

Corporate Department

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## United States Antitrust Guidelines

The American economic system depends upon free enterprise and open competition. The U.S. antitrust laws were enacted to help preserve this system by promoting competition and protecting the public from unfair and predatory trade practices. The interests of employers, employees and customers are best served by a strong policy of vigorous and fair competition in compliance with the antitrust laws.

Any company's antitrust compliance program depends upon the conduct of its people. It is the personal obligation of each employee to act in a manner consistent with the company's antitrust policy. Adhering generally to professional standards of business practice does not guarantee the absence of antitrust problems.

The antitrust laws are complicated, and an inadvertent violation can occur easily. Failure to comply with the U.S. antitrust laws can result in drastic legal and financial penalties for the company involved and for its individual directors, officers and employees.

### I. The U.S. Antitrust Laws

The United States antitrust laws were enacted to prevent undue economic concentration and to encourage free and open competition in the marketplace. The first antitrust statutes were enacted to prevent a device known as the "business trust" from being used to concentrate economic power and to eliminate competition in entire industries. Since then, elaborate federal and state antitrust laws have been enacted to prevent such anti-competitive practices as price fixing, vertical restraints of trade, monopolization, price discrimination, exclusive dealing and tying arrangements, anti-competitive mergers and acquisitions, and a host of other practices.

Each of these practices is antithetical to free and open competition. Some rely for their success upon agreement, collusion, or coercion. Some involve the necessary effect of lessened competition and increased economic concentration. Apart from the need to avoid the penalties which may be imposed for violation, compliance with the U.S. antitrust laws is in the best interests of our clients and their employees.

The four principal federal antitrust laws are the **Sherman Act**, the **Clayton Act**, the **Robinson-Patman Act** and the **Federal Trade Commission Act**.

**The Sherman Act** was the first modern U.S. antitrust law, and it remains today the most important. The key portions of the Sherman Act are Section 1, which prohibits "every contract, combination . . . or conspiracy, in restraint of trade," and Section 2, which bars any act of monopolization or attempt to monopolize any market.

As that law has been interpreted, it is not necessarily illegal for a company to have a monopoly or to try to achieve a monopoly position. The law is violated only if the company tries to maintain or acquire a monopoly position through unreasonable methods. For the courts, a key factor in determining what is unreasonable is whether the practice has a legitimate business justification.

The Sherman Act provides for criminal sanctions as well as civil penalties, and these penalties were recently increased significantly by the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (the “2004 Antitrust Legislation”). The maximum corporate fine is now \$100 million; the maximum individual fine is now \$1 million; and the maximum prison sentence has been increased to 10 years.

**The Clayton Act** deals in greater specifics than does the Sherman Act, and seeks to prevent anti-competitive practices at the outset.

Section 2 of the Clayton Act, commonly known as the **Robinson-Patman Act**, prohibits discrimination between similar customers in pricing or promotional practices. Section 3 of the Clayton Act prohibits the sale of a company’s products on the condition that the customer not deal in competitive products, where the effect is to substantially lessen competition or tend to create a monopoly. Section 7 of the Clayton Act prohibits mergers, acquisitions and joint ventures which may have the effect of substantially lessening competition or tending to create a monopoly. Section 8 of the Clayton Act prohibits interlocking directorates between competitors if certain jurisdictional limits are met.

**The Federal Trade Commission Act**, which is more accurately described as a trade regulation statute than as an antitrust law, established the Federal Trade Commission to supplement the enforcement activities of the antitrust division of the Department of Justice. The FTC Act is basically a catch-all statute designed to encompass unfair methods of competition and deceptive practices not expressly covered by the other federal antitrust statutes. Section 5 of the Federal Trade Commission Act outlaws “unfair methods of competition” but does not define “unfair.” The Supreme Court has ruled that violations of the Sherman Act also are violations of Section 5 of the Federal Trade Commission Act, but Section 5 covers some practices that are beyond the scope of the Sherman Act. The FTC enforces Section 5.

At the federal level, the antitrust laws are enforced by the Bureau of Competition at the Federal Trade Commission and by the Antitrust Division of the Department of Justice. At the state level, they usually are enforced by the State Attorney General. Private parties also can bring antitrust cases to redress illegal injuries.

