

AN ANTITRUST PRIMER FOR FEDERAL LAW ENFORCEMENT PERSONNEL

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I. INTRODUCTION

The purpose of this Primer is to provide federal law enforcement personnel with a quick overview of federal antitrust crimes.¹ Specifically, the Antitrust Division wants to share with you the hallmarks of price-fixing, bid-rigging, and market allocation conspiracies.

Price-fixing, bid-rigging, and market allocation agreements are economic crimes with potentially devastating effects on the U.S. economy. They rob purchasers, hurt workers, contribute to inflation, destroy public confidence in the economy, and undermine our system of free market competition. Deterring, detecting, and successfully prosecuting these offenses is therefore a crucial part of the Antitrust Division's mission.

We cannot fulfill this mission without the assistance and support of other federal law enforcement personnel. Antitrust Division investigations are typically conducted through a team approach, with attorneys, paralegals, support personnel, and agents.

We look forward to working with you and hope that your experience in working with us is as positive as the experience described by one FBI Special Agent on detail to the Antitrust Division:

My assignment to the Department of Justice's Antitrust Division came after almost twelve years of investigative experience with the Federal Bureau of Investigation. By that time, I had experience with just about every possible investigative technique used by the Bureau. The assignment was voluntary and believed largely to be a typical white-collar assignment. Within a short while after taking the assignment, I met some of the most professional, hard-charging, creative DOJ attorneys I have met to date. Their enthusiasm, level of competence, and extremely positive attitude combined with my knowledge of the investigative tools available through the Bureau led to one of the most successful white-collar cases to date. As a result, I count my detail to the Antitrust Division as part of a very short list of great assignments in my law enforcement career.

II. THE SHERMAN ACT

Section 1 of the Sherman Act (15 U.S.C. § 1) prohibits any agreement among competitors that unreasonably limits competition. Section 1 reads: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is

¹ This Primer provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. No limitations are hereby placed on otherwise lawful investigative and litigation prerogatives of the Department of Justice.

declared to be illegal” Price fixing, bid rigging, and market allocation are violations of Section 1 and are prosecuted criminally.

A. Overview of Criminal Antitrust Conspiracies

Per Se Violations. Price fixing, bid rigging, and market allocation are generally prosecuted criminally because they have been found to be unambiguously harmful, that is, per se illegal. Such agreements have been shown to defraud consumers and unquestionably raise prices or restrict output without creating any plausible offsetting benefit to consumers, unlike other business conduct that may be the subject of civil lawsuits by the federal government.

Limited Defenses. In a case alleging a price-fixing, bid-rigging, or market allocation agreement, it is not a defense that the challenged conduct was necessary to avoid cutthroat competition, or that it actually stimulated competition, or that it resulted in reasonable prices. Defendants cannot offer evidence to demonstrate the reasonableness or the alleged necessity of the challenged conduct. The essence of price fixing, bid rigging, and market allocation is simply this: consumers believe they are making purchases in a competitive market when, in reality, conspirators agreed not to compete.

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

- 1) The charged conspiracy was knowingly formed and was in existence at or about the time alleged;
- 2) The defendant knowingly joined the charged conspiracy; and
- 3) The charged conspiracy either substantially affected interstate or foreign commerce or occurred within the flow of interstate or foreign commerce.

Agreement Is Key. The agreement is the essence of a Section 1 violation. To prove an agreement, we must establish a meeting of the minds or mutual understanding between two or more independent business entities or individuals. The agreement can be established by direct evidence (*e.g.*, co-conspirator testimony that the defendant agreed to fix prices) or circumstantial evidence (*e.g.*, bids that establish a pattern of business being rotated among competitors).

The conspiratorial agreement must occur in, or affect, interstate or foreign commerce.

Sherman Act cases do not require proof of overt acts. Nor are we required to prove loss/harm.

Attempts to fix prices, rig bids, or allocate markets are not prosecutable under this statute. The Antitrust Division, however, has used the mail and wire fraud statutes to prosecute attempts to fix prices or rig bids where the U.S. mails or interstate phone lines were used in the attempt.

