

ANTITRUST COMPLIANCE TRAINING PROGRAM

May 3, 2007

Isle of Palms, South Carolina

Antitrust laws are designed to protect the free enterprise system, to promote vigorous and fair competition and to provide American consumers with the best combination of price and quality.

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Antitrust Training Objectives

Develop working knowledge of the requirements of U.S. federal antitrust laws.

Understand the consequences of antitrust violations.

- How federal antitrust laws are enforced
- Fines and sentences
- Requirements and benefits of an effective antitrust leniency program

Recognize and avoid situations that may involve antitrust activity.

- Illegal horizontal agreements with competitors.
- Illegal vertical agreements with customers or suppliers.

Gain your commitment to adhere strictly to antitrust laws.

- Recognize the benefits of antitrust legislation for the consumer.
- Appreciate the consequences of antitrust violations.

Antitrust Laws Protect Businesses and Consumers

Antitrust Enforcement: Good Business\$\$ for the Government

| Year | Appropriation (000) | Filing Fees | Total | Fines |
|------|------------------------|-------------|---------|----------------|
| 2001 | -- | 120,838 | 120,838 | 280,000 |
| 2002 | -- | 130,791 | 130,791 | 75,000 |
| 2003 | -- | 133,133 | 133,133 | 107,000 |
| 2004 | 21,133 | 112,000 | 133,133 | 350,000 |
| 2005 | 37,763 | 101,000 | 138,763 | 338,000 |
| 2006 | 28,088 | 116,000 | 144,088 | 473,000 |

Source: Department of Justice, Antitrust Division

The Federal Antitrust Laws

1. Sherman Act (1890)

Sherman Act violations are punishable by **criminal** sanctions.

- Prohibits **contracts, combinations or conspiracies which unreasonably restrain trade** or commerce

“Per se” -- hard-core, always deemed unreasonable and illegal:
price-fixing, bid-rigging, allocations of markets or customers

“Rule of reason” -- analysis of conduct to determine illegality:
weighs all facts and circumstances to see if it significantly
restricts competition with no overriding business justification.

- Prohibits **unreasonable business behavior** designed to achieve or maintain **monopoly** power.

The Federal Antitrust Laws

2. Clayton Act (1914) , as amended by Robinson- Patman Act (1936)

Prohibits sellers from **discriminating** in price and promotional allowances **between competing customers**

Prohibits buyers from inducing **discriminatory prices and promotional allowances**

Prohibits certain **exclusive dealing and tying arrangements**

Allows **civil actions, treble damages, and attorneys' fees and costs**

Prohibits certain mergers and acquisitions which threaten competition

Regulates serving on Boards of two or more competing companies simultaneously

The Federal Antitrust Laws

3. **Federal Trade Commission Act (1914)**

Prohibits **unfair methods of competition** and deceptive practices including activities that violate the Antitrust Laws as well as the spirit of such laws.

Authorizes the FTC to enforce antitrust laws through cease and desist orders or other relief against unfair methods of competition and anticompetitive practices.

DISASTER

Consequences of Antitrust Law Violations:

