
Title 7

Antitrust Division

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7-1.000 POLICY

7-1.100 DEPARTMENT OF JUSTICE POLICY AND RESPONSIBILITIES

The U.S. antitrust laws represent the legal embodiment of our nation's commitment to a free market economy in which the competitive process of the market ensures the most efficient allocation of our scarce resources and the maximization of consumer welfare. The Department of Justice is responsible for enforcing the federal antitrust laws, which essentially prohibit private restraints of trade (such as price-fixing, bid-rigging and other collusive arrangements among competitors) that unreasonably impede the free forces of the market. The Antitrust Division is responsible for coordinating the Department's antitrust enforcement and public policy advocacy efforts, and has jurisdiction for the statutes described in USAM 7-4.000, *infra*, among others.

The Antitrust Division accomplishes its mission in two principal ways. First, as an enforcement agency, it prosecutes violations criminally and civilly, primarily under the Sherman and Clayton Acts. Second, it advocates competition before Congressional committees and federal regulatory agencies, articulating pro-competitive solutions for economic problems. (The Division's competition advocacy functions are not treated in this Title, but are outlined in USAM 1-2.201).

U.S. Attorneys' offices should watch for manifestations of price-fixing, bid-rigging, or other types of collusive conduct among competitors that might have the effect of allocating customers, restricting output, or raising price: such conduct would constitute a criminal violation of Section 1 of the Sherman Act. See USAM 7-1.200, *infra*. A U.S. Attorney with evidence of a possible antitrust violation should consult with either the Director of Operations of the Antitrust Division in Washington, 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 because they have specific expertise in particular industries and markets. In some cases, however, it may be more advantageous for the U.S. Attorney's Office to investigate and prosecute a matter, particularly where localized price-fixing or bid-rigging conspiracies are involved or where the antitrust violations are part of an overall course of criminal conduct being investigated by the U.S. Attorney's Office.

The Antitrust Division, through the Director of Operations, may refer antitrust investigations to a U.S. Attorney. 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 ensures a

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consistent national policy on antitrust questions. Accordingly, the Division's approval is required at various stages of the investigation, as outlined in USAM 7-2.100 *et seq.*, *infra*.

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

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economy and to the consuming public. We depend upon your effective action.'

7-1.210 Notification to Targets

The Antitrust Division, of course, follows the Department's general practice of informing individuals, under certain circumstances, that they are targets of an investigation and 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.

Counsel for corporate and individual targets of the investigation may request 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. The U.S. Attorney will be notified in advance of all such meetings and may be present.

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7-2.000 PRIOR APPROVALS

PRIOR APPROVAL REQUIREMENTS

USAM SECTION	TYPE & SCOPE OF APPROVAL	WHO MUST APPROVE	COMMENTS
7-5.100; .210	Inquiry into possible antitrust violations.	Director of Operations, Antitrust Division	Written request and written approval required.
7-5.310	Grand jury investigation of possible antitrust violations.	Assistant Attorney General, Antitrust Division	Written request and written approval required.
7-5.400; .410	Initiate civil or criminal antitrust case.	Assistant Attorney General, Antitrust Division	Written request and written approval required.
7-5.610; .611; .612	Disposition of criminal actions, including plea agreements and sentencing recommendations.	Assistant Attorney General, Antitrust Division	

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7-3.000 ORGANIZATION OF THE DIVISION