Proof of the Conspiracy. In Sherman Act prosecutions, there is often evidence of an oral agreement between competitors. Proof of an oral agreement usually comes from the testimony of conspirators about what was said by the conspirators when they agreed not to compete or about what they understood the agreement to be. The witnesses upon whom the government relies are typically present or former employees in the middle- or upper-level of management.

In many of our cases, we also have documentary evidence of an agreement, for example in the form of emails, text messages, calendar entries, and notes.

Although overt acts in furtherance of the agreement are not required to prove a Sherman Act violation, we often offer this evidence at trial to prove the existence of the agreement. Overt acts can include secret meetings among corporate representatives, the issuance of price lists, bid submissions, phone calls and conversations between competitors to exchange future bid numbers or other confidential customer information, and the use of code words to conceal the conspiracy.

Proof of these overt acts generally comes from the testimony of conspirators, supported by documents, such as bids, price lists, price quotations, transmittal letters, telephone records, appointment books, job estimates, and expense account records. These documents are important pieces of evidence that can also corroborate witness testimony.

Finally, we often seek to introduce evidence regarding victims of the offense. Victims who testify that they were deceived and cheated by the conspirators can have a substantial impact with the jury.

Statute of Limitations. The statute of limitations for most criminal conspiracies, including antitrust conspiracies, is five years. 18 U.S.C. § 3282.

Punishment. Price fixing, bid rigging, and market allocation are felonies punishable by a fine of up to \$100 million for corporate entities, and a fine of up to \$1 million or ten years' imprisonment (or both) for individuals.

These violations are also subject to the alternative fine provision in 18 U.S.C. § 3571, which permits a fine of up to twice the gross financial loss or gain resulting from a violation.

Victims. The victims of price fixing, bid rigging, and market allocation can include private parties and government entities, whether federal, state, or local.

i. Price Fixing

Price fixing is an agreement among competitors at any level of the economy (manufacturers, distributors, or retailers) to raise, fix, or otherwise maintain the price at which their products or services are sold. Price fixing can take many forms, such as an agreement among manufacturers of a particular product to establish a minimum price for that product, or an agreement among competing buyers of a product to lower the prices they will pay for that product. Price fixing is any agreement among competitors that affects the ultimate price or terms of sale for a product or service. It is not necessary that the conspirators agree to charge exactly the same price for a given item; for example, an agreement to raise individual prices by a certain amount or maintain a certain profit margin also violates the law. Other examples of price fixing include agreements to:

- Establish or adhere to uniform price discounts
- Eliminate discounts
- Adopt a standard formula for prices
- Notify others before reducing prices

- Fix credit terms
- Add a fee or a component of price, such as a fuel surcharge
- Maintain predetermined price differentials between different quantities, types or sizes of products

Two recent price-fixing investigations are summarized below.

Liquid Crystal Display Conspiracies: An investigation by the Antitrust Division and the Federal Bureau of Investigation revealed a conspiracy to fix the prices of liquid crystal display (LCD) panels—a product used in computers, cell phones, and other household electronics. The conspiracy operated primarily in Taiwan, where the major Taiwan and Korean LCD companies held secret “Crystal Meetings,” occurring at rotating hotels to avoid detection, at which the conspirators systematically fixed the prices of LCD panels used for many electronics products. The conspirators summarized their pricing agreements on spreadsheets. The LCD investigation and resulting prosecutions led to criminal fines totaling more than \$1.39 billion and charges against 22 executives, 13 of whom pleaded guilty or were convicted at trial; seven remain fugitives.

