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WHAT EVERY BUSINESS SHOULD KNOW ABOUT THE ANTITRUST LAWS

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PREFACE

This discussion is not intended to be a legal treatise or a detailed explanation of the many provisions of the federal antitrust laws. *It is not a substitute for sound legal advice and does not take the place of competent legal counsel required in analyzing specific problems.*

This material is intended as a non-technical explanation of the major provisions of the federal antitrust laws, to stimulate awareness of the more common problems encountered by businesses and the general principles which govern these areas.

PURPOSE OF THE ANTITRUST LAWS

Our country's basic economic philosophy has been its faith in free competition. The purpose of the antitrust laws is to preserve and promote free competition. The antitrust statutes were not enacted as a unit but emerged over the years as the need for new laws or changes were recognized.

The statutes use general language rather than precise definitions of the exact kind of conduct which would violate the law. Because the antitrust language is so broad, the courts and the Federal Trade Commission have enjoyed wide discretion in interpreting and applying the law. This has been found desirable in a changing society. However, this flexibility has at times made it difficult for businesses to know whether certain practices violate the law.

FOUR BASIC ANTITRUST LAWS

1. SHERMAN ACT - - The Sherman Act was passed in 1890 and is the most important of the antitrust laws. Section 1 of the Act prohibits every contract, combination or conspiracy between two or more companies which exerts an unreasonable restraint on trade or commerce. Section 2 prohibits the monopolization, any attempted

monopolization, or any agreement or conspiracy to monopolize any market for a particular product or service.

Over the years, these broad principles have been applied by the courts to make certain commercial conduct unlawful. The "per se" rule makes certain practices conclusively unreasonable, and thus illegal. Among these practices are agreements to fix certain prices, to divide markets among competitors, to impose certain group boycotts or to allocate markets. Other practices which restrain commerce may be unlawful if they are judged unreasonable.

2. CLAYTON ACT - - Passed in 1914, the Clayton Act addresses specific practices where the effect may be to substantially lessen competition or tend to create a monopoly. The Act's coverage includes tying arrangements, exclusive dealing arrangements, mergers and acquisitions and interlocking boards of directors.

3. ROBINSON-PATMAN ACT - - Enacted in 1936, the Robinson-Patman Act principally deals with discrimination in prices charged to competing purchasers for products of like grade and quality. Its purpose is to protect smaller businesses by limiting the large company's ability to command discriminatory discounts through its purchasing power.

4. FEDERAL TRADE COMMISSION ACT - - This law authorizes the Federal Trade Commission to enforce the other three antitrust laws. Section 5 of the Act prohibits "unfair methods of competition" and "deceptive practices." Conduct which does not violate the other federal antitrust laws may nevertheless be unlawful under the FTC Act. The reason – the law is designed to nip anticompetitive practices in their "incipient" stage.

To apply, each statute requires some involvement in interstate commerce. Even wholly intrastate activity, however, has been ruled to affect interstate commerce so this standard is often met in a commercial transaction appearing to be wholly intrastate.

Finally, each state has enacted antitrust laws which complement the federal statutes, and which must be observed when applicable to business activities.

PENALTIES

Penalties for violation of the antitrust laws are severe. Violation of the Sherman Act is a felony. A criminal indictment may be instituted by the Justice Department, with corporate exposure to substantial monetary fines. Individual employees, officers or directors of the company who authorize or participate in the violation face felony conviction, imprisonment and substantial monetary fines as well.

Also civil damages may be recovered by private parties under section 4 of the Clayton Act. This provision permits any person whose business has been injured by an antitrust violation to recover triple damages plus costs of suit including attorney's fees. Additionally, the attorney general in each state may file a triple-damage class action on behalf of all consumers in the state for an antitrust law violation.

Enforcement may also be accomplished by a court-ordered injunction or by an FTC cease-and-desist order. Civil penalties may be assessed for violation of court injunctions or court-approved FTC orders.

YOU AND YOUR COMPETITORS

1. Price Fixing

Perhaps the most widely publicized violation of the Sherman Act is price fixing between competitors. Agreements between competitors to fix, raise, lower, stabilize or peg prices, or establish a range of prices, a minimum price, a maximum price, or a common pricing system are unlawful.

