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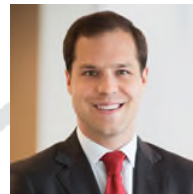
**UNDERSTANDING AND
PREPARING FOR THE NEW
DOJ PROCUREMENT
COLLUSION
STRIKE FORCE**

Mark Krotoski, Doug Baruch, Frank DeSimone
December 12, 2019

Presenters

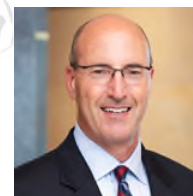


Mark Krotoski
Silicon Valley
Washington, DC



Frank DeSimone
Philadelphia

Philadelphia
Washington, DC



Doug Baruch
Washington, DC

Overview

- Background on antitrust violations
- The impact and significance of the Procurement Collusion Strike Force
- Enforcement tools and criminal and civil enforcement statutes
- Red flags and indicators of collusion
- Recent case examples and lessons
- How to respond after detecting potential collusion including under the Antitrust Leniency Program
- False Claims Act implications
- Examples of prior *qui tam* enforcement
- Federal Acquisition Regulation issues
- Responding to subpoenas and CIDs and preparing for a criminal or civil investigation
- Steps companies can take now to mitigate potential exposure



BACKGROUND ON ANTITRUST VIOLATIONS

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Sherman Act

Sherman Act Statute

“Every contract, combination in the form of trust or otherwise, or **conspiracy, in restraint of trade or commerce** among the several States, or with foreign nations, is declared to be illegal.”

15 U.S.C. § 1

Prohibits conspiracies “in restraint of trade or commerce”

- Since 1890

Only *per se* violations are prosecuted criminally

- Price fixing
- Bid rigging
- Customer or market allocation
- Production quantity agreements

Examples

- **Coordinating Bids**

- Bidders agree on who will submit the low bid or particular bids
- Bidders agree on who will and who will not bid or **what bid prices will be offered**

- **Agreements**

- To adhere to a **price or pricing strategy**
- To adhere to previously announced prices and terms
- To **exchange information** to “check up” on what customer is saying

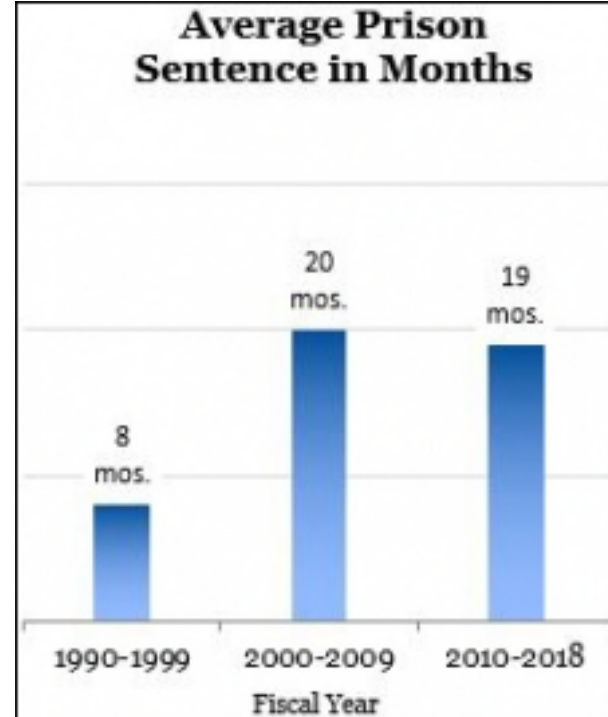
- **Market Allocation**

- **Percentage of market**
- Particular products or regions

Sherman Act

Criminal Penalties

- *Corporate Fine*
 - \$100 million
 - Or “twice the gain or twice the loss from the violation”
- *Executives*
 - Prison term up to 10 years
 - Up to \$1 million fine or “twice the gain or twice the loss from the violation”



Sherman Act

Corporate Criminal Penalties

- “twice the gain or twice the loss from the violation”
- Highest criminal fines
 - \$925 million
 - \$650 million
 - \$550 million
 - \$500 million
- Some listed case examples

Corp.	FY	Product	Fine (Millions)	Country
AU Optronics	2012	LCD Panels	\$500	Taiwan
Yazaki	2012	Auto Parts	\$470	Japan
Bridgestone	2014	Auto Parts	\$425	Japan
LG Display Co., Ltd	2009	LCD Panels	\$400	Korea
Royal Bank of Scotland	2017	Foreign currency exchange	\$395	Scotland (United Kingdom)
British Airways	2007	Air Transp.	\$300	UK
Starkist Co.	2019	Packaged Seafood	\$100	US
Archer Daniels Midland Co.	1997	Lysine & Citric Acid	\$100	US

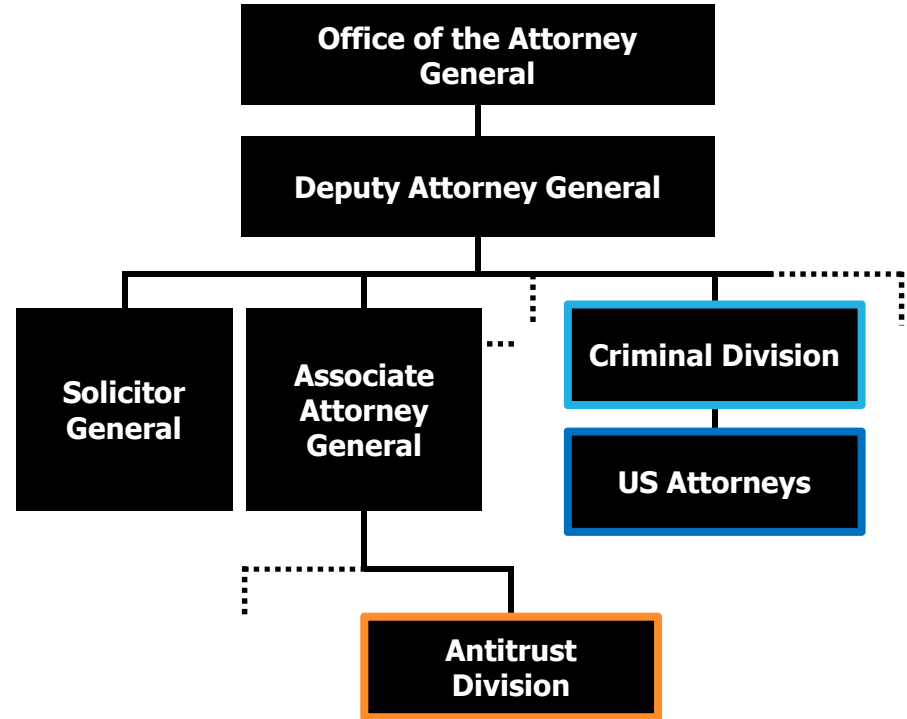
Criminal Antitrust Conduct Penalties and Risks