## II. Corporate Compliance Programs, Amnesty and Leniency

Our clients are well advised to have in place effective and efficient antitrust compliance programs. These programs are good business practice for both U.S. and foreign clients. More than half of the corporate defendants in recent DOJ enforcement actions have been foreign-based corporations, some still clinging to the

fallacy that their offshore activities could not have U.S. antitrust implications. EC and other antitrust authorities have typically followed the U.S. regime as a guide for their own competition enforcement, and all the antitrust prosecutors extend cordial cooperation to all of their counterparts.

In antitrust conspiracy cases, immunity from criminal prosecution typically is available only to the *first* cooperating party, and an effective compliance program can assist in the early identification of possibly serious antitrust issues. In some cases there has literally been a race to be first to the DOJ. Virtually every significant antitrust proceeding in recent years has been initiated or dramatically influenced by a whistleblower granted immunity or leniency by the DOJ.

In the landmark *Stolt-Nielsen* case in 2007, the Justice Department was required to stand by a leniency agreement that it had cancelled, and the court's decision was based in significant part upon the company's adoption of an effective corporate compliance program designed and implemented by Carter Ledyard & Milburn.

Antitrust Legislation in 2004 also limited the civil liability of corporations participating in the DOJ's 1993 corporate leniency program to single damages attributable to the company's specific share of commerce rather than treble damages attributable to all relevant damaged persons, *if* the defendants cooperate as specified with the criminal prosecutors and with the private plaintiffs in the inevitable civil actions. This is intended to eliminate the *in terrorem* choice presented by the desire to cooperate with the DOJ while not exposing the company to treble damage claims as a result. But the exact boundaries and requirements of these provisions are yet to be defined with precision.

Clients establishing antitrust compliance programs should be familiar with the DOJ's "Principles of Federal Prosecution of Business Organizations" (December 2006). In summary, an effective antitrust compliance program must have clear standards, with high-level executives involved instead of delegation to employees who may have an incentive to engage in illegal conduct. Effective communication of the standards and procedures is required, and obviously reasonable steps must be taken to achieve compliance. There should be enforcement provisions with appropriate disciplinary mechanisms, and reasonable procedures to respond to violations and to prevent them in the future. Every company will have unique requirements, and every compliance program must be tailored with care to address them.

### III. Restraints of Trade (Sherman Act, Section 1)

Section 1 of the Sherman Act prohibits every “contract, combination . . . or conspiracy” which *unreasonably* restrains trade.

To satisfy the “contract, combination or conspiracy” element of Section 1, some kind of joint or concerted action between two or more persons or companies must exist. As a result of this requirement, many business practices are permissible if *unilaterally* engaged in by a company, or by a legally formed joint venture, but are prohibited if they involve an *agreement* with others such as competitors, suppliers, distributors or customers.

The “agreement” need not be anything so formal as a written contract. “Understandings” are enough and may be inferred by a court or jury from the way the parties have conducted themselves. As a general rule, parallel action among competitors or between a manufacturer and its distributors by itself is innocent if it is demonstrably the product of independent, *unilateral* decisions by competitors in response to market conditions. However, there are numerous circumstances where a “contract, combination or conspiracy” is readily inferred by the joint actions of competitors (so-called “horizontal” agreements) or between a manufacturer and distributors or retailers (“vertical” agreements). Since an “agreement” is so easily inferred merely from parallel action taken after seemingly innocent *communications* between parties, that employees must avoid even the appearance of any common understandings with competitors, suppliers, distributors or customers.

However, for Section 1 to be violated the joint action must have as its purpose or effect an *unreasonable* “restraint of trade.”

#### A. *Per Se* Offenses

Ordinarily, business practices are illegal under the antitrust laws only if they have, or may have, some adverse effect on competition.

However, the courts have held that some arrangements and actions are so indefensible that they are conclusively presumed to be unreasonable restraints under Section 1. Such *per se* restraints of trade are conclusively deemed unlawful, and no argument will be entertained that they were harmless or even beneficial in any particular case.

*Per se* offenses are particularly important to know about and avoid. Because these acts are illegal *per se*, business justifications for these practices, even if valid ones exist, will not be heard. Moreover, federal enforcement policy encourages criminal prosecution for these *per se* offenses.

## 1. Price-fixing

### a. “Horizontal” Price-Fixing

Perhaps the most notorious type of *per se* offense is price-fixing. Price-fixing is the antitrust violation most frequently prosecuted criminally.