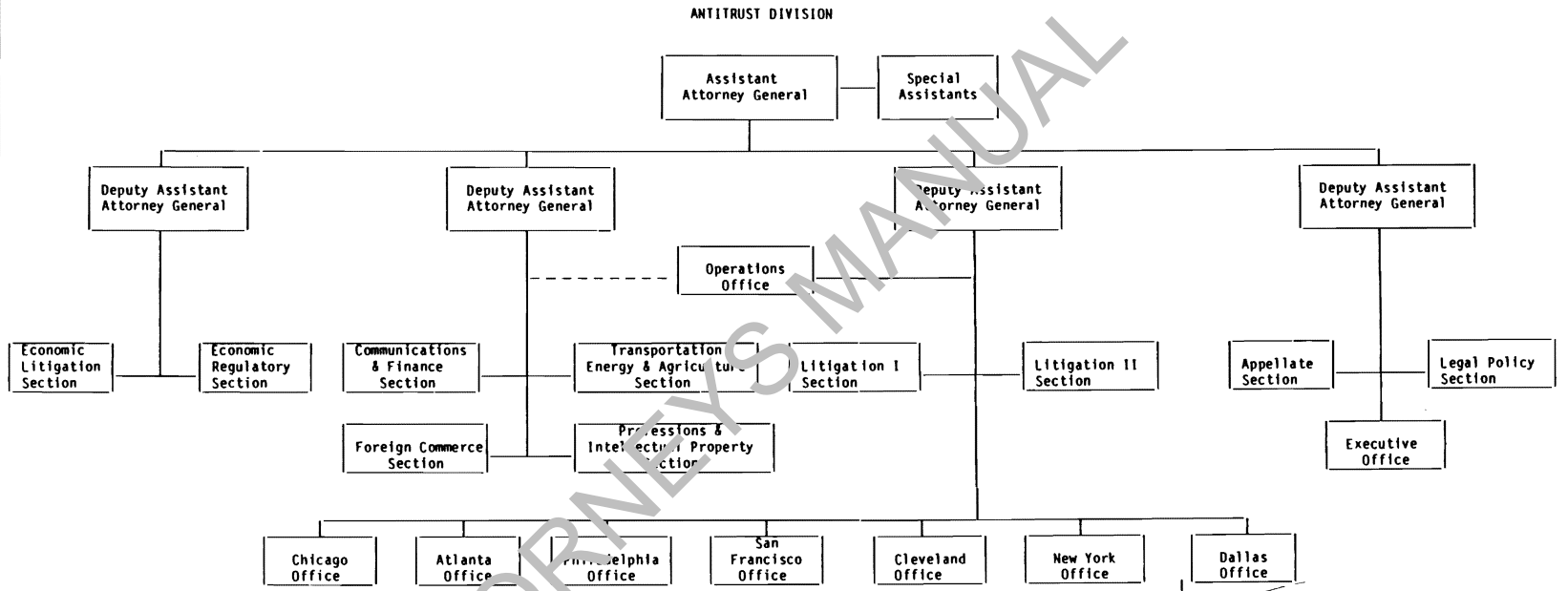
7-3.100 OFFICE OF THE ASSISTANT ATTORNEY GENERAL

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 7-3.200.

7-3.200 ORGANIZATIONAL CHART

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

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7-3.300 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.

7-3.400 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 affect national or multi-regional markets. They handle significant mergers and acquisitions, major civil investigations in which structural relief, such as divestiture, is anticipated, and conspiracies of regional or national 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 litigating section.

7-3.500 SPECIALIZED SECTIONS

The Division's remaining Washington 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 health care), drug commodities, labor, newspapers and motion pictures.

Two sections—the Transportation, Energy, and Agriculture Section and the Communications and Finance Section—investigate and litigate antitrust violations, appear in proceedings before regulatory agencies to advocate competitive policies, 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, including civil and criminal litigation, relating to energy, transportation, and all agricultural industries. The Communications and Finance Section is responsible for the fields of banking, finance, securities, and communications, including telecommunications.

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The Foreign Commerce Section is primarily responsible for the development of Division policy on issues of foreign 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 most enforcement matters, assisting 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 the United States under the federal antitrust laws, as well as all amicus filings in antitrust cases, and the Legal Policy Section, which prepares legal analyses of new or unusually difficult issues of antitrust law that arise in statutory enforcement or regulatory agency proceedings and is responsible for handling all legislative matters.

7-3.600 FIELD OFFICES

7-3.610 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 antitrust 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 7-3.611, *infra*.

7-3.611 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.

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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 60604.

Chief: Kent Brown. 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.

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 542-4070.

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: Alan A. Pason. Phone: (214) 767-8051, FTS 729-8051.

Arkansas, Louisiana, New Mexico, Oklahoma, and Texas.

New York Field Office

26 Federal Plaza, Room 3030, New York, New York 10278-0096.

Chief: Ralph T. Giordano. Phone: (212) 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 579-7405.

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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7-4.000 STATUTES IN GENERAL

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

7-4.100 SHERMAN ACT, 15 U.S.C. §§ 1 to 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 7-6.000, *infra*. While every violation of this Act is technically a felony, the Department reserves criminal prosecution for so called "'naked'" restraints of trade among competitors, e.g., price-fixing and bid-rigging, that are *per se* illegal. Violations of this Act occurring prior to January 1, 1985, carry 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 for crimes committed after that date.