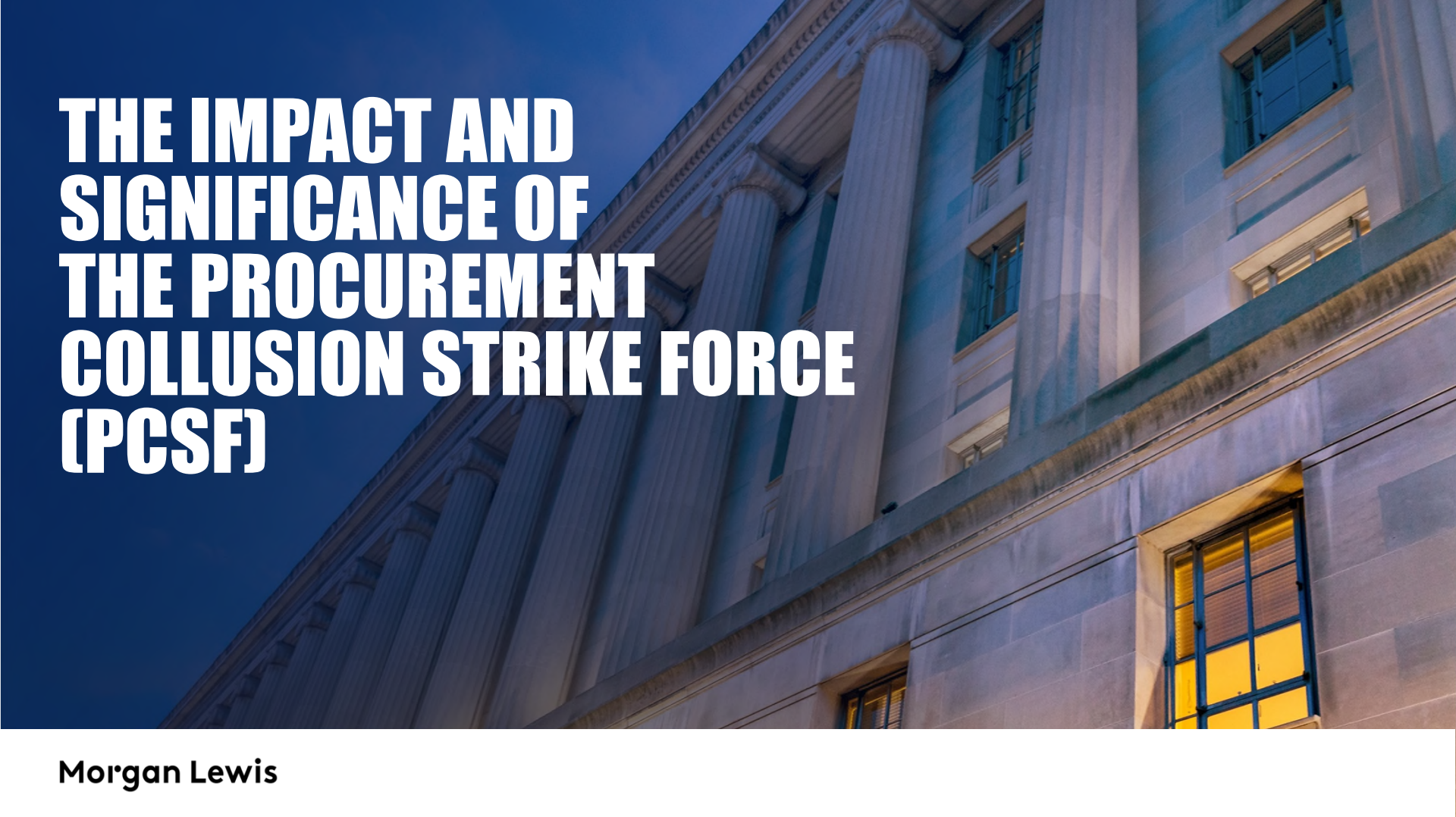
- Criminal corporate fines up to the statutory maximum of **\$100 million or more**
- Separate prosecution of **company executives** including prison terms **up to 10 years** and criminal fines up to \$1 million *or more*
- **Extradition** of executives outside the United States
- **Corporate Probation term** up to five years with specific conditions
- **Corporate monitor** up to five years at company expense
- Court order of **criminal restitution**
- **Continuing corporate obligation to Cooperate** with the Antitrust Division based on corporate plea agreement terms
- **Debarment or suspension** by federal or state agencies
- **Civil enforcement claims** including Clayton Act and False Claims Act for treble damages/penalties
- Parallel or follow-on **civil cases** including class actions seeking treble damages
- **Risk of detection and multiple fines in other jurisdictions** by other global leniency and whistleblowing programs

Antitrust Division

- The Antitrust Division is the exclusive DOJ component to authorize and supervise antitrust cases.
- “To ensure a consistent national, Department-wide policy on antitrust questions, the Assistant Attorney General for the Antitrust Division is responsible for **supervising all federal antitrust investigations**, pursuant to 28 C.F.R. Section 0.40.”

Justice Manual § 7-1.200 (The Antitrust Division's Responsibilities)





THE IMPACT AND SIGNIFICANCE OF THE PROCUREMENT COLLUSION STRIKE FORCE (PCSF)

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Pending Public Procurement Investigations

- “We also know from our experience prosecuting these crimes that the problem is a real one. . . [L]et me share one fact that informs our thinking as we move forward: today, **more than one third of the Antitrust Division’s 100-plus open investigations relate to public procurement or otherwise involve the government being victimized by criminal conduct.**”
- “Roughly **one out of every 10 dollars** of federal spending is allocated to government contracting. Last year, the federal government spent **more than \$550 billion**, or about 40 percent of all discretionary spending, on contracts for goods and services.”



Antitrust Division Assistant Attorney General
Makan Delrahim (Nov. 5 2019)

Formation of Procurement Collusion Strike Force

DOJ Announcement: November 5, 2019

- “Lead a coordinated national response to combat antitrust crimes and related schemes in government procurement, grant, and program funding at all levels of government.”
- Innovative “district-based task organization model” that partners with US Attorney offices and other agencies
- Targeted outreach training and education at federal, state, and local public procurement processes
- Use of criminal and civil enforcement tools



Primary Objectives and Function

1. “[T]o deter and prevent antitrust and related crimes on the front end of the procurement process through outreach and training”
2. “[T]o effectively detect, investigate, and prosecute crimes that do occur through better coordination and partnership in the law enforcement and inspector general communities.”
 - **Targeted Outreach:** With Inspectors General and other constituencies in organizations receiving federal funds at the federal, state, and local levels
 - **Coordination:** With “government contractors, their trade associations, and public contract lawyers in order to educate them about criminal antitrust violations and associated penalties.”
 - **Data Analytics:** “To identify potential ‘red flags’ of collusion in government procurement data.”

