of an agreement, understanding, and concert of action among the defendants and coconspirators, a substantial term of which was to submit collusive, noncompetitive, and rigged bids to the \_\_\_\_\_ State Department of Transportation for the award of the following \_\_\_\_\_ highway projects let during May, 1980:

- (a) CAS 41-802; Jones County;
- (b) CSS 123-4-31; Smith County;
- (c) ABC 18-3-20; Clark County; and
- (d) XRB 25-5-12; Brown County.

14. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and coconspirators did those things which they combined and conspired to do, including:

- (a) Discussing the submission of prospective bids on the aforesaid \_\_\_\_\_ highway projects;
- (b) Agreeing upon the successful low bidders on the aforesaid \_\_\_\_\_ highway projects; and

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(c) Agreeing not to bid or to submit intentionally high, noncompetitive bids on the aforesaid \_\_\_\_\_ highway projects.

7-4.300 CIVIL LITIGATION

Civil antitrust actions are usually brought under Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2); Section 7 of the Clayton Act (merger cases) (15 U.S.C. §18); and Section 4(A) of the Clayton Act (Federal antitrust damage actions) (15 U.S.C. §15a). Few civil actions are initiated by U.S. Attorneys; however, if a civil action is contemplated, the U.S. Attorney should consult with the Director of Operations or the local Antitrust Division field office to discuss the contemplated action and to obtain sample pleadings.

7-4.400 DISPOSITION OF CRIMINAL ACTIONS

Any matter involving the disposition of a criminal antitrust case must be approved by the Assistant Attorney General in charge of the Antitrust Division, and should be first reviewed by the Director of Operations.

7-4.410 Plea Agreements

Plea agreements require the approval of the Assistant Attorney General, particularly where counts are being dismissed, individuals or companies are being promised no further prosecution, or particular sentences are being recommended. The Director of Operations should be advised of a proposed plea agreement before it is finalized.

7-4.420 Sentencing Recommendations

The Antitrust Division has a standard sentencing policy that it employs in its cases, and a company's or individual's ability to pay a fine is often analyzed by the Division's Corporate Finance Unit. Sentencing recommendations must be approved by the Assistant Attorney General, through the Director of Operations, prior to their submission to the Probation Office.

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7-4.500 APPEALS

The Antitrust Division's Appellate Section is responsible for handling all appeals in antitrust cases. At the conclusion of the case, the U.S. Attorney should consult with the Division's Appellate Section through the Director of Operations.

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7-5.000 IDENTIFYING, DETECTING AND PROVING VIOLATIONS OF THE SHERMAN ACT

Section One of the Sherman Act (15 U.S.C. §1) prohibits any conspiracy or agreement that unreasonably restrains interstate trade or commerce. The most frequent violations of the Sherman Act are price fixing and bid rigging, both of which are usually prosecuted as criminal violations. Refer to USAM 7-2.100 for maximum penalties upon conviction.

This chapter outlines the elements of the offense, and the methods of identifying and detecting Sherman Act violations.

7-5.100 ELEMENTS OF THE OFFENSE

To establish a violation of Section 1 of the Sherman Act, the government must prove three essential elements:

- A. That a combination or conspiracy existed;
- B. That this combination or conspiracy was an unreasonable restraint of trade or commerce; and
- C. That the trade or commerce restrained was interstate in nature.

7-5.110 Conspiracy or Agreement

The conspiracy or agreement to fix prices or to rig bids is the key element of a Sherman Act case. In effect, the conspiracy must comprise an agreement, understanding or meeting of the minds between at least two competitors, for the purposes or with the effect of unreasonably restraining trade. The agreement itself is what constitutes the offense; overt acts in furtherance of the conspiracy are not essential elements of the offense and need not be pleaded or proven in a Sherman Act case.

In a Sherman Act criminal action, general intent must be proven. Customarily, however, proof of the existence of a price-fixing or bid-rigging agreement is sufficient to establish intent to do what the defendants agreed among themselves to do.

The agreement need not be embodied in express or formal contractual statements. It must merely constitute some form of mutual understanding that the parties will combine their efforts for a common, unlawful purpose. The ultimate success of the venture is immaterial as long as the agreement is in fact formed.

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7-5.120 Unreasonable Restraint of Trade

Price-fixing and bid-rigging are among the group of antitrust offenses that are considered per se unreasonable restraints of trade. The courts have reasoned that these practices have no legitimate justification and lack any redeeming competitive purpose and should, therefore, be considered unlawful without any elaborate analysis of their reasonableness, economic justification or other factors.

