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Informational Sheet

Business Credit and the Federal Antitrust Laws

Disclaimer

The Federal Antitrust Laws are extremely complex, and the following material should not be considered legal advice. If you have concerns, contact competent antitrust counsel. The comments below are based on several decades of experience and specialized training provided by NACM and various attorneys relating to antitrust and credit and industry credit group operations.

The general purpose of the antitrust laws

The antitrust laws are meant to encourage open competition in business and to restrain predatory or anti-competitive behavior. The laws recognize the potential for the restriction of competition through the acts of competitors working together or the actions within a company of preferring one customer over another, resulting in increased or controlled prices, controlled markets, or other monopolistic behavior.

The general exception for credit operations

While product pricing and other aspects of the marketing and sales function may never be discussed with competitors, the Antitrust laws have clearly recognize the "legitimate business interest in the exchange of [historical] credit information among business people."

Why do the Antitrust laws matter to your company?

1. **The antitrust laws apply to the customer relationship and virtually all customer transactions.** The statutes are designed to restrict anticompetitive activities primarily in the marketing and sale of products; however, the individual company's practices in the extension of credit and other aspects of the credit process have been determined to come within the scope of these laws. One of the laws, the Federal Trade Commission Act, is so broad as to cover virtually any communication or transaction with a customer.

2. **Rights to share information with the competition are limited.** The ability to share information with other companies in the same industry, while strictly prohibited in the marketing and sales function, is fundamental to effective management of credit and accounts receivable risk. This ability to share information, in large part, is conditioned by the antitrust statutes and subsequent case law. This sharing occurs in business credit reports and industry trade credit groups and includes any contact between competitors – at a group meeting, an industry golf tournament, social activities, and any other event that brings together individuals whose companies may compete for business.

3. **Violations may bring a panel of potential plaintiffs.** In addition to the regulatory agency charged with enforcement, several of the antitrust laws allow companies and individuals to use civil litigation as a means of redress.

4. **A written record of the alleged offenses may not be required.** The alleged offenses may be inferred from common actions of competitors ("conscious parallelism"). In other words, uniform actions of two or more competitors may be considered evidence of a conspiracy.

5. **The burden of defense may be especially onerous and expensive.** The defendant assumes the burden of proof. While the principle of innocent until proven guilty theoretically prevails, the power and virtually unlimited budget of the federal government, as well as the state government, may be brought to bear on the suspects. The sheer weight of process may affect the financial viability of the defending company and any named individuals, regardless of innocence. Recently, this burden has become substantially more difficult given the prosecutorial tendency to: (1) "shotgun" potential defendants, for example, by naming everyone in an industry, whether specific companies and responsible individuals have any connection to the case or not; and (2) name defendants for the specific purpose of gaining information on the actions of others.

6. **The bystander may be considered an accomplice.** The courts have held that an individual who knows of or should have known of unlawful behavior and who does not protest subjects the individual and the individual's company to potential liability and consequences.

7. **The disgruntled customer may claim conspiracy or other violation of the law.** The aggrieved customer, who may be delinquent, insolvent, or otherwise frustrated, may claim suppliers' violations of the antitrust laws have damaged the customer. Management, Sales, and Credit teams should have a clear understanding of the acts and the rights of suppliers to blunt such a claim.

8. **Penalties are severe.** Penalties for violation of the acts, including treble damages, imprisonment, and asset forfeiture, are severe and may be applied to the individual as well as the business.

9. **Violation may result "cement shoes".** Violation of any of the acts may affect company operations for decades. A company may sign a consent order, agreeing to certain behavior and to avoid certain other actions for an indefinite term. This may remain in place for decades and require every new key employee in a key position to be made aware of the order. This may have a chilling effect, especially on the ability to interact with competitors in the effort to effectively manage credit and receivables.

10. **Recent history has included lax enforcement of the antitrust laws.** Over the years, companies have been lulled into ignoring or attempting to circumvent these statutes by a distinct lack of enforcement, which in large part is a function of the of the political administration. Interest in and enforcement of the antitrust statutes is clearly cyclical and may return with a vengeance at any time.

The Federal Statutes

- **The Sherman Act (1890)** – First effort to regulate; **prohibits contracts, combinations and conspiracies in restraint of interstate trade**; an offense involves an act between two or more individuals or companies which has the effect of restraining or monopolizing trade or commerce; provides severe penalties, including fines (up to 500k for an individual and $1mm for a corporate defendant) and/or imprisonment for up to 3 years and/or property forfeiture; the **rule of reason** says not every restraint of trade is a violation; however, **certain acts are *per se* violations**, such as price fixing, boycotting of competitors, or divisions of markets; concept of "conscious parallelism" – inference from consistent behavior by competitors; requires proposed plan, motive for concerted action, and substantial unanimity of action. Enforced by the Federal Dept. of Justice.