Air Transportation Conspiracies: An investigation by the Antitrust Division and the Federal Bureau of Investigation revealed conspiracies to fix the prices of airline passenger tickets and air cargo shipments. Conspirators also fixed the rates that customers paid to ship cargo, such as heavy equipment, perishable commodities, and consumer goods, by air for certain routes to and from the United States, including by fixing fuel and post-September 11 security surcharges. As a result of this investigation, 22 airlines and 21 executives were charged with antitrust offenses, and more than \$1.8 billion was recovered in criminal fines.

ii. Bid Rigging

Bid rigging is the way that conspiring businesses effectively raise prices when purchasers—often federal, state, or local governments—acquire products or services by soliciting bids. In a bid-rigging conspiracy, competitors agree in advance who will submit the winning bid on a contract that a public or private entity wants to award through a formal or informal competitive bidding process. In other words, competitors agree to eliminate competition for some piece of defined business, whether it be a sale, a contract, or a project.

A bid-rigging conspiracy can take a number of forms:

- Bid Rotation—Competitors agree to take turns being the winner bidder
- Bid Suppression—A competitor agrees not to bid
- Complementary (“Comp”) Bid—A competitor agrees to submit bid that is designed to lose or be disqualified to give false appearance of competition

As with all criminal antitrust violations, the essence of bid rigging is the agreement among would-be competitors to eliminate competition, to the detriment of customers.

For other conspirators to bid higher than the designated winning bidder, there must be some type of communication among them as to what each of them should bid. Frequently, this

communication will involve a face-to-face or telephone conversation between the conspirator who is supposed to win the bid and the conspirator who agreed not to compete. This communication can take other forms, however, such as an electronic message (email, text message, Facebook message, Whatsapp, encrypted messaging apps like Confide, etc.). This message is not always sent from the winning bidder; in some instances, other conspirators facilitate the agreement or pass along messages to other members of the conspiracy.

After the bid is let, the winning bidder may pay off the coconspirators through cash payments or subcontracts. Purchasing agents might also receive payoffs to make sure that the conspiracy is unreported. A purchasing agent might even be the originator of a conspiracy in circumstances that require bid rigging for the conspiracy to be successful. Evidence of such payoffs can be very persuasive for a jury.

Frequently, the bid in question is merely one of a series of bids rigged by the conspirators, and rather than payoffs, the conspirators take turns being the winning bidder or rotate the bids. Competitors may take turns on contracts according to the identity of the customer or the size of the contract, trying to equalize the value of the contracts won by each conspirator over time.

Bid-Rigging Red Flags

- Rotation of winning bids among competitors—taking turns winning
- Same firm wins bids over time (may also indicate market allocation)
- Losing firm receives sub-contract award
- Bid prices for all companies suddenly increase without explanation
- Similarities in the actual bids (*e.g.*, same typos) or metadata may indicate all bids prepared by designated winner
- Statements that a bid was a courtesy, complementary, token, or cover bid

Bid Rigging at Real Estate Foreclosure and Tax Liens Auctions

Since 2010, the Antitrust Division and FBI have partnered to combat a pattern of collusive and fraudulent schemes among real estate speculators aimed at eliminating competition at real estate foreclosure auctions all across the country, including Northern California and the Southeast. Instead of competitively bidding at public auctions for foreclosed properties, groups of real estate speculators worked together to keep public auction prices artificially low by paying each other to refrain from bidding against one another, or holding unofficial “knockoff” auctions among themselves and paying each other money that should have gone to those with an interest in foreclosed property—such as homeowners and banks.

To date, more than 130 individuals and several companies have been prosecuted for participating in bid-rigging and fraud conspiracies targeting foreclosure auctions in California, Georgia, Alabama and North Carolina. The Division and the FBI continue to investigate this anticompetitive conduct at auctions around the country.

iii. Market Allocation

Market allocation schemes are agreements among competitors to divide the market among themselves. For example, in customer allocation, competing firms may divide up specific customers or types of customers so that only one competitor will be allowed under the conspiratorial agreement to sell to, buy from, or bid on contracts let by those customers. In return, the other competitor will not sell to, buy from, or bid on contracts let by customers allocated to its coconspirator. Territorial market allocation is also illegal. Its effects are comparable to customer allocation, but geographic areas are divided up instead of customers. The conspirators thereby insulate themselves from outside competition and are collectively able to raise prices to all customers.