Strike Force Composition



**DOJ Antitrust Division
(Criminal and Civil Sections)**



13 US Attorney Offices



DOJ Civil Division



**US Department of Defense
Office of Inspector General**



**Federal Bureau of
Investigation**



**General Services Administration
Office of Inspector General**

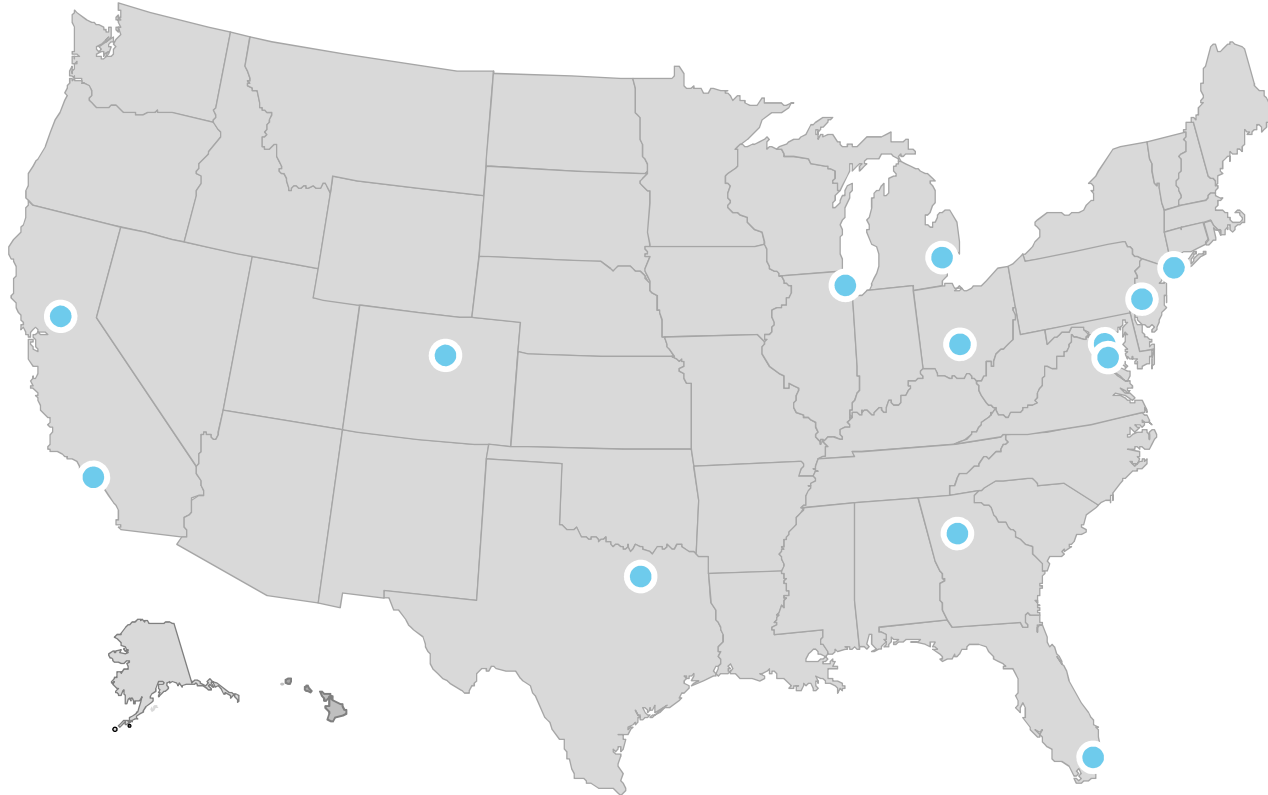


**DOJ Office of the
Inspector General**



**US Postal Service Office
of Inspector General**

US Attorney Office Locations



- **California, Central District** (Los Angeles)
- **California, Eastern District** (Sacramento)
- **Colorado (Denver)**
- **District of Columbia** (Washington, DC)
- **Florida, Southern District** (Miami)
- **Georgia, Northern District** (Atlanta)
- **Illinois, Northern District** (Chicago)
- **Michigan, Eastern District** (Detroit)
- **New York, Southern District**
- **Ohio, Southern District** (Columbus)
- **Pennsylvania, Eastern District** (Philadelphia)
- **Texas, Northern District** (Dallas)
- **Virginia, Eastern District** (Alexandria)

- **“PCSF Liaisons”**
 - 13 US Attorney Offices
 - Local Assistant US Attorneys designated by US Attorney
 - Paired with Antitrust Division trial attorney and local FBI Special Agent
- Focused, targeted, successful DOJ model in other areas generating criminal investigations and cases

Comparable DOJ Models Using Focused and Targeted Resources



THE UNITED STATES
DEPARTMENT OF JUSTICE

- **Computer Hacking and Intellectual Property (CHIP) Program**
 - 94 USAO Districts
 - National Support through the Computer Crime and Intellectual Property Section, Criminal Division
- **National/International Security Coordinators**
 - 94 USAO Districts
 - National Security Division
- **Project Safe Childhood**
 - 94 USAO Districts
 - Child Exploitation and Obscenity Section (CEOS), Criminal Division
- **Internet Crimes Against Children (ICAC) Task Forces**
 - 61 coordinated task forces representing more than 4,500 federal, state, and local law enforcement and prosecutorial agencies
- **Health Care Fraud Prevention and Enforcement Action Team (HEAT)**
 - Medicare Fraud Strike Force
 - DOJ Criminal Division, USAO, FBI, HHS, OIG
- **Organized Crime Drug Enforcement Task Forces (OCDETF)**
 - Prosecutor-led, multi-agency approach to combat transnational organized crime
 - USAO, Criminal Division, ATF, DEA, FBI, USMS, DHS, ICE, HIS, Coast Guard, Secret Service, IRS CID, USPS, DOL OIG, State and Local Law Enforcement Agencies

Coordinated Takedowns



THE UNITED STATES
DEPARTMENT OF JUSTICE

- Focused resources often result in large coordinated takedowns
 - Numerous arrests, charges, and seizures in multiple jurisdictions on the same day
- Example
 - **601 charged in 58 districts**
 - “including 165 doctors, nurses and other licensed medical professionals, for their alleged participation in health care fraud schemes involving more than \$2 billion in false billings”
 - Medicare Fraud Strike Force (MFSF), a partnership between the Criminal Division, US Attorney’s Offices, the FBI, and HHS-OIG

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Thursday, June 28, 2018

National Health Care Fraud Takedown Results in Charges Against 601 Individuals Responsible for Over \$2 Billion in Fraud Losses

Largest Health Care Fraud Enforcement Action in Department of Justice History Resulted in 76 Doctors Charged and 84 Opioid Cases Involving More Than 13 Million Illegal Dosages of Opioids

Attorney General Jeff Sessions and Department of Health and Human Services (HHS) Secretary Alex M. Azar III, announced today the largest ever health care fraud enforcement action involving 601 charged defendants across 58 federal districts, including 165 doctors, nurses and other licensed medical professionals, for their alleged participation in health care fraud schemes involving more than \$2 billion in false billings. Of those charged, 162 defendants, including 76 doctors, were charged for their roles in prescribing and distributing opioids and other dangerous narcotics. Thirty state Medicaid Fraud Control Units also participated in today’s arrests. In addition, HHS announced today that from July 2017 to the present, it has excluded 2,700 individuals from participation in Medicare, Medicaid, and all other Federal health care programs, which includes 587 providers excluded for conduct related to opioid diversion and abuse.

Coordinated Takedowns



THE UNITED STATES
DEPARTMENT OF JUSTICE

- More than **2,300 arrested** “during a three-month, nationwide operation”
- Internet Crimes Against Children (ICAC) task forces

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Tuesday, June 12, 2018

More Than 2,300 Suspected Online Child Sex Offenders Arrested During Operation “Broken Heart”

The Department of Justice today announced the arrest of more than 2,300 suspected online child sex offenders during a three-month, nationwide, operation conducted by Internet Crimes Against Children (ICAC) task forces. The task forces identified 195 offenders who either produced child pornography or committed child sexual abuse, and 383 children who suffered recent, ongoing, or historical sexual abuse or production of child pornography.

The 61 ICAC task forces, located in all 50 states and comprised of more than 4,500 federal, state, local and tribal law enforcement agencies, led the coordinated operation known as “Broken Heart” during the months of March, April, and May 2018. During the course of the operation, the task forces investigated more than 25,200 complaints of technology-facilitated crimes against children and delivered more than 3,700 presentations on Internet safety to over 390,000 youth and adults.

“No child should ever have to endure sexual abuse,” Attorney General Jeff Sessions said. “And yet, in recent years, certain forms of modern technology have facilitated the spread of child pornography and created greater incentives for its production. We at the Department of Justice are determined to strike back against these repugnant crimes. It is shocking and very sad that in this one operation, we have arrested more than 2,300 alleged child predators and investigated some 25,200 sexual abuse complaints. Any would-be criminal should be warned: this Department will remain relentless in hunting down those who victimize our children.”



Department of Justice

FOR IMMEDIATE RELEASE
THURSDAY, JUNE 30, 2005
WWW.USDOJ.GOV

CRM
(202) 514-2008
TDD (202) 514-1888

JUSTICE DEPARTMENT ANNOUNCES INTERNATIONAL
INTERNET PIRACY SWEEP

'Operation Site Down' Attacks Organized Piracy Networks In 10 Countries

WASHINGTON, D.C. - Attorney General Alberto R. Gonzales, Acting Assistant Attorney General John C. Richter of the Criminal Division and FBI Cyber Division Assistant Director Louis M. Reigel today announced another far-reaching and aggressive international enforcement action against criminal organizations involved in the illegal online distribution of copyrighted material.

Beginning yesterday, leading criminal organizations

“By dismantling the said Attorney General try to use the Internet

Operation Site Down overseas. Four individuals in Germany, Portugal and online piracy underground

International Coordination: Law enforcement from 10 other countries conducted more than **90 searches worldwide** as part of “Operation Site Down,” targeting “leading criminal organizations that illegally distribute and trade in copyrighted software, movies, music, and games on the Internet.”



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Citizen Complaint
Center

Procurement
Collusion Strike
Force

PROCUREMENT COLLUSION STRIKE FORCE



The Procurement Collusion Strike Force (PCSF) leads a coordinated national response to combat antitrust crimes and related schemes in government procurement, grant, and program funding at all levels of government—Federal, state, and local. The PCSF is comprised of the Antitrust Division of the U.S. Department of Justice, multiple U.S. Attorneys' Offices around the country, the Federal Bureau of Investigation (FBI), and the Inspectors General for multiple Federal agencies.

REPORT POSSIBLE VIOLATIONS



▶ [View ways to contact the PCSF Tip Center](#)

See also the Division's [Leniency Program](#) for corporations and individuals.

