

# FEDERAL ANTITRUST CRIME: A PRIMER FOR LAW ENFORCEMENT PERSONNEL



U.S. Department of Justice  
Antitrust Division

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## **I. INTRODUCTION**

This Primer provides an overview of federal antitrust crimes: price fixing, bid rigging, market allocation, and monopolization, including conspiracies and attempts to monopolize.<sup>1</sup>

These economic crimes threaten the U.S. economy and undermine our democratic institutions and national security. 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 a crucial part of the Justice Department's mission. Successful prosecutions lead to prison time for executives and substantial criminal fines and penalties for corporations.

The Antitrust Division's 100+ criminal prosecutors fulfill our mission by working collaboratively with law enforcement partners to detect, investigate, and prosecute antitrust crimes. In addition to prosecutors, the Division has a host of resources—paralegals, a document review unit, and access to additional technical resources—that can help you, as agents, investigate cases efficiently and effectively. The Antitrust Division also charges other crimes affecting competitive markets and public procurement processes—such as wire fraud, public corruption, money laundering, and obstruction of justice.

## **II. OVERVIEW OF FEDERAL ANTITRUST CRIMES**

### **A. Price Fixing, Bid Rigging, and Market Allocation**

The Antitrust Division frequently criminally prosecutes price fixing, bid rigging, and market allocation conspiracies.<sup>2</sup> These are general intent crimes (meaning we do not need to prove an intent to defraud) and limited defenses are available.

#### **1. Price Fixing**

Price fixing is an agreement among competitors to raise, fix, or otherwise maintain the price at which their products or services are sold. Price fixing can take

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<sup>1</sup> This Primer offers the views of the Antitrust Division of the Department of Justice and has no force or effect of law. 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. Nothing in this document should be construed as mandating a particular outcome in any specific case, and nothing in this document limits the discretion of the U.S. Department of Justice or any U.S. government agency to take any action, or not to take action, with respect to matters under its jurisdiction.

<sup>2</sup> 15 U.S.C. § 1.

many forms, such as an agreement among manufacturers of a particular product to establish a minimum price, or an agreement among competing buyers of a product to lower the prices they will pay. Price fixing is any agreement among competitors that affects the ultimate price or terms of sale. It is not necessary that the conspirators agree to charge the same price for a given item; for example, an agreement to raise individual prices or maintain a profit margin violates the law even if the resulting prices are not the same.

**Price-Fixing Agreements: Examples**

- 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 products

## **2. Bid Rigging**

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. Bid rigging allows conspiring businesses to effectively raise

**Case Example: 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.

prices when purchasers—often federal, state, or local governments—acquire products or services by soliciting bids.

#### **Bid Rigging: Common Types**

- **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

For other conspirators to bid higher than the designated winning bidder, there is often some type of communication among them as to what each of them should bid. This is why our investigations often focus on communications between competitors.

#### **Case Example: Bid Rigging at Real Estate 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.

After the bid is awarded, the winning bidder may pay off the co-conspirators through cash payments or subcontracts. Purchasing agents might also receive payoffs, and evidence sometimes shows the purchasing agent started the bid-rigging conspiracy. Evidence of payoffs can be very persuasive to a jury.

Frequently, conspirators rig more than one bid and rather than compensating each other through cash payoffs, they take turns being the winning bidder (“rotating” 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 generally results in price increases for consumers, though we do not need to prove that the price increased.

### 3. Market Allocation

Market allocation schemes are agreements among competitors to divide the market among themselves, usually by customer or geography. For example, in a customer allocation, competing firms may agree to divide up specific customers or types of customers so that only one competitor will be allowed 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 co-conspirator. 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 competition and are collectively able to raise prices to all customers.

#### **Red Flags: Market Allocation**

- 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

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

The Antitrust Division also criminally prosecutes labor market allocation (also known as “no-poach”) and wage-fixing conspiracies. Wage fixing is an agreement between employers not to compete on employee salary, benefits, or other terms of compensation.

A no-poach conspiracy is an agreement between two or more employers not to solicit (including cold calling or recruiting), 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). The Division criminally prosecutes no-poach conspiracies that are not reasonably necessary to a separate, legitimate transaction or collaboration between the employers, like a lawful joint venture.

### 5. Agreement Is Key

The agreement is the key to any conspiracy charge, including in antitrust. To prove an agreement, we must establish a meeting of the minds or mutual understanding between two or more independent businesses 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. Jury instructions from a recent criminal antitrust trial put it simply: “It is the agreement to act together that

constitutes the crime. Whether the agreement is actually carried out or whether it succeeds or fails does not matter.”