Criminal: Fines

greater of **\$100,000,000** or twice the gain or loss

maximum **individual** fine: **\$1,000,000**

Imprisonment

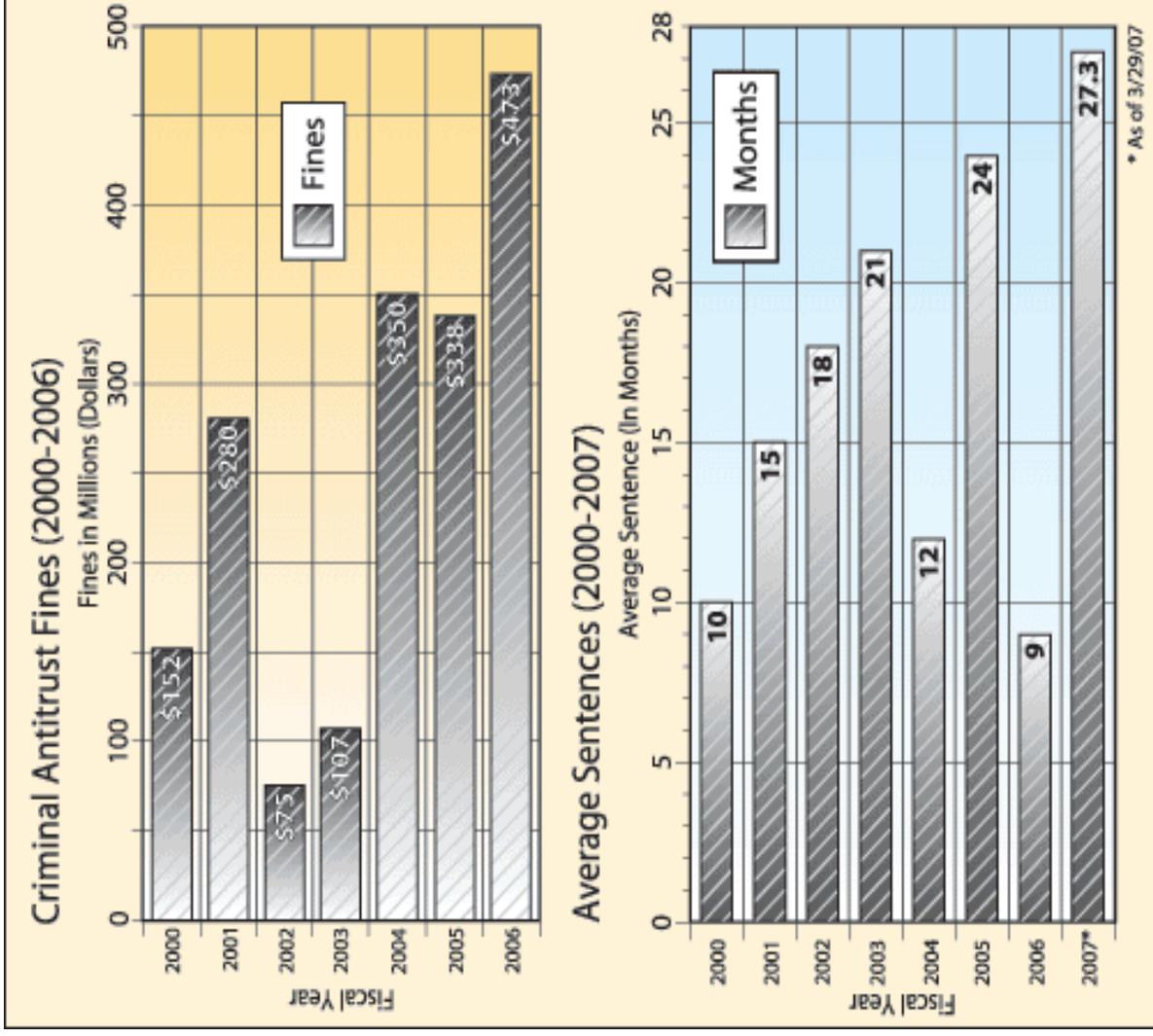
maximum **individual** sentence: **10 years**



average in 2005: 2 years (new high)

average under new guidelines – 3 years

Consequences of Antitrust Law Violations: Enforcement Trends



Source: DOJ Antitrust Division

DISASTER

Consequences of Antitrust Law Violations: **MORE**

Civil: Injunctions

Cease and Desist

Consent Decrees

Class Actions

Treble Damages

some settlements have exceeded **\$1 billion**



Consequences of Antitrust Law Violations: AND EVEN MORE

DISASTER

Both: Legal Fees (including the winner's legal fees and costs)

Distractions

Business Impairment

Loss of Reputation

Career Disruptions



Other: Wire fraud, obstruction of justice, destruction of evidence, perjury, tax evasion, bribery of public officials, RICO

Illegal Business Practices: Proof of an Agreement

Prosecution under the Sherman Act requires only:

1. concerted action
 2. in restraint of trade
 3. proof of damage or harm to competition.
- proof of an **agreement** among **competitors**
to fix prices, rig bids, or allocate markets

No overt acts need be proved, nor is a written or express agreement necessary. The agreement, understanding or concerted action may be conduct shown by

Direct evidence -- a document that contains or refers to an agreement, minutes of a meeting that record an agreement, or testimony by a person with knowledge of an agreement.