7-4.200 CLAYTON ACT, 15 U.S.C. §§ 14, 18, 19, and 20

This Act prohibits the corporate and other mergers and the acquisition of stock or assets, 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. Offenses of this Act are prosecuted civilly.

7-4.400 ANTITRUST PROCEDURES AND PENALTIES ACT, 15 U.S.C. § 16

This Act requires that proposed consent judgments in government anti-trust 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.

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7-5.000 PROCEDURES

7-5.100 INVESTIGATIONS

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. When a U.S. Attorney wishes to conduct such an investigation, he/she must obtain the approval of the Antitrust Division before beginning. The initial investigation of a potential antitrust investigation 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. The U.S. Attorney should also feel free to consult with the chief and assistant chief of the Division's field office in his/her geographic area.

7-5.200 STANDARDS FOR INITIATING A PRELIMINARY INQUIRY

Generally, a preliminary inquiry should be initiated if the facts presented appear to support a legal theory of an antitrust violation and the investigation will not duplicate other efforts of the Division, the Federal Trade Commission, or another U.S. Attorney.

Based on these general guidelines, a request for preliminary inquiry authority is reviewed by the Director of Operations. If the request meets these standards and clearance is obtained from the Federal Trade Commission, see USAM 7-5.220, *infra*, preliminary inquiry authority is granted.

7-5.210 Making a Request for Preliminary Inquiry Authority

If a U.S. Attorney believes that a matter is appropriate for a preliminary inquiry, 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;
- B. The alleged illegal practice (the specific practice should be outlined, if practicable, *e.g.*, price-fixing, bid-rigging, 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 names and locations of companies and individuals involved to the extent known;

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E. The geographic area involved, *e.g.*, nationwide, middle Atlantic region Montgomery County, Maryland; Eastern Virginia, etc.; and

F. A short, factual summary of the information upon which the request is based. This need be no more than a paragraph or two. Special considerations, such as the existence of private litigation or any particularly difficult legal issues, should also be discussed.

This detailed information is necessary for evaluating the request, obtaining FTC clearance, and determining whether any section or field office of the Antitrust Division or the FTC is investigating, or has investigated, the same activity.

Approval, subject to FTC clearance, should take no more than three working days and may be expedited when necessary.

7-5.220 FTC Clearance Procedure

All requests 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 inter-agency clearance is to ensure 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 will arrange to obtain FTC clearance on behalf of the U.S. Attorney. An investigation of criminal conduct, *i.e.*, bid rigging or price-fixing, is invariably and promptly cleared by the FTC.

7-5.230 Assistance From the Antitrust Division

The discussion of investigating and proving price-fixing and bid-rigging violations, *see* USAM 7-6.220, *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 7-3.611, *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, and can serve as, or obtain, expert witnesses. Requests for assistance by Division economists may be made to the Office of Operations.

7-5.300 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 may be desirable at the time the U.S. Attorney's Office is formulating a request for grand jury authorization.

7-5.310 Requesting a Grand Jury Investigation

If, based upon evidence initially presented to the U.S. Attorney or 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 for grand jury authority should be in the form of a brief memorandum (1-3 pages) that specifies, to the extent possible; (a) the companies, individuals, industry and commodity involved in the investigation; (b) the relevant statute(s); (c) the geographic area involved and judicial district where the investigation will be conducted; (d) the nature of the alleged violation, and (e) the basis for concluding a grand jury is warranted. (See generally USAM 7-5.210, *supra*.) If this grand jury memo initiates the investigation, i.e., if no preliminary investigation was required, the Office of Operations will seek FIC clearance based upon the grand jury request memorandum.

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. The U.S. Attorney is advised promptly of the decision. This approval process generally takes no more than three working days, and may be expedited where necessary.

In the course of a grand jury investigation of other criminal conduct, a U.S. Attorney often also will develop evidence of antitrust violations. Such evidence may support either inclusion of antitrust counts in an indictment charging other crimes or indictment on antitrust charges alone. As soon as such evidence is developed, the U.S. Attorney should contact the Director of Operations to apprise him/her of the possible antitrust violations, and to determine that no office of the Antitrust Division or the Federal Trade Commission is investigating the same conduct. Although, under these circumstances, further development of the evidence regarding the antitrust violations through the grand jury does not require authorization by the Assistant Attorney General, subsequent consideration of any proposed antitrust cases or counts may be expedited by keeping the Director of Operations generally apprised of antitrust developments.