Attempts or solicitations to enter into agreements to fix prices, rig bids, or allocate markets that are *unsuccessful* are not prosecutable under Section 1 of the Sherman Act. But depending on the evidence, they may be charged under other statutes, including mail fraud, wire fraud, and Section 2 of the Sherman Act (as attempted monopolization).

## **6. Limited Defenses**

Because criminal antitrust conspiracies are inherently anticompetitive, the agreement to fix prices, rig bids, or allocate markets is the crime. 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, that it actually stimulated competition, or that it resulted in reasonable prices. We do not need to prove loss to the customer under the Sherman Act, so lack of loss is not a defense either. It is also not a defense that the agreement was unsuccessful.

## **7. Legal Elements**

To establish these violations, the government must prove three elements:

- a. The conspiracy existed at or about the time alleged;
- b. The defendant knowingly joined the conspiracy; and
- c. The conspiracy had a nexus to interstate or foreign commerce.

## **B. Monopolization Offenses**

The Antitrust Division also prosecutes schemes to monopolize markets: monopolization, attempted monopolization, and conspiracy to monopolize. This can include conduct within just one company, rather than a conspiracy among competing companies and executives.

To bring a monopolization case, the prosecutor must show a specific intent to monopolize. A specific intent to monopolize means an intent to acquire or maintain monopoly power in a market via anticompetitive or exclusionary conduct. Monopoly power is the ability to control prices in a market or exclude actual or potential competition.

### **1. Conspiracies to Monopolize**

The elements of a monopolization conspiracy offense are:

- a. An agreement;

- b. A specific intent to monopolize, i.e., an intent to (1) acquire or maintain monopoly power in a market (2) via anticompetitive or exclusionary conduct; and
- c. A nexus to interstate or foreign commerce.

The “anticompetitive or exclusionary conduct” is *how* a monopolization crime is effectuated; intent to acquire or maintain monopoly power is *why* the crime is committed. The anticompetitive conduct the Division prosecutes criminally often—but not always—falls into the following categories:

- **Criminal price fixing, bid rigging, or market allocation.** Criminals may conspire to fix prices, rig bids, or allocate a market with the ultimate goal of monopolization. For example, co-conspirators who agree to divide a market into geographic territories to exclude competition in those markets have both committed a market allocation crime and entered into a criminal monopolization conspiracy.
- **Other criminal conduct.** For example, a group of competitors who threaten a rival with violence to push it out of a market may be prosecuted criminally—both for the violent crime and for the monopolization. And the predicate criminal conduct need not be violent. For example, the Division has prosecuted cases where bribery, extortion, and wire or mail fraud were designed to create or keep a chokehold on a market.

## **2. Monopolization and Attempted Monopolization**

To support a charge of monopolization or attempted monopolization, the government must prove additional elements. Unlike conspiracy to monopolize, which requires no showing of market power, the government must prove that a defendant or co-conspirators actually obtained or maintained monopoly power over a relevant market (when charging monopolization) or that there was a “dangerous probability” of achieving monopoly power (when charging attempted monopolization).



### **Case Example: Highway Crack-Sealing Services**

An investigation by the Antitrust Division, U.S. Attorney's Office for the District of Montana, and the Department of Transportation Office of Inspector General uncovered a scheme to monopolize the markets for highway crack-sealing services in Montana and Wyoming. The president of a paving and asphalt contractor approached his largest competitor and proposed a "strategic partnership" under which his company would stop competing for projects in Nebraska and South Dakota and the competitor would stop bidding for projects in Montana and Wyoming. He further proposed that the companies enter into a sham transaction to disguise the collusion. The defendant pleaded guilty to one count of attempted monopolization.

Monopolization and attempted monopolization charges can also reach purely unilateral conduct—i.e., monopolization schemes carried out by a single firm or individual. Such cases usually involve either (1) other criminal conduct in furtherance of the monopolization scheme, or (2) unsuccessful attempts or solicitations to enter into agreements to fix prices or allocate markets.

### **C. Proof of the Conspiracy**

Antitrust prosecutions often feature evidence of an oral agreement between competitors, usually from co-conspirator cooperators who testify about what they said when they agreed not to compete or about what they understood the agreement to be. Many of our cases also benefit from documentary evidence of an agreement, for example emails, text messages, calendar entries, and notes.

Although overt acts in furtherance of the agreement are not required to prove an antitrust 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. Relatedly, we often seek evidence showing the steps conspirators take to hide their relationships, communications, and agreements, during and after the conspiracy. This evidence not only helps prove the existence of a conspiracy, but also can be important to demonstrate consciousness of guilt, which is often powerful evidence for the jury.