Circumstantial evidence -- includes a meeting of competitors before they implemented certain practices, records of telephone calls, the use of code words, and signaling behavior, which shows that a company's conduct was more likely the result of an agreement than unilateral action.

Illegal Business Practices: Proof of an Agreement

The following can serve as supporting documentary evidence:

Bids

Telephone Records

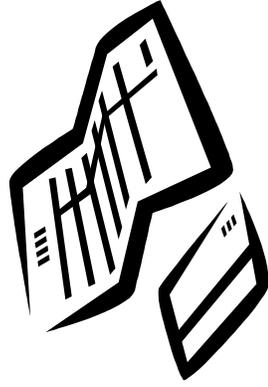
Price Lists

Appointment Books and Calendars

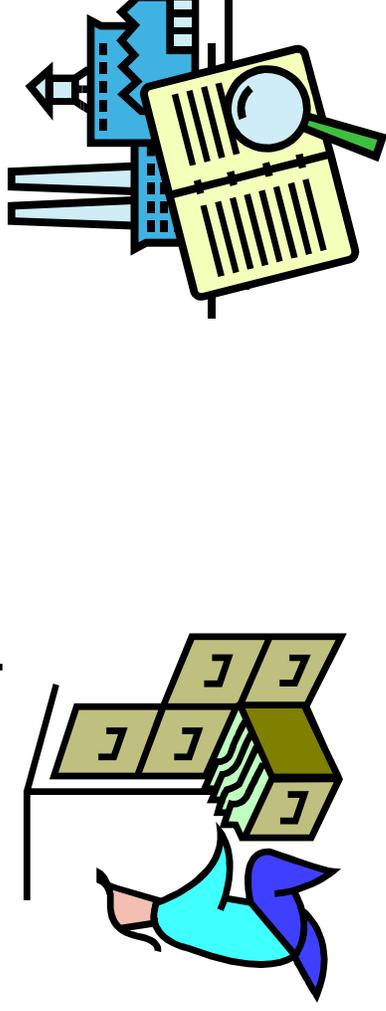
Price Quotations

Job Estimates

Transmittal Letters



Expense Account Records



Illegal Business Practices: Horizontal Agreements Among Competitors

Any agreement or understanding between competitors which unreasonably restrains trade is illegal.

No formal offer or acceptance is required for an **agreement** or understanding.

An illegal agreement **may be oral** and may be inferred from a **course of conduct**.

Agreements on Price

Price fixing includes any **agreement among competitors** at any level (manufacturers, distributors, or retailers) to raise, fix, or otherwise maintain the price for their products or services, including any agreement **that affects the ultimate price or terms of sale** for a product or service.

Illegal Business Practices: Horizontal Agreements Among Competitors

- among manufacturers of a product to establish a **minimum price** for that product
- among competing **buyers to lower prices they will pay** for a product
- to raise manufacturers' individual prices by a certain amount or maintain a certain **profit margin**
- to establish or adhere to uniform **price discounts** or eliminate or reduce discounts
- to adopt a **standard formula** for the computation of selling prices
- to **notify** others prior to reducing prices
- to **fix credit terms**
- to maintain **predetermined price differentials** between different quantities, types, or sizes of products

Illegal Business Practices: Horizontal Agreements Among Competitors

Bid Rigging

Includes bid rotation, bid suppression, complementary bidding, non-complying bids, subcontracting