“Horizontal” price-fixing typically involves agreements *between competitors* as to prices which they will charge to buyers, or which they will pay to suppliers. A specific price need not be set. It is unlawful to agree on maximum *or minimum* prices; or in some cases on a common sales agent; or on terms or conditions of sale (such as credit terms or discounts); or even on an exchange of price information if there is a stabilizing effect on prices. The agreement itself can be inferred from any series of otherwise apparently innocent conduct, such as telephone calls or meetings followed by uniform price action.

The following are areas in which you must exercise great care in dealing with competitors with respect to pricing:

- Do not exchange past, present or future price or cost information with competitors.
- Do not make any agreements and do not enter into any discussions with competitors concerning the prices, terms or conditions upon which you will purchase or sell. Agreements with respect to the inclusion of costs in prices are as dangerous as outright price-fixing; you risk not only fines but imprisonment.
- Do not attend any meeting where competitors will be present (including, for example, trade association meetings), at which you may have reason to expect prices will be discussed either formally or informally; if pricing is discussed at any such meeting, leave at once.
- Any unnatural uniformity of action between competitors, such as raising prices simultaneously, may invite investigation. Therefore, every important decision as to price which follows or may be followed by competitors should be taken only after internal deliberations, carefully recorded, which are not preceded or followed by discussions with competitors.

### b. “Vertical” Price-Fixing (Resale Price Maintenance)

In a competitive economy, prices should never be fixed either between competitors, and resale prices should not be fixed between manufacturers and distributors unless there is demonstrable business justification under the “rule of reason.” The latter arrangement is referred to as “vertical” minimum resale price fixing.

Since 1911, agreements requiring distributors and other resellers to resell only at a price prescribed by the manufacturer had been deemed *per se* illegal under U.S. Antitrust Laws, meaning that no competitive defense could save them. Then, with the 1997 decision of the U.S. Supreme Court in *State Oil v. Khan*, the Court held that henceforward agreements between manufacturers and distributors which fixed *maximum* resale prices would be tested under the rule of reason rather than being automatically held *per se* illegal. The new theory was that it could be pro-competitive, and therefore permissible under the rule of reason, if distributors or

retailers were prohibited by manufacturers from charging exorbitant prices for very popular products in short supply. In June 2007, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, the U.S. Supreme Court, in a landmark 5-4 decision, extended this principle to all resale price maintenance, and now both maximum *and* minimum RPM agreements are evaluated under the rule of reason. The Court's 1911 decision, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, was expressly overruled.

The following should be kept in mind with respect to resale prices charged by distributors or other resellers:

- With respect to maximum or minimum required resale prices, be prepared to justify (to a jury if necessary) why your resale price restraints are, on balance, *pro*-competitive.
- You may also announce that you will refuse to deal with distributors who do not conform to your suggested prices and that you may terminate a distributor on this ground. However, before taking any action with respect to price cutters, you should discuss the specific situation with counsel.
- Do not discuss the pricing activities of certain distributors with other distributors.

## 2. Agreements Between Competitors

Virtually any agreement or other arrangement between or among competitors, the purpose or effect of which is to limit competition between these competitors, is *per se* unlawful. Included in this category are agreements between competitors which limit production, allocate customers or territories, boycott customers or suppliers, or establish common methods or plans of distribution. The anticompetitive purpose and effect of such "horizontal" agreements is conclusively presumed to be unlawful. Participants in the same market are expected to compete for the same customers on the basis of quality and price; any agreements, discussions, or "understandings" which limit that competition violate Section 1.

The following are some non-price restraints of trade imposed by agreement between competitors which should be totally avoided to eliminate the possibility of *per se* illegality:

- Do not make any written, oral or implicit agreements, or have any understandings with competitors regarding geographic markets, sales territories or shares of any market, scope or methods of product distribution or reciprocal purchases.
- Do not exchange any information with competitors. Certain exchanges of general statistical information without editorial comment among competitors for the purpose of improving or expanding opportunities to compete may be permissible.
- Do not adopt or implement important decisions regarding any change in established practices, which may be followed by other members of the industry, without carefully recorded internal deliberations which are not preceded or followed by discussions with competitors. "Friendly" or "informal" discussions with competitors regarding internal policies may provide the basis for an inference of unlawful agreements when competitors may also follow similar policies. Additionally, uniform solutions by competitors to common industry problems should be constantly monitored to insure that practices originally adopted by independent action may not be construed as implied understandings.