TRAINING ON COLLUSION FOR INSPECTORS GENERAL AND PROCUREMENT OFFICIALS

The PCSF is committed to working with the Inspectors General of agencies receiving Federal funds, as well as government procurement officials, to train individuals at all levels of the

SEARCH ANTITRUST DIVISION

Search

SEARCH



ACTION CENTER

- [Comment on Division Cases](#)
- [File an NCRPA Notification](#)
- [Report Anticompetitive Conduct After a Natural Disaster](#)
- [Report Antitrust Violations](#)
- [Request a Business Review](#)
- [Request Public Documents](#)

A photograph of a classical building with columns and windows, illuminated at dusk. The building is made of light-colored stone or concrete. The sky is a deep blue. The text is overlaid on the left side of the image.

ENFORCEMENT TOOLS AND CRIMINAL AND CIVIL ENFORCEMENT STATUTES

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Criminal and Civil Enforcement Statutes

- **Sherman Act**

- 15 U.S.C. § 1
- Criminal penalties

- **Clayton Act Section 4A**

- 15 U.S.C. § 15a
- Civil treble damages

- **False Claims Act**

- 31 U.S.C. §§ 3729-3733
- Civil treble damages plus penalties

Other criminal statutes

- False statement 18 U.S.C. § 1001
- Mail fraud 18 U.S.C. § 1341
- Wire fraud 18 U.S.C. § 1343
- Conspiracy to defraud the United States 18 U.S.C. § 371
- Obstruction of justice
 - Several statutes
 - Anticipated investigations under section 1519

Clayton Act Section 4A

- “An important but underused enforcement tool that allows the government to recover treble damages for antitrust violations when the **government itself is the victim.**”
—Antitrust Division Assistant Attorney General, Makan Delrahim
- **Treble damages** may be awarded
 - Plus the cost of suit including reasonable attorneys’ fee.
- Only four cases since 1990
 - 1991: Gunpowder bid rigging (\$250,000)
 - 1992: Defense contractor teaming arrangement (\$4 million)
 - 2012: Natural gas bidding (\$525,000)
 - **2018**: Fuel supply bid rigging case highlighted renewed focus

Clayton Act Section 4A

- “The American Taxpayer deserves to see a revitalization of the government’s Section 4A authority. **This week’s [fuel supply] settlements are only the first in that direction.** Going forward, the Division will exercise 4A authority to seek compensation for taxpayers when the government has been the victim of an antitrust violation. We hope that these efforts will also deter future violations.”



Antitrust Division Assistant Attorney General
Makan Delrahim (Nov. 15 2018)

Criminal and Civil Enforcement Statutes

- Sherman Act
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- Obstruction of justice
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Certificate of Independent Pricing

- **(a)** The offeror certifies that -
 - **(1)** The **prices in this offer have been arrived at independently**, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to (i) those prices, (ii) the intention to submit an offer, or (iii) the methods or factors used to calculate the prices offered;
 - **(2)** The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or **competitor before bid opening** (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and
 - **(3) No attempt** has been made or will be made by the offeror to induce any other concern **to submit or not to submit an offer** for the purpose of restricting competition.

Criminal Charges

- False statement
- Mail fraud
- Wire fraud

Certificate of Independent Pricing

- **Criminal Information**
- Sherman Act, 15 U.S.C. § 1
- 11. Military Traffic Management Command (MTMC) “requires that each freight forwarder certify or affirm in a **Certificate of Independent Pricing**, incorporated in the Tender of Service which governs the bidding process, that each bid submitted was derived independently, without communication, agreement, understanding, collusion, or any other action in respect to rates or fares with any carrier, competitor, or agent thereof.”

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA)	CRIMINAL NO. 1:06CR57
v.)	Count I: 15 U.S.C. § 1
ALLIED FREIGHT FORWARDING, INC.,)	Count II: 15 U.S.C. § 1
Defendant.)	Filed: 2/24/06

CRIMINAL INFORMATION

Allied Freight Forwarding, Inc. ("ALLIED") is made a defendant on the charges herein.

THE UNITED STATES CHARGES THAT:

Defendant and Co-Conspirators

1. Defendant ALLIED is, and was during the relevant period, a U. S. company, organized under the laws of the State of Delaware and headquartered in Westmont, IL. Defendant ALLIED is a wholly-owned subsidiary of SIRVA, Inc., a corporation also headquartered in Westmont, IL. During the relevant period, defendant ALLIED was in the business of providing freight forwarding services, as described in paragraph 5, related to the transportation of military household goods.
2. Various companies, partnerships, and individuals, not made defendants in this Count, participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance of the conspiracy.
3. Whenever this Count refers to any act, deed, or transaction of any company, it means that the company engaged in the act, deed, or transaction by or

Certificate of Independent Pricing

- **Plea Agreement:** False Statement, 18 U.S.C. § 1001
- 4(d). [T]he defendant's corporate officer signed the 2G11 Parkway project bid form for the defendant, which included the **Certificate of Independent Price Determination**. On a blank in the Certificate of Independent Price Determination that requires the bid offeror to "insert full name of person(s) in the offeror's organization responsible for determining the prices offered in this bid or proposal," defendant's corporate officer filled in his name.
- 4(e). At the time that the corporate officer signed the bid form, he knew that he was certifying that the defendant had not disclosed its prices to any other offeror or competitor. In truth and fact, **at the time that the corporate officer signed the bid form, he knew that he had met with another offeror and competitor and had disclosed defendant's prices to that offeror and competitor.**

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

UNITED STATES OF AMERICA)	
)	Criminal No. 1:02CR84
v.)	
)	Filed: September 10, 2002
MAYMEAD, INC.)	
)	Violation: 18 U.S.C. § 1001
Defendant.)	

PLEA AGREEMENT

The United States of America and Maymead, Inc., the defendant, hereby enter into the following Plea Agreement pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure (the "Fed. R. Crim. P.");

RIGHTS OF DEFENDANT

1. The defendant understands its right:
 - (a) to be represented by an attorney;
 - (b) to be charged by indictment;
 - (c) to be charged in the District where the offense occurred;
 - (d) to plead not guilty to any criminal charges brought against it;
 - (e) to have a trial by jury, at which it would be presumed not guilty of the charges against it and the United States would have to

Criminal and Civil Enforcement Statutes

- Sherman Act
 - 15 U.S.C. § 1
 - Criminal penalties
- Clayton Act Section 4A
 - 15 U.S.C. § 15a
 - Civil treble damages
- False Claims Act
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- **Obstruction of justice**
 - Several statutes
 - Anticipated investigations under section 1519

Obstruction of Justice Charges

- Destruction of records [§ 1512(c)(1)]
- Destruction of records in anticipation of an investigation [§ 1519]
- Witness tampering, intimidation [§§ 1512(a), (b)]
- Obstruction of proceedings [§ 1505]
- Influencing or injuring officer or juror generally [§ 1503]
- Also, perjury [§§ 1621, 1623]

Obstruction of Justice

- Plea agreement conviction
 - Price fixing
 - Obstruction of justice by destroying records after search warrant
- Criminal fine **\$17.7 million**



Department of Justice

FOR IMMEDIATE RELEASE
TUESDAY, OCTOBER 30, 2012
WWW.JUSTICE.GOV

AT
(202) 514-2007
TTY (866) 544-5309

JAPANESE AUTOMOBILE PARTS MANUFACTURER AGREES TO PLEAD GUILTY TO PRICE FIXING AND OBSTRUCTION OF JUSTICE

Company Agrees to Pay \$17.7 Million Criminal Fine

WASHINGTON — Nagoya, Japan-based Tokai Rika Co. Ltd., has agreed to plead guilty and to pay a \$17.7 million criminal fine for its role in a conspiracy to fix prices of heater control panels (HCPs) installed in cars sold in the United States and elsewhere, the Department of Justice announced today. Tokai Rika has also agreed to plead guilty to a charge of obstruction of justice related to the investigation of the antitrust violation.

According to the charge, in or about February 2010, after the company and its executives and employees became aware that the FBI had executed a search warrant on Tokai Rika's U.S. subsidiary, a company executive directed employees to delete electronic data and destroy paper documents likely to contain evidence of antitrust crimes in the United States and elsewhere. The department said that as a result, electronic data was deleted and paper documents were destroyed, and some of the deleted electronic data and destroyed paper documents were non-recoverable.

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RED FLAGS AND INDICATORS OF COLLUSION



Morgan Lewis

Red Flags

- DOJ's MAPS Analysis

Market

Applications

Patterns

Suspicious Behavior

DOJ's MAPS Analysis

- **M = MARKET**

- Who is in the market for this award?