Agreements to Restrict Output or Control Production Volume

Boycotts

Include agreements among competitors not to deal with another to

- (a) force another party to pay higher prices or**
- (b) prevent a firm from entering a market or**
- (c) disadvantage a competitor, including denial of trade association membership**

Market and Customer Allocation

Agreements not to compete with each other either in certain geographic areas or with respect to certain customers

Illegal Business Practices: Vertical Agreements Between Buyers and Sellers

Resale price maintenance agreements

Vertical price-fixing -- an **agreement** between a supplier and a dealer or a manufacturer and a retailer that **fixes the minimum resale price** of a product has been **illegal**

A manufacturer's resale price maintenance **policy** regarding a desired range of resale prices **is permissible**

Tying Arrangements

Sale of a product on condition that customer buy a second product, which the customer does not want or can buy elsewhere at a lower price

Refusals to Deal

Exclusive Dealings, Requirements and Output Contracts

Illegal Business Practices: Price Discrimination

Price discrimination may be unlawful under the **Robinson-Patman Act** where

A seller charges **competing buyers different prices for the same commodity** or discriminating in the provision of "allowances" -- compensation for advertising and other services

Two common **defenses** to price discrimination:

it reflects the different costs of dealing with different buyers and only passes on savings associated with one buyer to that buyer

it results from a seller's attempts to meet a competitor's prices or services

Price discrimination may be a predatory pricing tactic -- setting prices below cost to certain customers -- to harm competition at the supplier's level.

Unlawful Price discrimination may lead to:

**FTC enforcement
civil lawsuits**

The Enforcement Process: Sources

Three main sources of enforcing federal antitrust laws are:



Criminal and civil enforcement actions by the Antitrust Division of the Department of Justice

Civil enforcement actions by the Federal Trade Commission and state attorneys general

Lawsuits by private parties and state governments seeking damages



The Enforcement Process: Government Sources

Sources of Government investigations and antitrust prosecutions include:

Other government investigations and agencies, including international

Former employees

Customers

Corporate Legal and Purchasing Departments

Proactive DOJ outreach efforts to procurement personnel

Amnesty Applicants

Covert **FBI** methods: recording of meetings on audiotapes and videotapes

Members of the **general public**



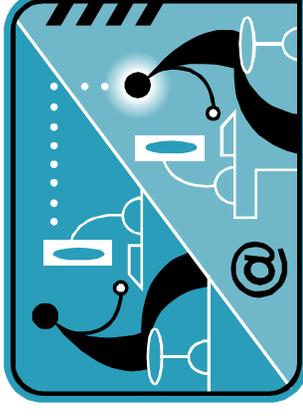
The Enforcement Process: Discovery and Documents

The investigative process and subsequent litigation will involve discovery of documents and statements by individuals

No documents other than privileged communications to or from counsel are exempt from **disclosure**.

All other documents may be **subject to production or subpoena, including emails** and **"personal"** handwritten notes of individual employees made in the course of their work and **drafts** of documents.

Even "deleted" E-Mail can be recovered by a computer expert.



The Enforcement Process: Guidelines Regarding Discovery and Documents

Careless language can have a **bad impact** on an antitrust investigation or lawsuit.

COMMON SENSE: IF YOU DON'T WANT TO SAY IT TO A PROSECUTOR, DON'T SAY OR WRITE IT AT ALL.

- Do not use **guilt complex** words ("Please **destroy** after reading")
- Do not use **exaggerated power words** (Our program will "**destroy**" **competition**)
- Be wary of "**tough talk**" in **directives**. It can lead to a finding of a specific intent to conduct predatory activity. ("Do whatever it takes to **put competitor X out of business**. **Squash him** like a bug.")
- Do not speculate as to the legal propriety or consequences of conduct ("**Better check with counsel on this**") or attempt to **paraphrase legal advice**
- Do not **misdescribe competition** as something unexpected or improper such as referring to price cutting as "**unethical**" or to a lost customer as one "stolen" by a competitor.