7-5.400 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 count or counts will be recommended and how the investigation might be concluded. The

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Director of Operations or other contacts within the Antitrust Division are available for consultation in this regard.

Three tasks usually are undertaken at the conclusion of an investigation. First, the U.S. Attorney determines whether to proceed with criminal or civil antitrust charges and selects the defendants to be recommended for prosecution. Second, the U.S. Attorney may, at his/her discretion, give counsel for the potential antitrust defendants an opportunity to present their views to the prosecutors. Finally, the U.S. Attorney and the staff prepare a brief prosecution memorandum and pleadings for the antitrust charges. This fact memorandum should be received by the Director of Operations at least two weeks before the case is scheduled to be filed.

Upon receipt of the fact memorandum, the Director of Operations and other reviewers will assess the merits of the antitrust charges. This review will focus primarily upon whether the facts as set forth meet the legal and policy requirements for a criminal antitrust violation. Assessment of the weight of the evidentiary support for the antitrust charges and litigation strategy will be left to the U.S. Attorney. The Assistant Attorney General in charge of the Antitrust Division makes the final decision whether to seek an indictment, file a civil suit or decline prosecution.

7-5.410 Preparation of Fact Memorandum

The fact memorandum should be prepared by the U.S. Attorney's staff as a brief summary statement of the factual and legal basis for the proposed charges. The purpose of the fact memorandum is to serve as a vehicle for consideration of the case in the review process, including identification of any antitrust policy issues that the case may raise.

The fact memorandum should be prepared after any meetings with defense counsel, and, if appropriate, allowing the "targets" to appear before the grand jury.

The memorandum should be forwarded to the Director of Operations accompanied by all pleadings (indictments, informations or complaints) in the matter and a draft press release. Sample pleadings and press releases are available from the Office of Operations and from the field offices.

7-5.420 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 the U.S. Attorneys.

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The memorandum should briefly summarize the highlights of the case, summarize the evidence in context, and set forth the general framework of the case. This discussion should include at least the following elements:

- A. The statutory provision(s) violated;
- B. The judicial district in which the proposed indictment would be returned or information filed, and, if appropriate, the expiration date of the grand jury;
- C. The proposed corporate and individual defendants, including the company affiliation and position of individual defendants;
- D. The duration of the conspiracy;
- E. The product or service involved;
- F. The geographic area involved;
- G. The level of product distribution (e.g., manufacturers, wholesalers, retailers);
- H. A brief summary of the evidence indicating how the conspiracy was formed or carried out and the evidence as to the involvement of each defendant;
- I. The amount of commerce affected on an annual basis; and
- J. A reference to any potential defenses or other problems the U.S. Attorney perceives, such as the statute of limitations, interstate commerce, single/multiple conspiracy issues, etc.

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

If applicable, the memorandum should analyse whether it would be appropriate to bring a companion federal damage action. If a damage action is recommended, the memorandum should describe in detail the damage theory and estimate the amount of damages.

7-5.421 Civil Actions Generally

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 given the more complex issues of antitrust policy

and analysis involved civil cases generally rely upon "Rule of Reason" analysis, see Section 7-6.120, *infra*. Such analysis requires substantial economic input and evaluation.

7-5.500 PROCEDURES FOR REVIEW OF CASE RECOMMENDATIONS

After drafting the fact memorandum, pleadings, and a press release, the package is sent to the Director of Operations for review. (As previously noted, sample pleadings and press releases are available from the Office of Operations and the field offices.)

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. This process generally will take no more than ten working days and may be expedited where necessary, see Section 7-5.400, *supra*.

Only in rare circumstances, where significant and novel issues are raised, will counsel for the potential defendants be provided with an opportunity to meet with the Assistant Attorney General. Generally, the Director of Operations will meet with counsel for a proposed defendant, if such a meeting is requested.

The U.S. Attorney will be informed immediately when a final decision is made by the Assistant Attorney General. 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 immediately inform the Office of Operations of that fact 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.

7-5.600 LITIGATION

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. Although the U.S. Attorney's Office handling a particular case is responsible for all pre-trial and trial activities, consultation with the Director of Operations is required whenever issues of antitrust policy or novel issues of antitrust law are raised in litigation.

7-5.610 Disposition of Criminal Actions

Disposition of a criminal antitrust case by plea or dismissal must be approved by the Assistant Attorney General in charge of the Antitrust

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Division after review by the Director of Operations. Such approval may be obtained orally through the Director of Operations.