### 3. Agreements Between Manufacturers and Distributors (Group Boycotts and Tie-ins)

In much the same way that competitors cannot agree to boycott a reseller or customer for anticompetitive purposes, a manufacturer should not agree with other of its distributors or customers to refuse to deal with or terminate another distributor or customer.

This is a very delicate area of the law, since a manufacturer *may* terminate a distributor lawfully even following complaints by other distributors about predatory practices by the distributor being canceled. The facts in each case must be studied carefully to determine if the termination is lawful. An agreement representing a group boycott (which is *per se* unlawful) can be inferred from evidence of communications regarding the refusal or termination.

Tying arrangements (the sale of one product on the condition that the buyer purchase another) are also in certain circumstances *per se* offenses, although courts recently have sometimes applied the rule of reason analysis to alleged tying arrangements.

The following guidelines should be kept in mind with respect to selecting and dealing with your customers:

- Do not adopt or announce a policy of automatically eliminating certain classes of firms such as discounters or other “troublemakers.” Such a policy can influence other manufacturers to adopt a parallel policy, with the inference of unlawful concerted action among manufacturers unlawfully to boycott the excluded classes of potential distributors. Such a distributor may nevertheless be terminated if the facts justify the termination in the particular case.
- Do not discuss or make any agreements with competitors or with others (including with other distributors) regarding the selection of distributors. Any choice of distributors should rest on good faith internal decisions regarding the proper marketing of the product.
- Do not discuss the allocation of products among various distributors with other distributors or with competitors. Any decision regarding the selective offering of products to certain distributors must be unilateral and based upon demonstrable considerations of marketing efficiency. Exclusive territories or vertical customer allocations generally are lawful, but the assignments are to be made *unilaterally*.
- Do not give favored treatment to particular similarly-situated distributors or customers with respect to price or service. While price differentials may be justified in some cases, this is an area in which the rules are rigid and highly technical, and caution is required. Similarly, benefits such as offers of payment for advertising and display, provisions for markdown allowances and returns, or other marketing services should be made available to all competing distributors on proportionately equal terms.

#### B. *Non-per Se* Offenses (Vertical Restraints of Trade)

Most acts or arrangements must be shown to have had some unreasonable restraint on competition before they are held to be an antitrust violation. Except for the conduct which the courts have singled out as *per se* offenses, all other conduct is tested by a “rule of reason.” Accordingly, a large body of law has developed

over the years enumerating various *non-per se* offenses and the circumstances under which they will or will not be held to be violations of Section 1 of the Sherman Act.

Whenever any such arrangements are involved, it is incumbent upon employees to bring the proposed transaction to senior management. After all, the transaction may be perfectly acceptable under the cases interpreting Section 1. On the other hand, the transaction may present issues which make litigation at least likely and which may not be worth that risk.

The “rule of reason” standard merely means that a defendant is given an opportunity *at trial* to prove that the restraint in question was reasonable. It does not eliminate the risk of lawsuits and expensive litigation. Therefore, it is important that management be given an opportunity to review proposed actions which involve any of the following potential restraints of trade:

### **1. Termination of Distributors**

Ordinarily, a person is free to choose the identity, number and location of his distributors. However, a manufacturer may not do so in conjunction with other distributors where the purpose or effect is to impose restrictions on the customer’s freedom of use, resale or pricing. In such circumstances, an illicit agreement may be inferred between the manufacturer and the *other* distributors.

While the manufacturers are not specifically required by law to inform their distributors of reasons for initially refusing to deal with them or refusing to extend their term, the manufacturer’s employees should discuss the reasons with management in advance for it may be advantageous to give reasons in a particular case.

Furthermore, a growing number of U.S. states, Wisconsin for example, have enacted protective legislation severely limiting manufacturers’ rights to terminate or not to renew distributors.

### **2. Tying Arrangements**

These are refusals to sell or lease one product or service unless another is also bought or leased. The tying of one product to the purchase of another is considered a *per se* violation when the seller has “appreciable economic power” over the tying product and a “not insubstantial” amount of commerce is foreclosed in the tied product market.

Although the requirements necessary to meet the *per se* illegality test are stringent, a tying arrangement may still be considered unreasonably restrictive of competition under the “rule of reason” test. Any such determination concerning tying arrangements requires a careful review of both the products involved and the law.

“Package” deals generally are not tying arrangements so long as the purchaser is in fact free to purchase the components separately if desired.