Red Flags:

- Competitors suddenly stop selling in a territory
- Competitors suddenly stop selling to a customer
- Competitor refers customers to other competitors
- Salesperson or prospective bidder says that a particular customer or contract “belongs” to a certain competitor

iv. Labor Market Allocation (“No-Poach”) and Wage Fixing

Labor market allocation (frequently referred to as “no-poach”) and wage-fixing agreements, when not reasonably necessary to separate, legitimate transactions or collaborations, are per se Sherman Act violations that eliminate employers’ competition for workers.

A wage-fixing agreement is an agreement between employers not to compete on employee salary, benefits, or other terms of compensation, either at specific levels or within a range. Wage-fixing is a form of price fixing for employee compensation.

A no-poach agreement is an agreement between two or more employers—or their third-party agents or intermediaries (*e.g.*, recruiters)—not to cold-call, solicit, recruit, hire, or otherwise compete for each other’s employees. These are market allocation agreements, but instead of allocating a corporation’s output (its customers or territory), labor allocation agreements allocate a corporation’s input (its employees). In other words, customer or territorial allocation agreements hurt customers. No-poach agreements hurt workers.

The Division has consistently taken the position that naked no-poach and wage-fixing agreements (*i.e.*, agreements not reasonably necessary to a separate, legitimate transaction or collaboration between the employers, such as a lawful joint venture) are per se unlawful violations of the Sherman Act. The Division has recently made a number of statements reiterating these principles and providing companies and individuals additional clarity regarding our intentions to prosecute criminally naked no-poach or wage-fixing agreements that began or continued after October 2016.

B. Civil Claims

i. Civil Remedies and Treble Damages

Criminal prosecution, incarceration, and substantial fines are the most effective, but not exclusive, deterrents to antitrust crimes. In those instances when the federal government or its agencies have been the victims of antitrust violations, the Department of Justice may obtain treble damages under the Clayton Act (15 U.S.C. § 15a) and civil penalties up to treble damages under the False Claims Act (31 U.S.C. § 3729). In addition, private parties (including state and local governments) can recover treble damages they suffer as a result of an antitrust violation, and they may use successful federal prosecution of collusion as prima facie evidence against a defendant in a follow-on suit for treble damages.

ii. Monopolization Generally Civil

Section 2 of the Sherman Act (15 U.S.C. § 2) prohibits monopolization as well as attempts and conspiracies to monopolize. Violations of Section 2 are generally not prosecuted criminally. Criminal prosecution is warranted, however, in circumstances where violence is used or threatened as a means of discouraging or eliminating competition, such as cases involving organized crime.

III. DETECTING PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION

A. Investigative Leads

Criminal investigations come to the Antitrust Division from many sources. Frequent sources include law enforcement agents investigating other conduct, complainants, leniency applicants, and proactive efforts by the Antitrust Division or other government agencies.

i. Agents Investigating Other Conduct

Government agents investigating other conduct—like fraud, money laundering, tax violations, or public or foreign corruption—sometimes discover evidence of price-fixing, bid-rigging, or market allocation conduct. Such leads are very helpful, and the Antitrust Division would like to see more of them. These leads can result in prosecutions, large fines, prison terms, and restitution for victims.

Take, for example, the following hypothetical situation. Agents may investigate a federal highway contractor for bribing public officials to maintain favored status in winning paving contracts and for submitting fake invoices for asphalt that was never applied. In the process of interviewing witnesses about bribery and fraud, agents could also ask them questions aimed at identifying competing highway contractors and communications among such contractors related to the rigging of upcoming bids. Such witnesses, if still employed in the industry, may not be entirely candid but may go so far as to relate rumors or general suspicions of collusion. They also may be able to identify former employees in the industry, who are likely to be more candid.

Agent investigations into bribes, payoffs, and kickbacks involving public or foreign officials can lead to the uncovering of bid-rigging activity, additional charges, and penalties. The Antitrust

Division and the U.S. Attorney's Office in Guam, for example, conducted an investigation resulting in the prosecution of the director of Guam's Department of Parks and Recreation for organizing separate bid-rigging conspiracies among contractors providing repair work for typhoon damage. The director was convicted of soliciting and receiving bribes in excess of \$100,000, committing wire fraud, and conspiring to launder money, in addition to organizing the bid-rigging schemes. He was ultimately sentenced to over eight years in prison.