  Two Supreme Court cases important to Trade Creditors relating to the Sherman Act:
  - The act does not force a trader or manufacturer to deal with every potential client – see United States vs. Colgate & Co. **Companies may not be forced to sell every buyer.**
  - See also Catalano v. Target Sales (1980) – Supreme Court held that **agreements to fix credit terms are *per se* violations.**

- **The Clayton Act (1914)** – Amends the Sherman Act by **identifying as violations actions before they have matured into an actual offenses**, such as sales conditioned by agreement not to use competition (e.g., tying agreements), certain types of acquisitions, interlocking directorates; violations may result in civil or regulatory actions, and injuries may result in treble damages.

- **The Federal Trade Commission Act (1914)** – Very broad and general, addresses **"unfair methods of competition, and unfair or deceptive acts or practices in commerce"**; any prospective violation of Sherman and Clayton Acts which doesn't quite meet the standards may be considered unfair competition, including false advertising and deceptive branding; enforced by FTC.

- **The Robinson-Patman Act (1936)** – Amends the Clayton Act; focuses on **price discrimination between purchasers of commodities of like grade and quality** when interstate and when effect is to substantially lessen competition; affects individual competitors acting to injure free enterprise; also used to preserve competition and to protect small business against larger competitors; proof requires only reasonable probability and not actual harm; defenses include "meet the competition" agreements and actual differences in cost of manufacturing, selling, or delivering goods; functional discounts (as a result of distribution function) may also be a defense to price differentials; quantity discounts may be violations unless discounts can be shown to be wholly justified by cost differences; prohibits kickbacks in many forms; applies only to goods and not services; penalties include fines and imprisonment.

  For Sales and Credit personnel, there's a need to have uniform criteria in evaluating customers and assure all functional customers are treated in the same manner.

  Terms of sale, sales programs, and the handling of unearned cash discounts, late charges, and chargebacks and disputes are subject to this act, which requires nondiscrimination.

- **States have Antitrust statutes** mirroring Federal statutes. Violations of Federal Acts are usually violations of State Acts, which means additional time, attorney billings, and penalties.

Examples of Antitrust violations

Individuals working in Credit may be exposed to potential violations. In industry credit groups, at the start of the meeting the secretary always gives the rules, at a minimum stating, "Discussions are limited to past and completed transactions; all information exchanged is for use by members in their individual and independent decisions regarding the extension and management of credit; and the information presented and the discussion that occurs during the meeting are confidential." But, listen for potential violations in this or any other forum of competitors such as the following:

The **overly aggressive sales effort**: Price fixing, boycotting of competitors, division of markets, all of which are *per se* violations of the Sherman Act.

The **overly aggressive credit effort**: Terms fixing, discussing future actions, blacklisting, all of which violate the Sherman Act.

The **discussion of terms of sale**:
- "We sell on Net 30 but will negotiate with large purchasers." Terms of sale are an aspect of price, and such discussions may be considered encouragement to group action.
- "Our terms are 2/10 Net 30, but we usually give in on the 2% if they pay at 30."
- "We charge a late charge of 1.5%, but we don't try very hard to collect it" or "and then we use the late charges as a negotiating tool to get past-dues paid."

The **cash customer**:
- "Let's add this account to our group list of COD only customers." This will be considered a blacklist. Lists of delinquent customers are legal, provided they do not include disputed accounts, and they are updated as delinquencies are resolved.
- "Well, given this industry credit group report and what you've all had to say, this account's going on COD." You can only discuss past and completed transactions; discussion of future actions will be considered encouragement to group action.
- "This customer is on terminal COD terms." This implies future action.

The **dangerous "we"**:
- "We should [insert almost anything relating to a customer]." This sounds like a proposal to conspire.
- "We should all sit on this account until we get paid."
- "We should stand firm on the cash discount policy in our industry."
- "We should force the payment of late charges."

Having given the above cautions and examples, it's worth reviewing those specific actions which have been determined to be legal activities:
- Discussion of account activities of common customers is legal, provided such is limited to past and completed transactions, and there is no agreement, express or implied, of any future action.
- Maintaining delinquent account lists is legal, provided care is taken to remove those with legitimate reasons for not paying on time, and the list is promptly updated when accounts are paid.

Conclusions

Any agreement among competitors regarding sales to customers is probably a conspiracy in restraint of trade and a violation of the Sherman Act.

Any agreement to refuse to sell to any person or business is probably a conspiracy in restraint of trade and a violation of the Sherman Act.

Any agreement to refuse to extend credit to any person or business is probably a conspiracy in restraint of trade and a violation of the Sherman Act.

Any publication of a blacklist is probably evidence of a conspiracy in restraint of trade and a violation of the Sherman Act.

Any disparate treatment of customers purchasing goods of like grade and quality by a Supplier is probably a violation of the Robinson-Patman act.

When in doubt, get good legal advice!

***Provided courtesy of NACM Commercial Services**