7-5.611 Plea Agreements

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

7-5.612 Sentencing Recommendations

Sentencing recommendations should be consistent with the U.S. Sentencing Commission Guidelines for sentencing antitrust violations. Sentencing recommendations must be approved by the Assistant Attorney General, through the Director of Operations, prior to their submission to the Probation Office.

7-5.620 Appeals

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

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7-6.000 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 7-4.100 for maximum penalties upon conviction.

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

7-6.100 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 or affected interstate trade.

7-6.110 Conspiracy or Agreement

The conspiracy or agreement to fix prices or to rig bids is the key element of a Sherman Act criminal case. In effect, the conspiracy must comprise an agreement, understanding or meeting of the minds between at least two competitors or potential 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.

7-6.120 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, which invariably have the effect of raising prices to consumers have no legitimate justification and lack any redeeming competitive purpose and should, therefore, be considered unlawful without any further 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 (1) whether the practice in question in fact is likely to have a significant anticompetitive effect in a relevant market and (2) whether there are any procompetitive efficiency justifications relating to the restraint. Under the Rule of Reason, if any anticompetitive harm would be outweighed by the practice's procompetitive efficiency effects the practice 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.

7-6.130 Interstate Trade and Commerce

Finally, the restraint must be shown to be in the flow of, or to affect interstate trade and commerce. This test 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 may be cases in which the manner of proving interstate commerce may be difficult, in those cases 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 a case.

7-6.140 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 whether a single, continuing conspiracy was in existence involving numerous price changes or bid awards, or whether certain isolated price changes or bid awards were the subjects of separate conspiracies. Consultation with the Director of Operations or the local field office is usually helpful in analyzing these issues.

7-6.200 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-rig-

ging, and market, or customer allocation between competitors (commonly described as "horizontal agreements"). This section will identify and describe the various types of price-fixing, bid-rigging and market and allocation, 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. For further guidance, see *An Antitrust Primer for Federal Prosecutors*, Antitrust Division February 1988. Vertical resale price maintenance, or agreement on price between a manufacturer and its distributors, is not prosecuted criminally because of the difficulty of distinguishing between vertical price agreements which are per se unlawful and other vertical restraints such as exclusive territories, that are judged under the Rule of Reason.

7-6.210 Identifying Price-Fixing Activities

Price-fixing generally involves any agreement between competitors to tamper with prices or price levels, or terms and conditions of sale for commodities or services. Generally speaking, price-fixing involves an agreement by two or more 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
- 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, by itself, evidence of a price-fixing conspiracy because similar prices may in fact be the outcome of competition. However,

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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; and, 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 or 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 possibility of collusion, and such evidence usually comprises the most effective circumstantial form of proof in price-fixing cases. Antitrust conspiracy cases, however, like other conspiracy cases, generally require testimony from a member of the conspiracy.

7-6.220 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 a 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, 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.

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 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 not too far 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 was a small number of proposed bidders for a project. As a practical matter, when there are a large number of bidders, e.g., more than six, for a project, it is more difficult, although not impossible, 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 bids on the same project, 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;

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;

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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.

7-6.230 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* illegal agreements among competitors that may be detected in the course of an antitrust investigation. These are customer allocation and territorial allocation.

Customer allocation is an agreement among 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 another's territory. Both customer and territorial allocation schemes result in an absence of competition in prices and choice of products for the affected customers.

CODE OF FEDERAL REGULATION REFERENCES

Code of Federal Regulation		Code of Federal Regulation	
Title and Section	USAM Section	Title and Section	USAM Section
28 C.F.R. § 0.40	7-1.100	28 C.F.R. § 0.40	7-5.100
		28 C.F.R. § 0.40	7-5.300
		28 C.F.R. § 0.40	7-5.600

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UNITED STATE CODE REFERENCES

United States Code		United States Code	
Title & Section	USAM Section	Title & Section	USAM Section
15 U.S.C. §§ 1-7	7-4.100	15 U.S.C. § 14	7-4.200
15 U.S.C. § 1	7-5.210	15 U.S.C. § 15a	7-5.421
15 U.S.C. § 1	7-5.421	15 U.S.C. § 16	7-4.400
15 U.S.C. § 1	7-6.000	15 U.S.C. § 18	7-4.200
15 U.S.C. § 2	7-5.421	15 U.S.C. § 18	7-5.421
		15 U.S.C. § 19	7-4.200
		15 U.S.C. § 20	7-4.200

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