Bid-rigging schemes may violate the Sherman Act's price fixing ban. Agreements between competitors to fix bids or to refrain from bidding and other collusive bidding

arrangements are unlawful. Agreeing to another bidder's request to submit an intentionally high "courtesy" bid to facilitate the requestor's achieving low bid status is unlawful price fixing.

Agreements between competitors which affect price have also been held unlawful. Thus an agreement among competitors to purchase certain amounts of distressed products was unlawful as it decreased market supply and increased price. Similarly, competitors who agreed to set production levels in order to limit supply (and thus increase price) acted improperly. Competitors must also avoid agreements as to the kind or amount of materials to be used in their products, or the product's formula or design. The price fixing prohibition also extends to the terms and conditions of sale. Competitors may not agree as to trade credit terms for its customers, or agree to eliminate interest-free trade credit. Agreements as to discounts, service charges, restocking charges, delivery charges and terms, product warranties, rebates, taxes and the like are unlawful.

It is unlawful for competitors to agree to follow an open pricing policy where each promises to adhere without deviation to the prices and terms as announced, even though each competitor made an independent decision on what the price for his product should be.

2. Allocation of Customers and Territories

Competitors may not agree to allocate specific customers or classes of customers, or geographic territories among themselves. Sharing the market may consist of allocating fixed percentages of available business to each competitor, dividing sales territories on a geographic basis, allotting customers to each seller or setting volume quotas as to customers or territories. Market sharing can also result from a competitor's agreement on bidding practices or refraining from bidding.

Similarly, competitors may not sell through a common sales agent where the agent designates for each competitor the price for his product, production levels, customers or territories.

3. Group Boycott

A group boycott, or concerted refusal to deal with other traders, is unlawful. Under such an arrangement, competitors agree to refuse to sell to particular customers or buy from particular suppliers. Thus competitors may not jointly refuse to sell to price-cutters, or to bad credit risks, or even to unethical customers.

It is unlawful for trade association members to agree only to buy from, or sell to, companies that are also association members. A company may not agree to deal with a customer only on the condition that such customer refrains from buying from the company's competitors where there may be a substantial adverse effect on competition.

The refusal to deal need not be total. Thus, competitors may not agree that they will deal with a company only at a discriminatory price or on unfavorable terms which are not imposed on other companies. Similarly, competitors may not collectively refuse to buy, sell, install or service products which do not meet a standard or are not "approved" or "certified" or "listed."

Even where there is no agreement among competitors, a single company that refuses to deal with another may nevertheless encounter antitrust problems. For example, it was unlawful for a newspaper to refuse to accept advertising from retailers who also advertised via a competing radio station. Here the newspaper had attempted to monopolize the local advertising market by forcing advertisers to boycott the competing radio station.

4. Exchanging Information with Competitors

It is important to avoid the exchange of sensitive business information with competitors without guidance from legal counsel. The exchange of price lists or prices charged to customers may violate Section 1 of the Sherman Act even though there is no agreement to fix prices, due to the natural tendency that such conduct will produce uniform or stabilized prices in the industry. Of course, you must obtain this information from *some* source in order to compete. But you should be able to show that you did not obtain it directly from your competitor and that you did not make your lists available to competitors.

The exchange of credit information on customers among competitors is a particularly sensitive activity and should be done only under strict supervision by legal counsel to avoid even the appearance of agreements in restraint of trade.

5. Trade Associations

The functions performed by a trade association for the benefit of its members and their industry are numerous and diverse. Special care must be taken when participating in the activities of trade associations or similar groups where competitors do come together and meet. Experienced legal counsel is needed to monitor association meetings, programs and activities to avoid those areas which involve potential antitrust implications.