### 3. Competing Products

A manufacturer may impose upon its distributors a requirement not to deal in competing goods unless the effect is to unreasonably restrain trade. An unreasonable restraint is more likely to be found where covenants not to handle competing goods are in widespread use in distributorship agreements, and alternative channels of distribution are not available to new competitors.

The following guidelines should be kept in mind in this area:

- Do not include in a distributorship agreement any restrictive clause against the distributor’s handling a competing product without legal advice. A manufacturer may require that a distributor carry its products exclusively, if there are alternative channels of distribution available to competitors and a substantial portion of the relevant market is not foreclosed as a result of such exclusivity arrangements.
- Do not have an understanding with a distributor that the distributor will not sell to jobbers who handle components manufactured by competitors.
- Do not make any agreement with other manufacturers that each manufacturer will refuse to deal with any of their distributors handling competing lines. Do not make any agreements with certain distributors, including company-owned distributors, limiting other distributors to dealing in selected items of the company’s products.

### IV. Monopolization (Sherman Act, Section 2)

Section 2 of the Sherman Act reaches single-firm conduct by a firm with monopoly power which restricts competition. The offense of monopolization requires the possession of monopoly power and some misuse of that power. “Monopoly” means the power to control prices or to exclude competitors. Generally, something over 50% of a particular market is necessary before any substantial question could arise.

Basic to most charges of a Section 2 violation is some misuse or abuse of existing economic power, such as relative size, financial resources or patent position. As market power increases, the concept of abuse broadens to encompass otherwise ordinary business practices. For example, it has been held to be “monopolization” for a company with monopoly power merely to embrace each new business opportunity arising in its industry (by expanding capacity to meet anticipated demand, for example), because by doing so the company effectively keeps anyone else from coming in.

Some other examples of practices which should be avoided by a dominant firm are:

- A seller’s refusal to sell to a particular customer where the motive for such refusal is to eliminate competition, as in a case where the customer is also a competitor of the seller.

- A nationwide seller's driving of a local competitor out of business by sharp price reductions made only in that competitor's primary market area.
- Selling below cost, in certain circumstances, for the purpose of injuring a competitor.
- Attempts by a seller systematically to close distribution channels to competitors or to cut off sources of supply.

It would be virtually impossible to make a complete list of practices which may result in charges of monopolization or attempts to monopolize. However, if a company enjoys a prominent market position in some product and geographic markets, it is important for employees to exercise extra care in any of its dealings with competitors and customers in those markets.

### V. Exclusive Dealing (Clayton Act, Section 3)

The Clayton Act is detailed and specific. It was designed to prohibit business practices considered unaffected by the general language of the Sherman Act. The sections of the Act here discussed deal primarily with the activities of the seller of goods (not services), and restrict such activities when the probable effect may be to "substantially" lessen competition.

Section 3 of the Clayton Act prohibits any lease, sale or contract for sale of goods on the "condition, agreement or understanding" that the lessee or purchaser shall not use or deal in the goods of a competitor, where there is a substantial anticompetitive effect.

Section 3 clearly applies to a seller who requires its buyer not to deal in competitive goods. It also applies to two situations which are not so obvious: sales on the condition that the buyer take all or a major part of its requirements from the seller (a "requirements" contract); and sales on the condition that the customer take another product (a tying agreement).

Again, as under Section 1 of the Sherman Act, the agreement need not be formal or express. It can be inferred from any course of dealings between buyer and seller, *e.g.*, that the buyer *complied* with the condition against its will.

The following guidelines should be considered, with professional advice, in order to avoid problems presented by exclusive dealing arrangements:

- Do not try to tie up customers unreasonably, especially with contracts for terms longer than necessary or usual under the circumstances.
- Do not condition the sale of one product on the sale of another, at least not without advice, and be careful about using one product to "coax" the sale of another.
- Do not ask a dealer or any reseller not to handle competing products without advice.

- Use cancellation and other protective clauses that are fair to both parties under the particular contract involved.

## **VI. Price Discrimination (Robinson-Patman Act)**

The Robinson-Patman Act (actually an amendment to Section 2 of the Clayton Act) prohibits price discrimination between purchasers of goods of “like grade and quality.” The Act, designed during the Great Depression to protect small, independent retailers from the purchasing power enjoyed by the large chain stores, provides that a seller must not charge two different buyers two different prices for goods of like grade and quality.