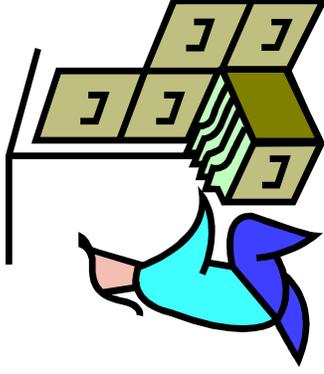
The Enforcement Process: More Discovery and Documents Guidelines

- Use great **care** when **discussing competition and prices**. Avoid the impression that your **company is not competing vigorously**, that its prices are based on anything other than its own business judgment or that its public statements are "**signals**" to competitors
- Avoid the false impression that companies in the industry are excluded from an association or activity for competitive reasons.
- When discussing the prices or plans of competitors, **identify the source** of your information so there will be no false implication that the information was obtained under a collusive arrangement with a competitor
- Avoid giving any impression that **special treatment** is being accorded to a customer or class of customers ("**Only for you**")
- Avoid words that might imply that your company was pursuing a course of **action** as a matter of "**industry agreement**" or "**industry policy**" rather than **as a matter of its own individual self-interest**

The Enforcement Process: Discovery and Statements



- A. You do not know what is in anyone else's files;
- B. The Justice Department or class action plaintiffs may get documents from competitors, customers, suppliers and other files in your own company;



- C. If interviewed by the Justice Department or deposed by class action plaintiffs, a conspirator may turn quickly on former "friends," including competitors and co-employees, to obtain immunity or other advantages and more favorable treatment for himself or herself



Amnesty Program



Leniency Programs in early 90's established **incentives** for corporations and individuals to **self-report antitrust violations**

Antitrust Criminal Penalty Enhancement and Reform Act of 2004:

- A company that discovers a criminal antitrust violation by employees can get complete **amnesty for itself and its employees from criminal prosecution** by the Department of Justice
- may get **immunity from the tripling of damages** in subsequent civil litigation

Amnesty Program: Requirements

A company can obtain amnesty **ONLY IF:**

- the company **immediately withdraws** from the illegal conspiracy and **self-reports** the violation to the Department of Justice
- before **competitors** have reported it and
- before the **government** has begun an **investigation**

Early detection of antitrust crimes = **head start** in the amnesty **horserace**.

Only a company with an **effective antitrust compliance program** can hope to be the first company in the door.

Federal Sentencing Guidelines: Effective Antitrust Compliance Program

For sentencing credit for a compliance program, a company must

1. promptly **report violations** to the government,
2. **have an "effective program"** designed, and enforced so that it will be effective in **preventing** and **detecting** a criminal antitrust violation, and
3. have **no high-level involvement** in the violation.

The organization must exercise **due diligence to prevent and detect criminal conduct** by its employees and other agents.



Federal Sentencing Guidelines: Required Due Diligence Steps

The Sentencing Guidelines state that **due diligence requires** at least seven steps:

1. **Standards.** A written corporate policy statement establishing compliance standards and procedures that are reasonably capable of reducing the prospect of a criminal antitrust violation.
2. **Responsibility.** A specific high-level individual in the organization is designated with overall responsibility to oversee compliance with the standards and procedures.
3. **Safeguard.** The organization must use due care not to delegate substantial discretionary authority to individuals the organization knew, or should have known, had a propensity to engage in illegal activities.
4. **Training.** The organization must communicate standards and procedures to all employees and other agents by training programs or publications that explain in a practical manner what is required.

Federal Sentencing Guidelines: Required Due Diligence Steps

5. **Auditing/Reporting.** The organization must achieve compliance with its standards, by steps such as monitoring and auditing systems and a publicized reporting system whereby employees can report criminal conduct without fear of retribution.
6. **Enforcement.** Appropriate and consistent disciplinary mechanisms must enforce antitrust compliance standards, including discipline of individuals responsible for failure to detect an offense.
7. **Remedy.** After an offense is detected, the organization must respond and take remedial action to prevent further similar offenses.