For most other antitrust offenses, the courts have established an analytical approach labeled the "Rule of Reason." Under the Rule of Reason, the courts may undertake an extensive evidentiary study of whether there are justifications relating to the restraint. Under the Rule of Reason, if the justification outweighs the harm, the practice at issue is not unlawful.

Virtually all antitrust offenses likely to be prosecuted by a U.S. Attorney's Office will be governed by the per se rule.

7-5.130 Interstate Trade and Commerce

Finally, the restraint must be shown to be in the flow of, or to affect interstate trade and commerce. This is ordinarily satisfied by demonstrating that products involved in the case were shipped across state lines, that services involved interstate activities, or that significant federal funding was involved.

Since there are cases where the manner of proving interstate commerce is very difficult, it would be useful to discuss the theory of interstate commerce with the Office of Operations or local Antitrust Division field office in advance of proposing the case.

7-5.140 Single Versus Multiple Conspiracies

In addition to proving the elements of the offense, it is always necessary to determine the scope of the conspiracy and the actors who participated in it. The most difficult issue in many of these cases involves the determination of what constitutes the conspiracy. In price-fixing and bid-rigging cases, it is especially important to determine if a single, continuing conspiracy was in existence involving numerous price changes or bid awards, or whether certain isolated price changes or bid

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awards constituted separate conspiracies. Consultation with the Director of Operations or the local field office is usually helpful in analyzing these issues.

7-5.200 IDENTIFYING SHERMAN ACT VIOLATIONS

The most common violations of the Sherman Act--and the violations most likely to be prosecuted criminally--are horizontal price-fixing, bid-rigging and market allocation. This section will identify and describe the various types of price-fixing and bid-rigging, as well as describe the methods of detecting violations. These descriptions should be useful for investigative planning by U.S. Attorneys, Special Agents of the Federal Bureau of Investigation, and other federal investigators.

7-5.210 Identifying Price-Fixing Activities

Price-fixing generally involves any artificial tampering with prices or price levels, or terms and conditions of sale for commodities or services. Generally speaking, price-fixing involves an agreement by a number of producers of a specific commodity, or providers of a particular service in a defined geographic area, to raise or set prices for their goods or services. It may take place at either the wholesale or retail level and, although it need not involve every competitor in a particular market, it usually involves most of the competitors in the particular market.

In its most common form, price-fixing is an agreement to raise the price of a product or service to a specific amount, e.g., all widget manufacturers agree to a 5% increase in price effective June 1, 1984. Other manifestations of price-fixing include the following:

- A. Agreements to establish or adhere to uniform price discounts;
- B. Agreements to eliminate discounts to all customers or certain types of customers;
- C. Agreements to adopt a specific formula for the computation of selling prices;
- D. Agreements on terms and conditions of sale, including uniform freight charges, quantity discounts, or other differentials that affect the actual price of the product; and

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E. Agreements not to advertise prices or to refuse to sell the product through any bidding process.

The fact that all competitors charge the same price, or use the same terms of sale, is not, in itself, evidence of a price-fixing conspiracy. However, where price increases are announced by all competitors at the same time, or prior to a uniform effective date, there is a substantial likelihood of collusion.

Further, the fact that all prices are not identical does not indicate the absence of a conspiracy. For example, one company may have traditionally sold at a price lower than the others; however, when a general increase in price occurs, the company with the lower price may adopt the same percentage or absolute increase as the others.

Records of changes of prices, including price lists, price-change notices, and company memoranda relating to price analysis, are all helpful in determining the existence of a conspiracy. In addition, evidence of competitors' meetings or telephone conversations raise the strong possibility of collusion, and such evidence usually comprises the most effective form of proof in price-fixing cases.

7-5.220 Identifying Bid-Rigging Activities

Bid-rigging generally involves an agreement or arrangement among companies to determine the successful bidder in advance of a bid letting at a price set by the successful bidder. The agreed upon winning bidder customarily advises the other potential bidders of the bid amount they must exceed (usually the amount of the winning bid or a certain amount above that bid). The higher bids submitted by the other bidders are generally known as complementary bids. Also, some of the potential bidders may refrain from bidding on a particular project. In most bid-rigging situations, the conspirators endeavor to submit three or more bids on the project to create the appearance that competitive bidding has occurred.