Price differentials may be justified in some cases. This is an area in which the rules are rigid and highly technical, and caution is required. Generally, do not give favored treatment to similarly situated distributors or customers with respect to price or service. Similarly, promotional services, provisions for markdown allowances and returns, or other marketing services should be made available to all distributors on equal terms. Any promotion or marketing plan which involves discrimination between different classes of customers should be reviewed with care.

## **VII. Interlocking Directorates (Clayton Act, Section 8)**

Section 8 of the Clayton Act bars, with certain exceptions, an individual from serving on the boards of directors of two competing corporations. Over the years, enforcement has been sporadic at best. The 1990 Antitrust Amendment Act made significant changes concerning interlocking directorates.

Section 8 continues to prohibit individuals from serving on multiple boards of competing companies; however, a significant change under the 1990 Amendments was the creation of a series of safe harbors that, if met, permit interlocking directorates and officers. For example, under the 1990 statute only corporations with assets greater than \$10 million (rather than the old \$1 million) come within the prohibition. The \$10 million threshold (\$26,161,000 as of February 2009) is indexed to the gross national product.

The 1990 Antitrust Amendment Act included three *de minimis* safe harbor rules which exempt corporations from the strictures of Section 8 if: (i) the competitive sales of either corporation are less than \$1 million (adjusted annually; \$2,616,100 as of February 2009), or (ii) the competitive sales of either corporation are less than 2% of total gross revenue of that corporation, or (iii) the competitive sales of each corporation are less than 4% of the corporation’s gross revenues. The *de minimis* exemptions were created because a ban on interlocking directorates serves no functional purpose where the corporations are not in competition with one another to a significant degree or where they compete in a line of business that is not economically significant in relation to their overall operations.

Common directors and officers who fall within the Act's safe harbor will continue to face exposure to criminal or civil liability under Section 1 of the Sherman Act for exchanges of sensitive information or coordination of decisions.

Since 1990, officers as well as directors are subject to Section 8, but indirect interlocks, vertical interlocks and interlocks between horizontal potential competitors are unregulated. For example, competing corporations that have directors who sit together at a third, related corporation which does not compete are not in violation.

### **VIII. Mergers and Acquisitions; Joint Ventures**

Section 7 of the Clayton Act prohibits mergers, the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." The purchase of the stock or assets of another corporation may raise antitrust implications, no matter how small the company. Particular transactions may require the filing of a pre-merger notification in compliance with the Hart-Scott Rodino Antitrust Improvements Act, which also requires, in section 4(c) that all analyses of a proposed acquisition prepared by or for management be filed with the antitrust authorities; this requirement often presents a road map for an antitrust challenge and is often a trap for the unwary.

Likewise, research and development joint ventures, as well as production joint ventures, (regardless of size) present problems similar to those presented by mergers and acquisitions. Each proposed joint venture should be reviewed to determine its likely competitive effect.

The past year has been characterized by increased federal merger and acquisition enforcement activity, both at the Department of Justice and at the Federal Trade Commission, as well as aggressive enforcement efforts at the state level and in private actions.

### **IX. Trade Associations**

The antitrust principles which apply to the activities of individuals apply similarly to the activities of trade associations. Individual members of such associations may not engage in anticompetitive activities such as price-fixing, market allocation, or setting production quotas. Unfortunately, an association's nature as a "combination" often makes any concerted actions among its members suspect as agreements in restraint of trade. Consequently, many activities may be considered illegal depending on purpose and effect. These, among others, are product standardization, exchange of statistical information, and credit activities.

Senior management should be contacted for advice as to whether the objectives and operations of an association, in which membership is proposed, are proper from an antitrust standpoint.

Where doubts or uncertainties arise concerning any specific trade association activity, they should be resolved against the activity until contrary advice is received. Where legitimate benefits of participation are involved despite these doubts, the matter should be reviewed before any action is taken.

The following guidelines should be considered in order to avoid problems presented by trade associations:

- Agenda or programs should be submitted to counsel prior to meetings of the association or any of its committees which company personnel attend.
- Following each formal or informal meeting of a trade association or any of its committees, all documents (such as minutes or speeches) distributed at or after the meeting should be sent to counsel.
- Approval of counsel should be obtained before statistics or other information is submitted to a trade association or any of its committees.