An agent's alertness and inquiry into potential antitrust violations while investigating other matters can be extremely productive. For example, an executive of a fish company was facing a prison sentence for a tax evasion problem. The defendant provided information about his company's involvement in a bid-rigging conspiracy in the sale of fresh fish to the Department of Defense. His cooperation, for which he received a reduced sentence, led to a dozen convictions, including criminal fines and jail sentences for other conspirators, and a large restitution award to the Department of Defense.

ii. Complainants

Complainants report possible antitrust violations directly to the Antitrust Division or another government investigative agency. Most complainants are not directly involved in the illegal activity they report, but many may be in some way victimized by it. A complainant may be, for example, a disgruntled former employee of a corporate conspirator, an overcharged customer, or an executive of a smaller competitor that has been the victim or target of conduct, such as predatory pricing, by conspiring competitors.

Complaints may also come from purchasing officials working for private businesses or public agencies. Such individuals become familiar with a variety of industries in connection with their purchasing responsibilities. They are in a good position to spot price-fixing red flags, such as simultaneous price increases by two or more suppliers, industry-wide price schedules, and instances when it appears that one supplier is following a competitor's price increase, as well as bid-rigging red flags, such as the submission of identical bids, the unexplained failure of one or more bidders to submit a bid, suspicious patterns among winning and losing bidders, and wide margins between winning and losing bids. Purchasing personnel may also have access to other red flags, applicable to both price fixing and bid rigging, such as rumors in an industry about companies exchanging price or bid information or meeting with competitors.

Wherever they have such contacts, agents should ask purchasing officials about what they have heard or observed, instead of waiting for them to volunteer such information. Purchasing officials are often times reluctant, for a variety of reasons, to volunteer information that they believe might implicate a supplier.

iii. Leniency

Leniency applicants are an effective generator of leads for both international cartel cases and domestic antitrust matters. Unlike most complainants, leniency applicants have direct knowledge of conspiratorial activity.

The Antitrust Division's Leniency Policy allows companies and individuals involved in antitrust crimes to self-report and avoid criminal convictions and resulting fines and incarceration. The first corporate or individual conspirator to confess participation in an antitrust crime, fully cooperate with the Antitrust Division, and meet additional conditions (which are set forth in a written policy) receives leniency for the reported antitrust crime.

The benefits of being admitted to the program can provide substantial incentives to cooperate for those with inside knowledge of an antitrust conspiracy.

Additional information about the Antitrust Division's leniency program is available at <https://www.justice.gov/atr/leniency-program>.

iv. Proactive Investigation and Outreach

The Antitrust Division undertakes proactive efforts to uncover violations, often in conjunction with the Federal Bureau of Investigation and other law enforcement agencies. The Antitrust Division also works to expand awareness of "red flags" for antitrust violations by making outreach presentations to the public and private sectors. In an outreach presentation, an Antitrust Division attorney describes and explains criminal violations of the Sherman Act and suggests ways in which purchasing officials can identify whether their company or agency may be the victim of price fixing, bid rigging, or market allocation by suppliers and vendors.

B. Use of Covert Methods to Investigate Antitrust Crimes

The Antitrust Division and the law enforcement agencies with which it works, such as the FBI, will vigorously investigate cartel conduct using all available tools, including informants, wiretaps, consensual monitoring, search warrants, and foreign assistance requests.

Attorneys working with such agencies rely on the expertise and experience of the agents. For example, the FBI directed the covert recording of conspiratorial meetings on audiotapes and videotapes in the Antitrust Division's investigation of price fixing in the lysine industry. The tapes were important evidence in obtaining guilty verdicts at trial against three ADM executives, all of whom received jail sentences of 30 months or longer. ADM, four foreign corporations, and two other individuals pled guilty and were fined a total of over \$90 million.

