AICC Business Interruption Guidelines and Agreements

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Agenda

1. Antitrust primer.
2. Necessity for AICC members of business interruption agreements (the “Agreements”).
3. Discussion re guidelines and different sections of the Agreements.
4. Q&A.

Antitrust Primer

- The basic principle of the federal antitrust laws is to eliminate practices that interfere with free competition.
- These laws are designed to promote a competitive economy in which each business has a full opportunity to compete based on price, quality, and service.

Antitrust Primer

- The main federal antitrust statutes are the Sherman Act, the Federal Trade Commission Act, the Clayton Act, and the Robinson-Patman Act.
- The Sherman Act has particularly widespread application and generally prohibits: (1) contracts, combinations, and conspiracies in restraint of trade; and (2) monopolization, attempts to monopolize, and conspiracies to monopolize.

Antitrust Primer

- The federal antitrust laws are enforced concurrently by the U.S. Department of Justice and the U.S. Federal Trade Commission.
- The Federal Government takes violations of the antitrust laws very seriously; criminal violations of the Sherman Act are felonies punishable by imprisonment for up to three years and/or fines of up to $350,000 for individuals and $10 million for corporations per violation.

Necessity for AICC Members

- COVID-19 has impacted nearly every aspect of Americans’ daily life.
- Over the past several months, there has been a necessity to rethink certain business relationships because of the interruptions that COVID-19 has caused.

Necessity for AICC Members

- The interruptions that COVID-19 has caused make it necessary for AICC members to create new relationships and partner with other companies regarding business functions, such as production, distribution, marketing, purchasing or R&D, to benefit customers/consumers by expanding output, reducing price, or enhancing quality, service, or innovation.

Guidelines for the Agreement

- Participation in any program or entering into any Agreement **must** be voluntary and can be terminated at any time, subject to the rights and obligations of parties included in the Agreement.
- There should be **no** adverse consequence (e.g., retaliation or future boycotting) for electing not to participate in the program or not entering into the Agreement.

Guidelines for the Agreement

- The Agreement between the parties may not be characterized as a "vertical" agreement or restraint. Entering into a vertical agreement between firms or individuals at different levels of the production and distribution process.
- Here’s an example.

Guidelines for the Agreement

- The Agreement between the parties may not be characterized as "horizontal" agreement or restraint.
- The Agreement between actual or potential competitors to restrain their rivalry in some respect is commonly called a horizontal agreement.
- Here’s an example.

Guidelines for the Agreement

- An Agreement may not be used among parties to divide markets or allocate customers.
- An Agreement may not deny the provision of goods or services to a common buyer or exclude another competitor from the market (i.e., be used as a boycott).

Guidelines for the Agreement

- The Agreement should have a beginning and an end date.
  - The Agreement's length should not last longer than necessary to achieve its unique circumstances (e.g., the disruptive event) and procompetitive benefits.
- The Agreement may not simply be an exchange of data, particularly price information, among market competitors.
  - If sensitive data is to be shared, it should not be competitively sensitive information, and confidentiality requirements should be included in the Agreement.

Guidelines for the Agreements

- Please see more at:

https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws.

https://www.justice.gov/atr/guidelines-and-policy-statements-0.

Sections of the Agreement

- **Term.** This Agreement will continue as long as necessary to achieve the Agreement's objectives, unless terminated earlier.
- **Termination.** This Agreement may be terminated: (1) by either party without cause given a notice period, or (2) if one party breaches a material term and does not cure.

Sections of the Agreement

- **Damages.** Damages may be assessed if the Subcontractor: (i) materially breaches this Agreement and does not cure; (ii) terminates this Agreement without cause: (iii) breaches a material term of the Original Agreement; or (iv) breaches Section 2(c).
- Notwithstanding anything to the contrary, the total amount of damages that may be assessed may not be greater than the sum of the Original Agreement.
- **Note.** This section may be amended as necessary to include other damages not specified here, i.e. liquidated damages, set amount of damages, or no damages at all. **It is up to the discretion of the Manufacturer.**

Sections of the Agreement

- **Confidentiality.** Each party (the “Receiving Party”) acknowledges that in connection with this Agreement it will gain access to information that is treated as confidential by the other party (the “Disclosing Party”),
- Such confidential information may include, but is not limited to, information about its business operations and strategies, goods and services, customers, pricing, marketing, and other sensitive and proprietary information.
- It will be safeguarded to the best ability of the Receiving Party.

Sections of the Agreement

- **Intellectual Property**. The parties agree and understand that goods, materials, lists, data, business plans [**can be a more complete list**] that either party considers it be part of any trademark, copyright, or intellectual property may [or **shall**] be licensed to the other party to for the purpose of the Agreement.

Sections of the Agreement

- **Indemnification.** Both parties indemnify the other party and its officers, directors, employees, agents, successors, and assigns from any claims which arise out of or are otherwise directly or indirectly related to any breach of this Agreement, **unless such breach is due to the negligence or willful misconduct of the indemnifying party or its Releases.**

Sections of the Agreement

- **Force Majeure.** "Act of God" which materially affects the performance of both parties, Manufacturer believes will impair its ability to perform, or makes it commercially impracticable, inadvisable, illegal, or impossible for a party to fully perform as the parties originally contracted, then the Agreement may be terminated.
- **Subcontractor may not invoke force majeure and terminate the Agreement, or delay delivery under the Original Agreement, for the reason that the Agreement was entered into, the Event that the Manufacturer was impacted by (i.e. COVID-19).**

Sections of the Agreement

- **Relationship of Parties.** The [**partnership, joint venture, etc.**] relationship between the parties is strictly for the term of this Agreement. After this Agreement is terminated for any reason, the parties shall not be classified as [**partners, joint ventures, etc.**].

Sections of the Agreement

- **Cooperation Between the Parties.** The parties agree it to be their common intention that this Agreement shall operate between them with fairness and without detriment to the interests of any of them.

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QUESTIONS?

THANK YOU!

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