

Antitrust Compliance Programs: How to Help Your Client Avoid Antitrust Problems

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Current Criminal and Civil Enforcement is Active

- Bumble Bee Tuna and its senior VP pleaded guilty to felony price fixing, \$25 million fine to company.
- United States Judicial Panel on Multidistrict Litigation has just consolidated 9 proposed class actions and 44 related civil cases.

Criminal Penalties

- Sherman Act

- Fines

- Corporations: Up to \$100,000,000
 - Individuals: Up to \$1,000,000
 - Under some circumstances, the maximum fines can be higher, up to twice the gain or loss involved.
 - For example, Citicorp was fined \$925 million in 2017.
<https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more>

- Imprisonment: Up to 10 years

Criminal Penalties

- Robinson-Patman Act
 - Fines up to \$5,000
 - Imprisonment: Up to one year
- Utah Antitrust Act
 - Fines
 - Corporations: Up to \$500,000
 - Individuals: Up to \$100,000
 - Imprisonment: Third-degree felony

Civil Penalties and Costs

- Federal Antitrust Laws
 - Private lawsuits
 - Treble damages
 - Litigation costs and attorney fees
 - Injunctive relief
 - Government
 - Cease and desist authority
 - Injunctive relief
 - Restitution/Disgorgement
 - States can bring actions to recover damages on behalf of their residents

Civil Penalties and Costs

- Utah Antitrust Act
 - Penalties
 - Individual: Up to \$100,000
 - Corporations: Up to \$500,000
 - Remedies
 - Treble damages
 - Cost of suit, including attorney fees
 - Injunctive relief

Additional Costs to Clients

- Lost personnel time for discovery, depositions, and document production
- Bad PR
- Loss of competitive edge
- The client's attorneys' fees

Why Should You Discuss Basic Principles With Clients Even if They Have Heard this Before?

1. Increase in bid rigging conduct
2. Myth that antitrust enforcement has lessened
3. Growing familiarity among competitors
4. Belief that interactions with competitors don't amount to price fixing – no smoke filled room for cabal

Prohibited Communications with Competitors

- Prices of products or services sold
- Projected output
- Costs of products
- Credit terms
- Labor costs
- Customer allocation
- Geographic market divisions
- Whom you intend to not deal with

Avoid “Spill-Over” Communications

- Avoid “spill-over” communications with your clients’ competitors who also buy products from your client or sell products to your client
- Keep communications confined to the appropriate transactions

Bid Rigging – Criminal Violation and Per Se Civil Liability

- Don't agree with competitors on price you will bid on
- Don't agree to rotate high bids with competitors
- Don't agree with competitor not to bid on a job
- Don't submit a high bid you know has no chance
- Don't discuss your bid with competitors
- Don't agree with competing bidders at auction or trustee sales



Treat Competitors Like Coiled Rattlesnakes

- Inferences of agreement can be drawn from the number and types of communications with competitors
- Any communications with competitors may have to be explained before a grand jury
- A competitor may entangle you in improper communications and then get immunity for himself when subpoenaed before a grand jury

Trade Associations, Social Contacts

- Association counsel should review agenda of meetings and attend them
- If improper discussion occurs, withdraw, note it in minutes and contact your antitrust report
- Be cautious on golf courses, at dinner, lunch, or during casual conversations with a competitor
- Innocent, casual contact after trade association meeting can lead to indictment

What Does Your Client Do If a Competitor Makes an Improper Communication?

1. Don't just ignore it.
2. Affirmatively reject suggestion and withdraw from conversation.
3. Report improper communication to antitrust report.
4. Counsel should respond to competitor's counsel telling them to cease such communications.

Compliance Program Should Address Issues Specific to the Client and the Market in Which It Operates

- The client's distribution scheme
- Tying arrangements
- Exclusive dealing contracts
- Refusals to do business or termination of relationships
- Specific strategies where client has market power in the relevant product or geographic markets

Tailor these discussions to each client's situation

Be Accurate With Any Documents You Create

- Be careful with texts, email, Twitter, etc.
- Avoid hyperbole – “we’re taking the whole market”
- Avoid “intent to destroy competitors” language
- Documents remain long after memories that could explain the documents fade
- Assume each document your client creates could be read to a jury

Robinson-Patman Act

It is unlawful to directly or indirectly discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved are in commerce, where such commodities are sold for use, consumption, or resale within the United States.

*There must be at least 2 contemporaneous sales to customers who are in competition with each other.

Documentation Needed to Support Meeting Competition Defense

- Letter signed by customer.
- Competitive price reports client keeps with name of customer, date, and details and competitive offer to customer.
- The customer's copy of your competitor's offer to your customer, invoice or price quotation to customer. Make sure client's sales people note date received and individual's name who gave it to client to avoid price fixing allegations.

Cooperate with Any Investigation or Lawsuit

- a. Pre-Dawn raid:
 - Call counsel first
 - Person designated to accompany agents – take notes on what taken
 - Have counsel present for any interviews
 - Cooperate in finding documents sought in search warrant
 - Preserve all documents

- b. CID from AG prior to any lawsuit
 - Get counsel involved immediately
 - Preserve all documents

- c. In civil litigation, subpoenas, summons
 - Get counsel involved immediately
 - Preserve all documents

Help Your Clients Spot Antitrust Issues and Seek Counsel on How to Avoid Problems

- Provide a basic outline of danger areas
- Hold question and answer sessions with the clients' employees most likely to encounter antitrust problems
- Establish a reporting program to an antitrust report - the person in your client's organization who receives all antitrust concerns and may be inside or outside counsel or an officer of company
- Have individual officers and employees regularly review and sign written acknowledgements of compliance
- Hold an antitrust compliance program and question and answer session every 2 years

Consistently Follow Guidelines

- Be able to say years later in front of a grand jury, “I never deviated from the guidelines,” even if memories of a specific issue have faded.
- Deal with issues when they arise and correct situations.
- Encourage open communication between key people in client’s organization and counsel.

Questions?