IV. INTERACTION WITH OTHER CRIMINAL VIOLATIONS

The prosecution of criminal antitrust violations also may be accompanied by charges of: mail or wire fraud (18 U.S.C. §§ 1341, 1343); conspiracy to commit an offense or to defraud the United States (18 U.S.C. § 371); conspiracy to defraud the government with respect to claims (18 U.S.C. § 286); making false, fictitious or fraudulent claims (18 U.S.C. § 287); making false statements to a government agency (18 U.S.C. § 1001); and a wide variety of other federal statutes, including the Racketeer Influenced and Corrupt Organizations (RICO) law (18 U.S.C. § 1962(c)).

The Antitrust Division and the agencies with which it works often uncover other criminal offenses while investigating Sherman Act violations. Most frequently, those are offenses that affect the integrity of its investigatory process (like perjury and obstruction) and substantive offenses that are related to anticompetitive conduct (like mail fraud, wire fraud, money

laundering, and tax offenses). The Antitrust Division will investigate and prosecute these offenses, or refer them to the appropriate U.S. Attorney's Office.

Sometimes, the Antitrust Division and a U.S. Attorney's Office will conduct a joint investigation. One such investigation recently resulted in a conviction after trial of a defendant for an antitrust violation and multiple Title 18 violations. The defendant was sentenced to more than eight years in prison.

V. PROSECUTION OF INTERNATIONAL CARTELS

Prosecution of international cartels that victimize U.S. businesses and consumers is one of the Antitrust Division's highest priorities. International cartels, compared to their domestic counterparts, tend to be broader in scope, larger in terms of affected volumes of commerce, and more harmful in terms of numbers of businesses and consumers injured. Investigations have uncovered meetings of international cartels in over 100 cities and in over 35 countries.

The Antitrust Division's emphasis on international cartel enforcement has led to extraordinary success in cracking such cartels, securing the convictions of corporate and individual defendants, and obtaining record-breaking fines and jail sentences. The Antitrust Division has been incredibly successful at obtaining jurisdiction over foreign national defendants either voluntarily or by extradition, and since the first foreign antitrust defendant served time in a U.S. prison in 1999, close to a hundred foreign defendants have served prison sentences in the United States for participating in—or for obstructing investigations of—international antitrust cartels.

At their core, international cartels have essentially the same purpose as domestic conspiracies: to increase profits among conspirators by fixing prices, rigging bids, or allocating business markets among themselves.

For foreign commerce, the Foreign Trade Antitrust Improvements Act (FTAIA) exempts from Section 1 of the Sherman Act conduct involving only exports or wholly foreign commerce absent a "direct, substantial, and reasonably foreseeable effect" on import or domestic commerce or a U.S. exporter. 15 U.S.C. § 6a(1).

The Sherman Act applies to conspiracies involving import commerce.

- Look for conspiratorial transactions between foreign sellers and U.S. purchasers

The Sherman Act does not apply to commerce involving exports or commerce between or within foreign nations absent meaningful effects on U.S. commerce

- Look for significant, practical effects on transactions between foreign sellers and U.S. purchasers

The conduct's location should be considered. If the conduct is wholly foreign, Section 1 requires an intended and substantial effect in the United States. But acts by co-conspirators in the U.S. can potentially avoid this requirement, so long as the connection to U.S. commerce exists. Domestic acts are also useful for establishing venue and engaging jurors.

Look for acts in the U.S. in furtherance, including meetings, marketing of price-fixed products to U.S. purchasers, and sales calls on U.S. clients.

VI. ANTITRUST ADVICE AND TRAINING

The Antitrust Division provides informal training to federal and state agencies to enhance their ability to detect and report suspicious antitrust conduct and often answers other law enforcement officials' inquiries about possible violations. It is important that all major federal investigative agencies be able to recognize evidence of antitrust violations.

The Antitrust Division maintains offices in Washington, D.C., New York, Chicago, and San Francisco that investigate and prosecute criminal violations of the antitrust laws. Feel free to call these offices with any questions or information you may have. The Antitrust Division also maintains a website at <http://www.usdoj.gov/atr>.