- **A = APPLICATIONS**

- Are there similarities between vendor applications or proposals?

- **P = PATTERNS**

- Have patterns developed among competing vendors?
- Review the outcome of prior awards for the same product or service to identify patterns over time.

- **S = SUSPICIOUS BEHAVIOR**

- Competitors' behavior suggests they worked together on the award.
- Keep an eye out for suspicious behavior that indicates that vendors worked together rather than competed for the award.

Red Flags and Indicators

- Few competitors or limited number of qualified bidders
- Similar bids
 - Handwriting, typos, meta data, lastminute changes
- Pricing patterns
 - Increase in bid price among competitors without explanation
 - Rebates removed without explanation
 - Other corresponding last-minute changes related to price
- Award patterns
 - Same vendor wins for particular area or customer (could reflect allocation agreement)
 - Or competitors stop bidding for particular area or customer
 - Competitors rotate as award winner
 - Post-bid changes to bid
 - Unexplained withdrawal by some competitors

Red Flags and Indicators

- Unexplainable gaps in price of winning bid and other bids
- Winning company subcontracts to losing company
- Barriers to entry by new competitors
- Product not easily replaced
 - Standardized products
 - Few substitutes
 - Price is key differentiator
- Bidding vendor lacks ability to provide goods or services
- Communications indicating knowledge of competitor pricing or ability to win bid
- Communications among competitors
 - Meetings before bid
 - Trade association meetings

Bid Rigging Forms

- **Bid Rotation**
 - Competitors take turns on winning bids
- **Cover Bids**
 - Competitors agree to submit high bids to enhance the chances of one competitor winning the “low” bid
- **Bid Suppression**
 - Competitors agree not to submit a bid to enhance the chances of one competitor winning the bid



RECENT CASE EXAMPLES AND LESSONS

Morgan Lewis

Fuel Supply Bid Rigging Case: November 2018

- Initial whistleblower report to Defense Logistics Agency Inspector General
- **Three companies** agree to pay a total of **\$236 million**
 - \$82 million in criminal fines
 - \$154 million in civil damages
- Bid-rigging conspiracy targeting contracts to supply fuel to US Army, Navy, Marine Corps, and Air Force bases in South Korea
- Civil settlement money to the US Government
 - Up to treble damages possible under Section 4A of the Clayton Act

JUSTICE NEWS

Department of Justice
Office of Public Affairs

FOR IMMEDIATE RELEASE Wednesday, November 14, 2018

Three South Korean Companies Agree to Plead Guilty and to Enter into Civil Settlements for Rigging Bids on United States Department of Defense Fuel Supply Contracts

Three Companies Agree to Plead Guilty and Pay a Total of \$236 Million in Criminal Fines and Civil Damages

South Korea-based companies SK Energy Co. Ltd., GS Caltex Corporation, and Hanjin Transportation Co. Ltd. have agreed to plead guilty to criminal charges and pay a total of approximately \$82 million in criminal fines for their involvement in a decade-long bid-rigging conspiracy that targeted contracts to supply fuel to United States Army, Navy, Marine Corps, and Air Force bases in South Korea, the Department of Justice announced today.

"These charges are the first to be announced in this investigation into bid rigging and price fixing of fuel supply services to the Department of Defense in this critical region," said Assistant Attorney General Makan Delrahim of the Department of Justice's Antitrust Division. "Section 4A of the Clayton Act is a powerful yet historically underused enforcement tool that empowers the United States to obtain treble damages for anticompetitive conduct when the government is itself the victim. The Antitrust Division has a long history of vigilantly protecting the interests of American consumers through civil and criminal antitrust enforcement. Going forward, it is my goal to apply that same vigilance to protect the interests of American taxpayers. When a firm cheats the United States by rigging bids, the Division will insist on robust civil settlements like those announced today."

US v. GS Caltex Corp. et al., No. 2:18-cv-1456 (SDOH)

Fuel Supply Bid Rigging Case: March 2019

- **Two additional companies** agree to pay **\$127 million**
 - \$75 million in criminal fines
 - \$52 in civil damages
- **Seven individuals charged**
 - Associates, managers, and executives of companies conspiring to rig bids for fuel supply contracts
- **Civil settlements**
 - Antitrust Division's Transportation, Energy, and Agriculture Section
 - Civil Division
 - USAO SD Ohio, Civil Fraud Section



*US v. Hyundai Oilbank Co., Ltd & S-Oil Corp.,
No. 2:19-cv-1037 (SDOH)*

Fuel Supply Bid Rigging Case Lessons

- Highlighted specific tools to investigate and prevent collusion in the bidding process for government contracts in an effort to protect American taxpayers
- Renewed focus on Clayton Act Section 4A damages payable to the government
- PCSF is focused on the domestic market for now, but could expand its reach internationally

Online Bid Rigging



THE UNITED STATES
DEPARTMENT OF JUSTICE

“[F]irst plea agreement in its investigation into bid rigging at online auctions for surplus government equipment”

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Wednesday, April 10, 2019

Texas Bidder Pleads Guilty To Rigging Bids at Online Auctions for Surplus Government Equipment

First Charge Filed in GSA Auctions Investigation

Marshall Holland, the owner of a Texas company that purchases computers to resell and recycle, pleaded guilty today in connection with an ongoing investigation into a conspiracy to rig bids submitted to the Government Services Administration (GSA), the Department of Justice announced.

According to the one-count felony charge filed in the U.S. District Court for the District of Minnesota, Holland conspired with others to rig bids at online public auctions of surplus government equipment conducted by the GSA. Holland is charged with participating in the conspiracy from about February 2017 until as late as May 2018. Holland is the first individual charged in this investigation and he has agreed to cooperate in the Department's ongoing investigation.

“The Department and its law enforcement partners will not tolerate collusion that corrupts online markets and deprives taxpayers and the federal government of the benefits of competition,” said Assistant Attorney General Makan Delrahim of the Department of Justice's Antitrust Division. “We will work tirelessly to prosecute online bidders who cheat taxpayers for their own benefit.”

Online Bid Rigging



THE UNITED STATES
DEPARTMENT OF JUSTICE

Conspiracy to rig bids at online public auctions of surplus government equipment conducted by the GSA

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Tuesday, September 24, 2019

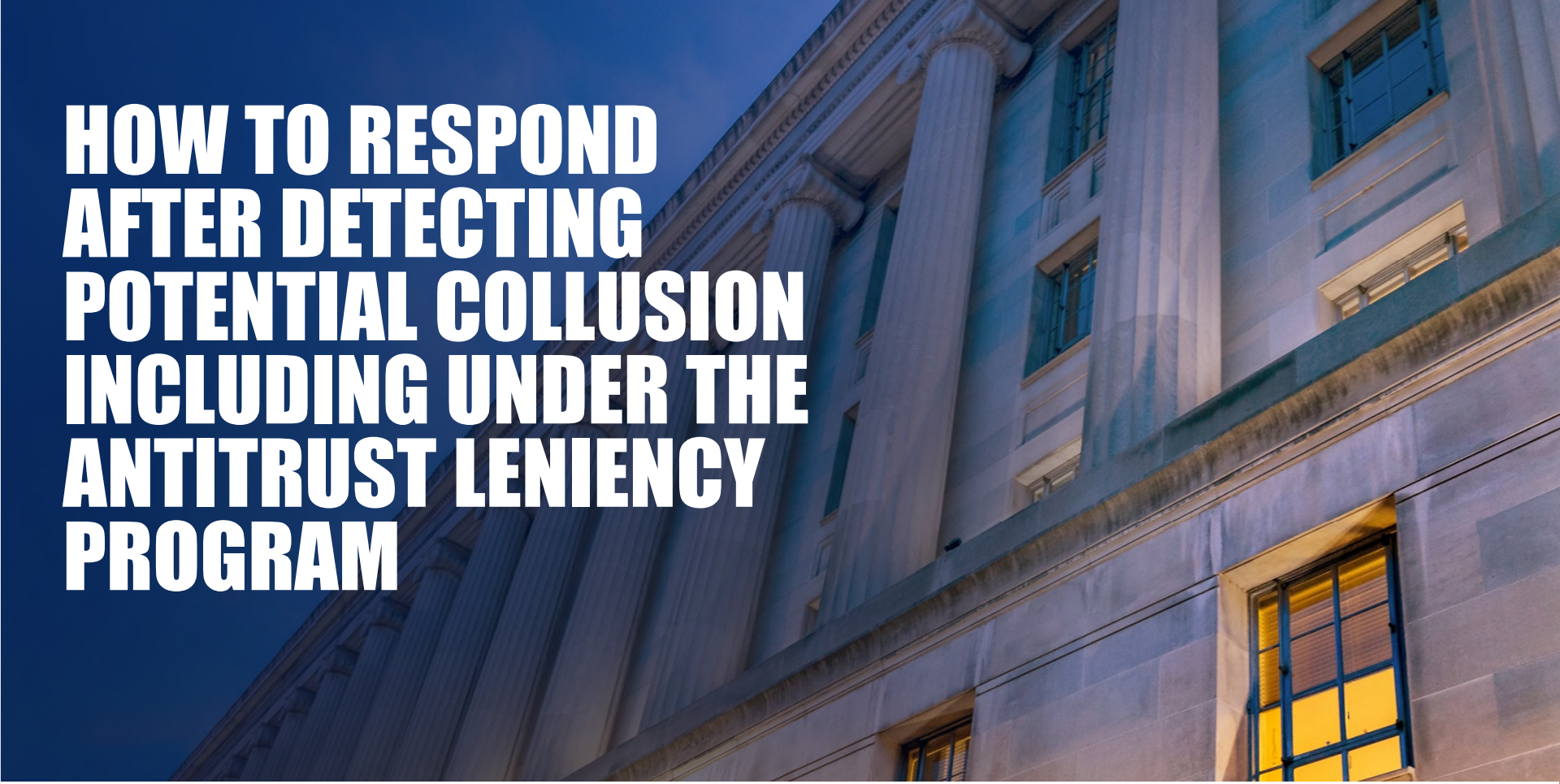
Online Bidder Pleads Guilty to Antitrust Charge for Rigging Bids at Government Auctions