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.

Antitrust cases do not require proof of loss or harm, although if such proof exists, it can be quite persuasive. Victims who testify that they were deceived and cheated by the conspirators can have a substantial impact with the jury.

#### **D. Statute of Limitations**

The statute of limitations for antitrust crimes is five years.<sup>3</sup>

#### **E. Victims and Restitution**

The victims of antitrust crime include retail consumers, workers, small businesses, and government entities that purchase goods and services and award contracts. For example, an antitrust crime could affect everyone who purchased a certain product nationwide during the time period of the crime.

Restitution is not mandatory for Sherman Act offenses, but a court may order an antitrust defendant to pay restitution if it is part of the defendant's plea agreement. Circumstances where government entities are victims, or a defendant has insufficient resources to pay both a Guidelines criminal fine and restitution to the victims, receive particular consideration from Antitrust Division prosecutors.

#### **F. Additional Consequences of Conviction**

Collateral consequences include civil damages actions and debarment. When the federal government or its agencies are victims of antitrust crime, the Department of Justice may obtain treble damages. 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. Finally, individuals and entities may be suspended or debarred from doing business with the government as a result of a criminal conviction for violating the Sherman Act.

### **III. DETECTING ANTITRUST CRIME**

#### **A. Investigative Leads**

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

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<sup>3</sup> 18 U.S.C. § 3282.

## **1. Proactive Investigation and Covert Methods**

Like any other criminal investigation, the Antitrust Division undertakes proactive efforts to uncover violations, often in conjunction with the Federal Bureau of Investigation, federal Offices of Inspector General, and other law enforcement agencies. Tools used to investigate antitrust crime include confidential informants, wiretaps, undercover agents, surveillance, consensual monitoring, cooperators, search warrants, and foreign assistance requests.

For example, in the highway crack-sealing investigation highlighted above, Department of Transportation OIG agents were able to record phone calls between the defendant and a cooperator in which the defendant made numerous admissions—including an explanation that the two companies were each other’s only real competition and the allocation scheme and lack of competition would mean higher margins for both companies.

The Antitrust Division also works to expand awareness of “red flags” for antitrust violations by making outreach presentations to the public and private sectors.

## **2. Agents Investigating Other Conduct**

Agents investigating other conduct often uncover evidence of price fixing, bid rigging, or market allocation. 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 of more than \$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.

In another example, an executive of a fish company was facing a prison sentence for a tax-evasion charge. 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.

## **3. Complainants**

Complainants report possible antitrust violations directly to the Antitrust Division or other investigative agencies. Many complainants are not directly involved in the illegal activity. Often they are victims, including disgruntled former employees of conspirators, overcharged customers, or executives of smaller competitors that have been affected by the conduct.

Complaints may also come from purchasing officials working for private businesses or public agencies. Such individuals are familiar with many industries and are in good positions to spot price-fixing red flags, such as simultaneous price increases by two or more suppliers. In addition, they can spot bid-rigging red flags, such as the submission of identical bids and suspicious patterns among winning and losing bidders.

#### **4. Leniency**

The Antitrust Division's Leniency Policy allows companies and individuals involved in price fixing, bid rigging, or market allocation 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 [here](#)) receives leniency for the reported antitrust crime. Additional information about the Antitrust Division's leniency program is available at <https://www.justice.gov/atr/leniency-program>.

#### **B. Procurement Collusion Strike Force**

The Antitrust Division leads the Procurement Collusion Strike Force (the "PCSF"), the Department of Justice's coordinated, national response to collusion in public procurement. The PCSF is an interagency partnership dedicated to deterring, detecting, investigating, and prosecuting antitrust crimes and related schemes that target government procurement, grants, and program funding at all levels of government—federal, state, and local.

The PCSF consists of several interagency partners: the Antitrust Division, strategically important U.S. Attorney's Offices, and national law enforcement partners. The PCSF has two main objectives: 1) deter antitrust and related crimes on the front end of the procurement process through outreach and training; and 2) facilitate more effective detection, investigation, and prosecution of these crimes. Contact information and more is available at: <https://www.justice.gov/procurement-collusion-strike-force>.

#### **IV. ANTITRUST ADVICE AND TRAINING**

The Antitrust Division has offices in Washington, D.C.; New York; Chicago; and San Francisco. Feel free to [contact these offices](#) with any questions or information you may have, or to request training. The Antitrust Division's Criminal Enforcement Program maintains a website at <https://www.justice.gov/atr/criminal-enforcement>.