

Complying with Antitrust Laws

August 2011

The current administration has made enforcement of the antitrust laws a top priority, and is investigating potential criminal violations in a number of industries. Complying with the antitrust laws has never been more important.

The most basic antitrust rule is that it is *per se* (that is, automatically) illegal to agree with a competitor to fix prices or to rig bids, divide markets or allocate customers. It does not matter whether an exact or uniform price is agreed upon. Agreeing on formulas to calculate prices, on price differentials among products, or on **elements** of price, like terms of credit, amount of discounts, inclusion of freight charges, etc. is *per se* illegal.

An *agreement* between competitors does not have to be formal or written. It does not require a handshake or even the words "I agree" or their equivalent. Evidence of an agreement can take many forms. For example, changing prices after talking with a competitor about prices can be evidence of an agreement to fix prices. Staying away from certain customers, declining to bid on a project, or staying out of certain lines of business after communicating with competitors on these subjects, can be evidence of an agreement to fix prices, rig bids or allocate customers. **Therefore, do not discuss or exchange information with competitors about prices, pricing policy, bids or customers.**

This is where it gets complicated. Restraints of trade that are not subject to *per se* treatment are analyzed under the "rule of reason." This includes a wide range of conduct, for example mergers; the formation of joint ventures and certain agreements related to them; restrictions on resellers' prices or territories; agreements to deal exclusively with a vendor or customer; most tie-in sales or product bundling; and denial of membership in a trade organization or buying group. The legality of any specific restraint depends on a detailed analysis of competitive conditions, and consideration of legitimate justifications that may outweigh the impact on competition. In general, only justifications that increase efficiency or promote competition can be considered. Abstract "ethical" principles cannot justify a restraint of trade.

The federal antitrust laws are enforced by the Antitrust Division of the U.S. Department of Justice. Violations are felonies, punishable by fines and imprisonment. Many states have antitrust statutes that track the federal laws. Private individuals or corporations injured by antitrust violations may file lawsuits and recover treble damages, injunctions and attorney fees. Class actions by customers and even (in some states) by *their* customers are now available to recover alleged over-charges. A class action can turn a small individual claim into a large lawsuit.

You should never engage in conduct that might violate the antitrust laws without consulting counsel knowledgeable about the antitrust laws. The Department of Justice has a corporate amnesty program that offers significant benefits to the first company to report a violation. If you know of conduct that might be a violation, you should immediately consult counsel and consider applying for amnesty.