Communications with Competitors: Guidelines

Exchanging information with competitors regarding price, costs, or pricing practices is **dangerous**.

Enforcers say price-fixing conduct includes "**signaling**" involving no direct contact between competitors (e.g., a pattern of press releases concerning future prices).

Avoid any conduct and conversation suggestive of improper collusion.

Follow these **guidelines in any contacts with competitors**:

Avoid discussions which might be misconstrued as price-fixing, customer or market allocation, attempts to limit research or boycott suppliers and customers.

Immediately **leave** any gathering or **terminate** any **discussion** with any competitor who raises any of these topics, after first **emphatically** declining to discuss them.

If in a large group, **make sure everyone will remember you objected and left**.

Do not feel awkward about appearing "uptight." There's too much at stake to worry about "playing ball."

There are no "off the record" conversations with competitors.

Some Very Basic Antitrust Do's and Don'ts

DON'T

1. Do not, **in fact or appearance**, discuss or exchange information regarding:
 - (a) individual company prices, price changes, price differentials, mark-ups, margins, discounts, allowances, credit terms or data that bear on price, e.g., costs, production capacity, inventories, sales, etc.;
 - (b) industry pricing policies, price levels, price changes, differentials, etc.;
 - (c) bids on contracts for particular products or procedures for responding to bid invitations;
 - (d) plans of individual companies concerning the design, production, distribution or marketing of particular products, including proposed territories or customers;
 - (e) matters relating to actual or potential individual suppliers that might have the effect of excluding them from any market or of influencing the business conduct of firms towards such suppliers or customers.

2. Do not discuss or exchange information regarding the above matters during social gatherings incidental to company business meetings even in jest.

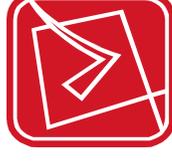
3. Do not meet without ICAC staff or counsel present.



Some Very Basic Antitrust Do's and Don'ts

DO

1. **Follow** prepared agendas for all ICAC meetings and object any time meeting minutes do not accurately reflect the matters which transpired;
2. **Understand** the purposes and authority of each group or committee in which you participate;
3. **Consult** with your company counsel or antitrust compliance officer on all antitrust questions relating to competitor contacts or other matters of antitrust concern or with ICAC counsel regarding ICAC concerns;
4. **Protest** against any discussions, meetings or activities which appear to violate the antitrust laws; disassociate yourself from any such discussions or activities and leave any meeting in which they continue;
5. **Report** any suspected antitrust violation, either within your company, or among competitors, to the company's counsel or antitrust compliance officer or, if regarding ICAC, to ICAC counsel.



§ 1 Sherman Act, 15 U.S.C. § 1

Trusts, etc., in restraint of trade illegal; penalty
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2 Sherman Act, 15 U.S.C. § 2

Monopolizing trade a felony; penalty
Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(fines now up to \$100,000,000 for a corporation, \$1,000,000 for an individual and ten years imprisonment for Sherman Act violations)

REPORTING ANTITRUST CONCERNS

ANTITRUST DIVISION

How You Help the Antitrust Division

Information from the public is vital to the work of the Antitrust Division. Your e-mails, letters, and phone calls could be our first alert to a possible antitrust violation and may provide the initial evidence needed to begin an investigation.

How to File a Complaint

If you have information about a possible antitrust violation or potential anticompetitive activity, please **contact us** by e-mail, regular mail, or phone. We recommend that you use the following questions as a guideline when describing your complaint:

- What are the **names** of companies, individuals, or organizations that are involved?
- How do you believe they have violated the antitrust laws?
- Can you give **examples** of the conduct that you believe violates the antitrust laws? If so, please provide as much **detail** as possible.
- What is the product or service affected by this conduct? Where is the product manufactured or sold, or where is the service provided?
- Who are the major **competitors** that sell the product or provide the service?



thanks!