Second Charge Filed in GSA Auctions Investigation

Igor Yurkovetsky pleaded guilty today in connection with an ongoing investigation into a conspiracy to rig bids submitted to the Government Services Administration (GSA), the Department of Justice announced.

According to the one-count felony charge filed in the U.S. District Court for the District of Minnesota in Minneapolis, Yurkovetsky conspired to rig bids at online public auctions of surplus government equipment conducted by the GSA. Yurkovetsky, a Pennsylvania resident, is charged with participating in the conspiracy from about July 2012 until as late as May 2018. He is the second individual charged in this investigation, and he has agreed to cooperate in the Department's ongoing investigation.

"Today's charge brings to justice another participant in a long-running conspiracy to corrupt online markets and cheat taxpayers and the federal government of the benefits of competition," said Assistant Attorney General Makan Delrahim of the Department of Justice's Antitrust Division. "This charge will not be the last in this investigation. The Department and its law enforcement partners are committed to prosecuting individuals who rig bids at government auctions."



HOW TO RESPOND AFTER DETECTING POTENTIAL COLLUSION INCLUDING UNDER THE ANTITRUST LENIENCY PROGRAM

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Detection of Potential Collusion

- Initial complaint or discovery
 - Whistleblower
- Internal investigation
 - Attorney-client privilege and work product doctrine
- Determine scope, facts, and participants
 - How many jurisdictions?
- Assess criminal antitrust and other criminal exposure
- Is the Antitrust Division Leniency Program available?
 - Will competitors act first?
- Consider False Claims Act exposure
- Develop coordinated strategy to address all criminal and civil issues

Leniency Program



- **Leniency Program**
 - 1978: Established
 - 1993: Corporate Leniency Program Modified
 - 1994: Individual Leniency Program
- **Benefits**
 - No criminal convictions for company, executives, or employees
 - No criminal fine but must make restitution
 - No prison
 - De-treble civil damages
 - Under ACPERA, single damages and no joint and several liability

- **Confidential**
 - Identity of applicant and information provided held in strict confidence
 - Not shared with anyone, including foreign authorities, without applicant's permission



Race to Leniency Under Marker System



- “The Division grants **only one corporate leniency per conspiracy**, and in applying for leniency, the company is in a race with its co-conspirators and possibly its own employees who may also be preparing to apply for individual leniency.”
 - Race to be the “first-in-the-door”
 - Marker system
- “Time is of the essence”
 - “On a number of occasions, the second company to inquire about a leniency application has been beaten by a prior applicant by only a **matter of hours.**”

Frequently Asked Questions About The Antitrust Division’s
Leniency Program And Model Leniency Letters (Jan. 2017)
1-12.100

FALSE CLAIMS ACT IMPLICATIONS



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False Claims Act Implications— Recent Settlements and FCA Actions

Recent FCA “Antitrust” Enforcement

- Wide-ranging criminal and civil enforcement activity against companies accused of bid rigging on fuel-supply contracts for US military bases in South Korea
- Investigations were prompted, in part, by *qui tam* “whistleblower” claims
- Global settlement included resolution of False Claims Act liability

Prior FCA Cases

- Prior FCA cases have focused on similar “anticompetitive” conduct (e.g., collusion, bid rigging, etc.)

FCA Implications

- Expect DOJ Strike Force to use these investigations/cases as template for FCA enforcement

False Claims Act Implications— A Brief Introduction to the FCA

- The False Claims Act (31 U.S.C. §§ 3729-3733) is a Civil War era statute. Impetus for the law was rampant fraud among contractors to the Union Army
- FCA amendments in 1943, *1986, *2009, and twice in 2010 expanded the FCA's reach
 - FCA has a unique enforcement mechanism that empowers private individuals or “qui tam relators” to file suit on the government's behalf and receive a “bounty” of up to 30% of the recovery
- Almost \$60 billion in FCA recoveries since 1986

FCA Violation

- Unlike the antitrust laws, there is no “per se” FCA violation for anticompetitive conduct
- Instead, FCA liability is premised on false claims for payment to the federal government
- False certifications and statements can be a basis for FCA suit. *See Universal Health Servs. v. US ex rel. Escobar* (U.S. 2016)
 - *E.g.*, Certificate of Independent Price Determination, 48 C.F.R. § 52.203-2

False Claims Act Implications— FCA Liability

Liability: Principal bases for FCA liability:

- Making or using a false claim to the government
- Making or using a false statement material to a false claim
- Avoiding an obligation to repay the government (known as a reverse false claim), or
- Conspiring to violate the FCA

Intent: Specific intent to defraud is not required. Instead, the FCA applies a “knowing” standard, which means:

- Actual knowledge of the information
- Deliberate ignorance of the truth or falsity of the information, or
- Reckless disregard of the truth or falsity of the information

Collateral Estoppel: Upon guilty verdict (including by plea), FCA defendants cannot contest essential liability elements. However, this “essential elements” test may not be satisfied in a criminal (or civil) antitrust proceeding where particular fraudulent invoices and the defendant’s knowledge of their falsity have not been established.

False Claims Act Implications— FCA Damages, Penalties, Fees

- **Treble Damages.** FCA damages are three times the amount of damages sustained by the government “because of” the defendant’s act.
- **Joint and Several.** In general, liability for FCA damages is joint and several
- **Penalties.** FCA penalties—between \$11,181 to \$22,363—are mandatory
- **Fees.** FCA defendant is required to pay the prevailing relator’s reasonable attorneys’ fees
- **Suspension/Debarment.** Potential preclusion from government contracting

False Claims Act Implications— FAR Mandatory Disclosure Rule

- The FAR Mandatory Disclosure Rule requires contractors to report to the government whenever there is “credible evidence” of any violation of the FCA or certain criminal statutes. *See FAR, Code of Business Ethics and Conduct, 48 C.F.R. § 52.203-13*
- The FAR includes as causes for suspension and debarment, the knowing failure to timely disclose “credible evidence” of a violation of the FCA, certain criminal statutes, or significant overpayments on the contract. *See FAR, Contractor Qualifications, 48 C.F.R. §§ 9.406.2 (debarment), 9.407.2 (suspension)*
- Contractor must take reasonable steps to determine that the evidence is credible

EXAMPLES OF PRIOR QUI TAM ENFORCEMENT



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Examples of Prior Qui Tam Enforcement— Bid-Rigging

Prior qui tam suits have focused on bid-rigging allegations.