6. Discussion Topics to Avoid

An unlawful agreement among competitors is often alleged, and sometimes proved, merely by innocent conversations or sharing of information with a competitor. This is *circumstantial* evidence that an unlawful understanding was reached. In order to avoid even the appearance of improper concerted action, you should avoid discussing the following with any competitor:

- Prices, pricing procedures, changes in or stabilization of prices, terms or conditions of sale
- Pricing practices of any industry member
- Forecasts of price increases or decreases
- A specific company's credit terms, discounts, rebates, freight allowances, profits, profit margins or costs, market shares or sales territories
- Selection, rejection or termination of one or your suppliers or customers
- Production levels or schedules
- Bids, or intent to bid or not to bid on a contract

YOU AND YOUR CUSTOMERS

1. Selection of Customers

Generally a company lacking monopoly power has a right, acting independently, to choose its customers. This right is not absolute. It may not be exercised to bring about a result prohibited by the antitrust laws. For example, a unilateral rejection or termination of a customer who refuses to adhere to suggested resale prices could be an unfair method of competition prohibited under the FTC Act. Or a company refusing to do business with firms who also deal with that company's competitors may be an unlawful attempt to monopolize prohibited by Section 2 of the Sherman Act.

2. Non-price Resale Restrictions

Are non-price resale restrictions agreed to by a company and its customer lawful? This question can only be answered on a case-by-case basis by applying the "rule of reason." Under this rule, all the circumstances in a particular case must be weighed to determine whether the agreed to non-price restrictions impose an unreasonable restraint on competition. As one court noted, applying this rule requires a business to "ramble through the wilds of economic theory."

Examples of non-price resale restrictions between a company and its customer include: a requirement that a customer resell the company's products only to approved or designated persons; a requirement that a customer resell the company's products only to persons in a designated geographic territory; a requirement that a customer sell the company's products only from designated stores or locations. These restrictions should be reviewed in advance by company counsel as they may be improper.

3. Resale Price Maintenance

May a company and one or more of its customers agree as to the prices the customer will charge when reselling the company's products? In 1997, the Supreme Court decided the legality of *maximum* resale price agreements between a vendor and its customer is determined under the "rule of reason" test. In 2007, the Supreme Court overruled a 1911 precedent and declared that the legality of *minimum* resale price agreements will also be determined under the "rule of reason". However, these agreements may remain *per se* unlawful under state antitrust laws so caution is advised when considering these types of agreements. In very limited circumstances where a "true" consignment of goods takes place, the company consigning the goods may specify the resale price to be charged by the consignee but here great caution must be exercised.

It is said that a company without monopoly power is generally free to announce in advance that it will unilaterally refuse to deal with any customer who fails to adhere to suggested resale prices. Here again great caution must be exercised. This rule has been severely restricted by the courts, and such a unilateral refusal to deal could violate the antitrust prohibitions against attempts to monopolize or unfair methods of competition.

4. Price Discrimination

The Robinson-Patman Act requires a seller to treat all competing purchasers equally without discrimination in price. The main provision prohibits a seller from charging purchasers different prices for goods of like grade and quality where the effect may be to injure competition. A difference in price may injure competition for it gives the favored customer an advantage over the disfavored customer in the resale of the product. Differences in delivery terms, rebates, service charges and the like, and disparate credit terms not related to credit worthiness, are treated as differences in price.

There are two principal exceptions to the rule against price discrimination. The "meeting competition" defense permits the seller to charge a lower price to one customer if done in good faith in order to meet (but not beat) an equally low price offered to that customer by one of the seller's competitors. The seller should carefully document the competitor's lower price before relying on this defense.

Second is the "cost justification" defense. This defense is extremely difficult to prove, may involve complex cost accounting and economic theories and should only be relied on when documented in advance.

The Act also makes it unlawful for a customer to knowingly induce or receive a prohibited price discrimination from the seller.

5. Services, Facilities and Promotional Allowances

A company which furnishes services, facilities or promotional allowances in connection with the sale of its product intended for resale must make such services, etc. available on proportionately equal terms to all competing purchasers.

6. Exclusive Dealing Arrangements

A company sometimes may enter into a "requirements contract" with a customer. This commits the contracting buyer to take all or most of its requirements for a product from the contracting seller. Such exclusive dealing arrangements are unlawful if the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce by foreclosing other sellers from doing business with the contracting buyer. Such arrangements require great caution and the prior review of counsel.