In other situations, the potential bidders may agree to (a) rotate the projects among themselves, thereby assuring that each gets some work; (b) allocate geographic areas, so that the bidder closest to the job site is always the winner; or (c) divide the project by granting subcontracts to several bidders or contractors for portions of the work. Where companies that submitted high or complementary bids on a specific project are later identified as project subcontractors, the bids should be analyzed carefully.

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The Antitrust Division has worked with many federal and state agencies to identify the most effective methods of detecting bid rigging. Based on experience in this area, the most useful bid analysis techniques usually require careful study of records of the bid, including an initial screening of bid submissions to determine:

A. Whether there was any cost estimate for the project prepared by the governmental or private authority letting the bids, and if so, whether the low bidder's final price exceeded the estimate. It is also quite important to know whether the bidders and potential bidders were aware of the cost estimate prior to bidding since the bidders could use that information to set their agreed upon low bid at or above the estimate of cost without serious danger that the bids will be rejected as too high. Bidders ordinarily know the percentile range above the estimate of cost that the bidding authority is likely to accept before the bidding authority would recommend rejecting the bids and rebidding the project.

B. Whether there were fewer than six bidders or six proposed holders for a project. As a practical matter, when there are a large number of bidders or potential bidders for a project, it is more difficult to rig the bids.

After this initial screening, suspicious bids should be analyzed for the following practices, which are frequently indicia of collusion:

A. Qualified bidders fail to bid, or, more specifically, the logical bidders for the job fail to bid;

B. Certain contractors repeatedly bid against one another or, conversely, certain contractors never bid against one another;

C. Successful bidders repeatedly subcontract work to companies that submitted higher (or complementary) bids on the same projects, or to companies that requested or received proposals for bids but did not submit bids;

D. Different groups of contractors appear to specialize in winning bids from certain kinds of customers, to the exclusion of others, suggesting that customers have been allocated among the bidders;

E. A particular contractor appears to bid substantially higher on some bids than on other bids within the same period of time and geographic area (where there would be little or no difference in material, manpower, or transportation costs for the projects). This can be detected if the bids are submitted with item-by-item-cost listings (line-item basis) rather than by a single price;

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F. A particular contractor always wins the projects in a certain geographic area;

G. Certain contractors submit bids frequently in a given geographic area but never win there;

H. Identical bid amounts on particular line items are submitted by two or more contractors. In some instances, identical line-item bids can be explained, since suppliers often quote the same prices to several bidders. However, a large number of identical bid items, or identical bids on any service-related item, should be viewed critically;

I. Contractors previously convicted of bid rigging in other states or areas submit bids;

J. Joint-venture bids are submitted where either contractor in the venture could have bid individually as the prime contractor; and

K. The original bidders fail to rebid when the original bids were rejected for being too far over estimate, or a rebidding results in the same bidders being ranked in the same order as on the original bidding.

The Director of Operations of the Antitrust Division, or the chief of the local Antitrust field office, can aid in determining how to analyze bid data. The Antitrust Division's Information Systems Support Group (ISSG) has conducted analyses of bid data, and can provide specific technical assistance, as can the offices of inspectors general in several federal agencies.

In addition to the analysis of data that is essential in a bid-rigging investigation, the most important evidence to be developed relates to meetings or discussions of bids among the competing bidders. Often, they meet at the bid-letting site to finalize their bids--this is also where agreements to rig bids are often established. To determine what actually occurred at these meetings it is frequently necessary to rely on the testimony of participants in the conspiracy willing to testify.

7-5.230 Identifying Other Per Se Violations of the Sherman Act

In addition to price-fixing and bid-rigging, there are two other types of per se Sherman Act violations that may be detected in the course of an antitrust investigation. These are customer allocation and territorial allocation.

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Customer allocation is an agreement among a group of competitors that each will service certain designated customers or classes of customers and will not attempt to compete for the business of customers allocated to a competitor.

Territorial allocation is an agreement among competitors to solicit or service customers only within a certain geographic area. The competitors who agree to this type of arrangement will often reject business from customers in other's territory. Both customer and territorial allocation schemes result in an absence of competition in prices and choice of products for the affected customers.

These two violations are usually investigated by interviewing the affected customers and reviewing their records. These activities will customarily be prosecuted as criminal violations of the Sherman Act.

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