- *US ex rel. Barko v Halliburton Co.* (D.C. Cir. 2017)
- *US ex rel. Bunk v. Gosselin World Wide Moving, N.V.* (4th Cir. 2013)
- *US ex rel. Miller v. Bill Harbert Int'l. Constr., Inc.* (D.C. Cir. 2010)

Examples of Prior Qui Tam Enforcement— False Certification and Collusion

Qui tam and FCA suits often have alleged false certifications and collusion in contract procurement and performance—claims that also can have anticompetitive impacts. Examples:

- *US ex rel. Harrison v. Westinghouse Savannah River Co.* (4th Cir. 1999) (collusion between contractor and subcontractor in obtaining government funds)
- *US v. SAIC* (D.C. Cir. 2010) (false certification that contractor had no organizational conflict of interest under contract to provide technical assistance on recycling radioactive material to the Nuclear Regulatory Commission while also working on recycling issue with other firms)

Collusion Strike Force Could Have Meaningful FCA Impact

- Dedicated Enforcement Teams have yielded significant FCA results
 - **HEAT** – “*Healthcare Fraud Prevention and Enforcement Action Team*”
 - Increased healthcare fraud charges: ~\$8 billion in recoveries
 - **Big Lender Initiative**
 - DOJ/USA/OIG/HUD focused enforcement against federal mortgage lenders
 - **National Center for Disaster Fraud**
 - DOJ Criminal Division’s national coordination agency established post-Katrina
- Affirmative Civil Enforcement—ACE Coordinators
- Qui Tam Counsel will be incentivized to provide information
- Qui Tam “threat” from competitors



FEDERAL ACQUISITION REGULATION ISSUES

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Federal Acquisition Regulation Issues

- Certificate of Independent Pricing
 - 48 C.F.R. § 52.203-2
- Mandatory disclosure
 - Federal Acquisition Regulation 3.303
 - 48 C.F.R. § 52.203-13
- Ongoing business ethics awareness and compliance program
 - 48 C.F.R. § 52.203-13(b), (c)
- Internal controls
 - 48 C.F.R. § 52.203-13(c)
- Suspension and debarment

Federal Acquisition Regulation 3.303

3.303 Reporting suspected antitrust violations.

(a) Agencies are required by 41 U.S.C. § 3707 and 10 U.S.C. § 2305(b)(9) to report to the Attorney General any bids or proposals that evidence a violation of the antitrust laws. These reports are in addition to those required by subpart 9.4.


Federal Acquisition Regulation 3.303(c)

(c) Practices or events that **may evidence violations** of the **antitrust laws** include-

- (1) The existence of an "industry price list" or "price agreement" to which contractors refer in formulating their offers;
- (2) A sudden change from competitive bidding to identical bidding;
- (3) Simultaneous price increases or follow-the-leader pricing;
- (4) Rotation of bids or proposals, so that each competitor takes a turn in sequence as low bidder, or so that certain competitors bid low only on some sizes of contracts and high on other sizes;
- (5) Division of the market, so that certain competitors bid low only for contracts awarded by certain agencies, or for contracts in certain geographical areas, or on certain products, and bid high on all other jobs;
- (6) Establishment by competitors of a collusive price estimating system;
- (7) The filing of a joint bid by two or more competitors when at least one of the competitors has sufficient technical capability and productive capacity for contract performance;
- (8) Any incidents suggesting direct collusion among competitors, such as the appearance of identical calculation or spelling errors in two or more competitive offers or the submission by one firm of offers for other firms; and
- (9) Assertions by the employees, former employees, or competitors of offerors, that an agreement to restrain trade exists.

Federal Acquisition Regulation Compliance Program

- FAR requires the contractor to:
 - Exercise due diligence to prevent and detect criminal conduct
 - Promote an organizational culture that encourages ethical conduct and a **commitment to compliance** with the law
- FAR requires an “ongoing **business ethics awareness and compliance program**”
 - Including **effective training programs**
 - Training for “the Contractor's principals and employees, and as appropriate, the Contractor's agents and subcontractors”



RESPONDING TO SUBPOENAS AND CIDS AND PREPARING FOR A CRIMINAL OR CIVIL INVESTIGATION

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DOJ Investigations

- Grand Jury Subpoena
- Search Warrants
- CID
- Parallel Proceedings



Investigation Tools

- Dawn raids
 - Globally or domestically coordinated
- Search warrants
 - Seizure of documents and electronic evidence
 - Request concurrent voluntary interviews
- Knock and talks
 - Voluntary unannounced interviews
 - At residence or office
 - May serve grand jury subpoena
- Grand jury subpoenas
 - Compel production of records to the grand jury
 - May request testimony
- Arrest
- Wire taps
- Border watch
- Mutual legal assistance treaty
- CLOUD Act
 - Executive Agreements
- Extradition
- Separate civil investigation
 - CID
 - IG subpoenas

DOJ No “Piling On” Policy

- 2018 “policy discourages ‘piling on’ by instructing Department components to appropriately coordinate with one another and with other enforcement agencies in imposing multiple penalties on a company in relation to investigations of the same misconduct.”
- “In highly regulated industries, a company may be accountable to multiple regulatory bodies. That creates a risk of repeated punishments that may exceed what is necessary to rectify the harm and deter future violations.” —Deputy Attorney General Rod Rosenstein
- “The Department should also endeavor, as appropriate, to **coordinate with and consider the amount of fines, penalties, and/or forfeiture** paid to other federal, state, local, or foreign enforcement authorities that are seeking to resolve a case with a company for the **same misconduct.**”

See Justice Manual § 1-12.100 (Coordination of Corporate Resolution Penalties in Parallel and/or Joint Investigations and Proceedings Arising from the Same Misconduct)

JUSTICE NEWS

Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute

New York, NY ~ Wednesday, May 9, 2018

Remarks as prepared for delivery

Thank you, Marshall, for that gracious introduction, and for your service in the Department of Justice. I am also grateful to Michael Schachter for chairing this event, and to the staff of the New York City Bar for your courtesies. I think I last visited this office to speak at a tax seminar about 15 years ago.

There are many current and former colleagues from the Department in this room, as well as friends from law firms and the private sector.

I am very happy to be with you in Manhattan. You may have heard that I have been kind of busy in Washington.

After I speak with you this morning, I need to head across Times Square to participate in the annual conference about the Foreign Corrupt Practices Act.



STEPS COMPANIES CAN TAKE NOW TO MITIGATE POTENTIAL EXPOSURE

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Steps Companies Can Take Now to Mitigate Potential Exposure

- Update Antitrust Compliance Program to Satisfy New Antitrust Division Corporate Compliance Program Elements
 - Review internal controls
- Training
 - Executives
 - Sales
 - Contractor's principals, employees, agents, and subcontractors
- Dawn Raid Preparedness
 - Criminal investigations
 - Various scenarios

New Antitrust Division Compliance Policy



At charging, consider credit for compliance programs

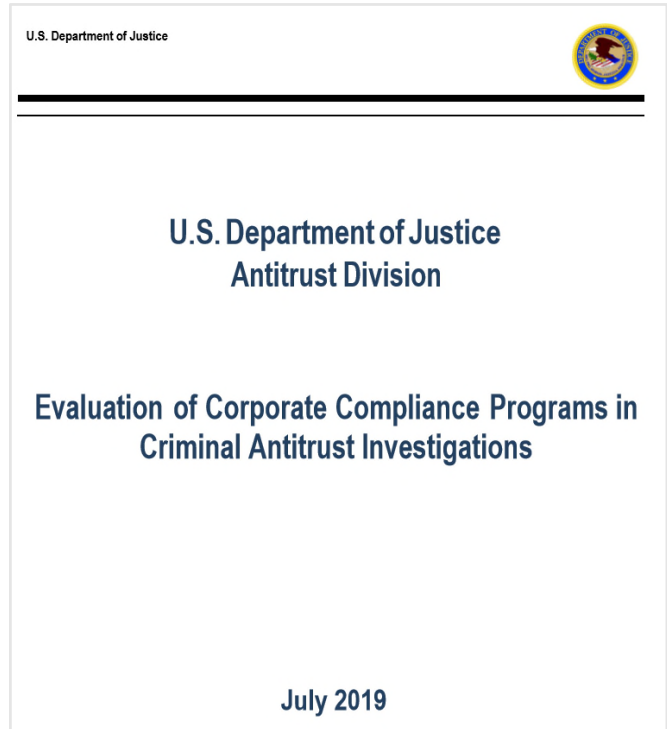
- Possibility of a deferred prosecution agreement when “relevant factors, including the adequacy and effectiveness of the corporation’s compliance program, weigh in favor of doing so.”