7. Tying Arrangements

Another customer arrangement which is generally unlawful is the forcing of a tying arrangement. Here a company conditions the sale of a product or service on the customer's agreement to also purchase a different ("tied") product or service from the company, or alternatively refrain from buying it from anyone other than the company.

There are a number of legal qualifications which modify the general prohibition against tying arrangements. There are circumstances where a company may properly sell its product or service in combination. These should be undertaken only with advance review by counsel.

Another unlawful variation is the reciprocal dealing arrangement, where Company A agrees to buy Company B's products if Company B buys other products from Company A. While mere cross-dealings are not unlawful, the use of coercion or market power to obtain reciprocal sales must be avoided.

MONOPOLY POWER

Section 2 of the Sherman Act makes it unlawful for a company (1) to monopolize, or (2) to attempt to monopolize, or (3) to conspire or agree with any other person or persons to monopolize the market for any product or service in any part of the country. Note that the first two prohibitions reach action taken by a single company *alone;* no agreement or action with others is necessary.

A company has monopoly power when it is able to control prices or exclude other competitors from the market. Possession of monopoly power alone is not unlawful; willful acquisition, maintenance or expansion of that power need be shown.

Most common are situations involving the "attempt to monopolize" prohibition, where a company has the specific intent to obtain a monopoly. Intent is proven circumstantially by the company's conduct. The key factor is the intent to injure a competitor. Examples are sales below cost to eliminate a competitor, or action to interrupt a competitor's source of supplies or distribution channels.

ADVERTISING AND PROMOTION

Statements made in advertising, sales literature or in sales presentations must be free from deception to avoid violating the FTC Act. A statement is "deceptive" if, when considered, as a whole it tends to deceive the average purchaser. Deception may also occur where certain disclosures are not made about the product – for example: product changes, composition, dangers in use, foreign origin of the product, imperfections, and the used or rebuilt character of the product.

Substantiation for representations made about a product must be obtained before making claims to the purchaser. The seller's lack of knowledge that a claim is false or deceptive will not stop FTC's enforcement of the law.

ANTITRUST GUIDELINES

A number of general guidelines and rules can be drawn from the discussion of federal antitrust laws.

Dealings with Competitors

1. Don't agree on and avoid discussing the following topics with any competitor:

   - Prices, pricing procedures, changes in or stabilization of prices, terms or conditions of sale
   - Pricing practices of any industry member
   - Forecasts of price increases or decreases
   - Specific credit terms, discounts, rebates, freight allowances, profits, profit margins or costs, market shares or sales territories
   - Selection, rejection or termination of one of your suppliers or customers
   - Production levels or schedules
   - Bids, or intent to bid or not to bid on a contract

2. If you are a member of a trade association or similar group, be sure competent legal counsel monitors the association meetings, programs and activities.

3. Don't exchange price information (or other sensitive business information) with competitors without guidance from company counsel. Be able to show that you obtained information on a competitor's prices from some source other than the competitor.

4. Don't agree with any competitor to refuse to sell to certain customers, or to buy from certain suppliers.

Dealings with Customers

1. Don't agree with a customer as to the resale price the customer will charge for your product without prior approval of your company counsel.

2. Don't agree with a customer as to the persons or markets or territories where he may resell your product without prior approval of your company counsel.

3. Don't discuss your dealings with a customer with any other customer.

4. Prices, terms of payment, delivery and other conditions of sale of a product or service must generally be the same for competing purchasers. Any deviation from a uniform policy should be reviewed in advance by company counsel.

5. A company which furnishes services, facilities or promotional allowances must make these available to all competing customers on proportionally equal terms.

6. Avoid requirements contracts, reciprocal dealing agreements and tying arrangements unless approved by company counsel.

7. Be certain that termination of suppliers or customers is for justifiable and documented business reasons and in compliance with applicable state law and contract terms.

8. Be sure advertising claims are documented in advance.

CONCLUSION

Routine business decisions involving prices, terms and conditions of sale, contacts with suppliers and customers, advertising and numerous other business activities frequently have implications under the antitrust laws. These laws are intricate and inadvertent violations can occur and result in substantial penalties. Thus it is essential to be aware of the scope of the antitrust laws and guard against possible violations.