## **X. Penalties for Violation of the Antitrust Laws**

The consequences of violating the federal antitrust laws can be extremely severe, both to the company and to individual employees. Penalties can be imposed directly upon employees, officers or directors who authorize, order or participate in the unlawful conduct. A person found guilty of violating either Section 1 or Section 2 of the Sherman Act may be punished by a fine or by imprisonment or by both.

**Prison Sentences:** Criminal violation of the Sherman Act is a felony. In addition to fines, prison sentences of up to ten years per offense (increased from 3 years in 2004) may be imposed on any officer, director or employee who is found guilty of violating Section 1 or Section 2 of the Sherman Act. The trend towards incarcerating corporate officers, directors and employees has been increasing in recent years.

**Fines:** Criminal violation of the Sherman Act by a corporation is subject to a fine of up to \$100 million for each criminal offense (increased from \$10 million in 2004). Alternatively, the fine could be twice the gain or loss from the illegal conduct, but this alternative has inherent issues which make it questionable under recent sentencing jurisprudence.

A *person* found guilty of violating the Sherman Act is subject to a fine of up to \$1 million for each criminal offense (increased from \$350,000 in 2004).

**Injunctions and Decrees:** Other penalties can have even more serious effects on the business of a company. In civil proceedings, permanent restrictions limiting future activities may be directed by judgment or decree or by a consent order or cease and desist order issued by the FTC. Such decrees normally go far beyond the prohibition of the precise conduct found unlawful.

A decree or injunctive order entered against a company may have more serious business consequences than a fine or damages because a company subject to a decree or order is placed at a distinct competitive disadvantage. It must gear its operations to the terms of the decree or order, may be required to file periodic

compliance reports or maintain special records, and will be subject to fines or other penalties if it violates the decree or order.

Other remedies from government enforcement proceedings may include divestiture, debarment from bidding on government contracts, compulsory licensing of patents or know-how, or abandonment of methods of marketing which competitors may be allowed to continue. These decrees and orders are usually phrased very broadly in order to anticipate future conduct which “may” be unlawful.

**Treble Damages:** Any person, class of persons, or the United States government, directly injured in its business or property by an antitrust violation, may recover in civil actions three times the amount of damages actually suffered. During the past several years, juries have awarded verdicts which, once trebled, have exceeded the largest private judgment ever awarded. Private suits have proliferated. Actions are often initiated by disgruntled customers, terminated distributors, and unsuccessful competitors. That such lawsuits may be without antitrust merit does not avoid the expense of defending them. Employees must be constantly aware of these potential litigants and must guide their conduct to give them the least opportunity to sue for treble damages. In the 2004 Legislation, the Corporate Leniency Policy, intended to reward cooperation with antitrust investigation, was extended to protect the first cooperating company or individuals in a cartel from treble damages, but they still would be subject to actual damages and to the payment of legal fees.

**Legal Fees:** In addition to the defendant’s own legal expenses, which can be very substantial, the defendant will generally be required to reimburse a successful plaintiff’s fees. These are in addition to any final award of damages granted to a successful plaintiff.

**State Laws:** Violations of various state antitrust laws may be punishable by a fine or imprisonment or both. Also, most state antitrust laws provide for the recovery of damages sustained by reason of a violation of such laws. In some states, treble damages may be recovered; in others, recovery may be had for actual damages, and a few states provide for the recovery of a statutory penalty.

**Other Considerations:** In the event of a criminal indictment an individual will be booked, finger-printed, have mug shots taken and be forced to undergo enormous personal upheaval. Under some circumstances, where an employee of a corporation is included as a defendant in a criminal or civil action, the employee’s legal expenses, as well as fines or judgment imposed, may not be reimbursed by the corporation. Accordingly, an antitrust violation can have disastrous personal and economic consequences for an individual.

## **Conclusion**

Any overview of the federal antitrust laws such as this Summary should prompt questions, not resolve them. If you are aware of any present practice which may be in conflict with the principles summarized here, it should be called to the attention of senior management. Future questions should similarly be reported. The

antitrust laws are vigorously enforced by both the federal government and private litigants and the most effective protection against liability is the continuing awareness of every responsible officer of the areas of concern and the immediate resolution of questions that arise

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Questions regarding this advisory may be directed to **Robert A. McTamane**y (212-732-3200, mctamaney@clm.com), or **Gary D. Sesser** (212-238-8820, sesser@clm.com) of our New York Office.

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