At sentencing, an “effective” compliance program may result in

- Three-point reduction in a corporation culpability score under the Sentencing Guidelines
- Recommendation for a lower criminal fine and
- Recommendation on whether to impose probation

Guidance on factors used to evaluate antitrust compliance programs

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Compliance Program Factors


- Design and comprehensiveness of the program
- Culture of compliance within the company
- Responsibility for, and resources dedicated to, antitrust compliance
- Antitrust risk-assessment techniques
- Compliance training and communication to employees
- Monitoring and auditing techniques, including continued review, evaluation, and revision of the antitrust compliance program
- Reporting mechanisms
- Compliance incentives and discipline
- Remediation methods

Board and Management Roles

- Board and management active roles generally essential to the success of an antitrust compliance program
- New policy focuses on board and management leadership on antitrust compliance issues
- Board's general duty of oversight to manage risk including antitrust risk
 - *Caremark* duty of oversight under *In Re Caremark International Inc. Derivative Litigation Consolidated Civil Action No. 13670*, 698 A.2d 959 (Del. Sept. 25, 1996), and progeny.

Dawn Raid Preparedness

- Are you prepared in the event of a dawn raid?
- Do your executives know how to respond to knock-and-talk requests?
- How to avoid obstruction of justice issues
- Role of simulated training and table-top exercises



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DAWN RAID GUIDELINES

GOLDEN RULES
ALERT AND ORGANIZATION

- **Don't obstruct.** Be professional and cooperative.
- **Don't destroy** documents or other evidence.
- **Call counsel** immediately to protect your rights.
- **Keep a record** of what is searched, what is taken, who was involved in the search, and persons in focus.
- **Know your rights:**
 - The search should be limited to the scope of the warrant.
 - You have the right to receive inventory of materials seized.
 - You have the right to withhold or receive back-privileged materials.
 - In the United States, interviews on substantive topics are voluntary and may be refused. You may insist on counsel being present.
 - In the European Union, you must answer purely factual questions but may refuse to answer questions to which the answers may be self-incriminating.

STEP-BY-STEP RESPONSE TO A DAWN RAID

1. **Ask to see** investigators' identification and documents authorizing the search.
 - a. Confirm that your company's premises are permitted to be searched.
 - b. Keep a record of the investigators' names and affiliations.
2. **Call counsel** immediately.
 - a. Ask investigators to wait for counsel to arrive (they may refuse).
 - b. Put counsel in touch by phone with investigators.
3. **Assign a point of contact** to interface with the investigators and organize the response.
 - a. Provide a conference room free of business materials and away from business operations for investigators.
 - b. Assign individuals to "shadow" investigators.
 - c. Interfere with outside counsel.
4. **Ensure document preservation**, send out a litigation hold notice immediately, and take steps to ensure that all relevant evidence is preserved—regardless of location.
5. **"Shadow" the search**—assign someone to follow each investigator.
 - a. This person should be trained to understand the rights of both the company and individuals.
 - b. Ensure that company employees are cooperating with the search.
 - c. Keep a record of all items searched and seized.
 - d. Involve external counsel for any questions regarding privilege.
6. **Make copies of all materials seized**—one copy for investigators and one copy for company files.
7. **Protect privileged materials** by objecting to the seizure of any privileged material and agreeing to a procedure to ensure that any privileged materials seized are returned. Involve outside counsel in this exercise.
8. **Do not break seals** where the investigators have sealed the company's premises (e.g., overnight).

HOW WE CAN HELP

If you need assistance with more detailed dawn raid guidelines or training, contact a Morgan Lewis lawyer listed below:

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QUESTIONS?



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Mark L. Krotoski is the former Assistant Chief of the National Criminal Enforcement Section in the DOJ's Antitrust Division, supervising international criminal antitrust cartel investigations and successfully leading trial teams in prosecuting antitrust and obstruction of justice cases involving corporations and executives.

- His experience includes handling every phase of the cartel enforcement process.
- In addition to other DOJ leadership positions, he has nearly 20 years of experience as a federal prosecutor.
- Mark represents and advises clients on antitrust cartel investigations; white collar and government investigations; cybersecurity and privacy matters; trade secret; fraud matters.

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Douglas W. Baruch is a litigation partner resident in the Washington, DC, office. Doug has over 30 years of experience representing corporations and individuals in a variety of complex civil and criminal litigation matters, ranging from investigations to federal and state court litigation and appeals, with an emphasis on cases arising under the False Claims Act (FCA).

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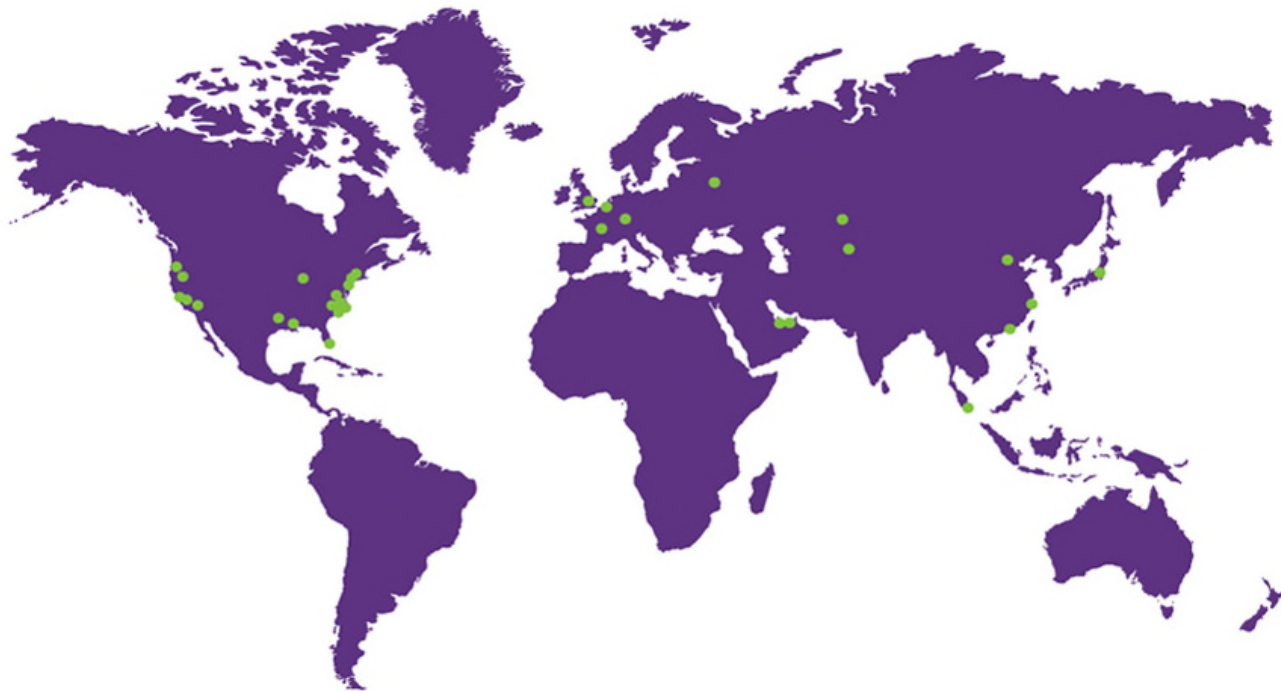
Frank A. DeSimone is part of a team that represents United States and international clients in a variety of high-stakes complex commercial matters, with a focus on civil and criminal antitrust litigation and class action litigation. He also advises companies on mergers and acquisitions and joint venture transactions before the US Federal Trade Commission and the US Department of Justice. Prior to joining Morgan Lewis, Frank worked as a corporate and securities associate in Philadelphia and as an antitrust paralegal for an international cartel investigation in Paris.

Our Global Reach

Africa
Asia Pacific
Europe
Latin America
Middle East
North America

Our Locations

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