

National Association of Credit Management

ANTITRUST COMPLIANCE

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Topics to be Discussed

- Antitrust Law Overview
- Dealings with Competitors
- Dealings with Suppliers, Distributors, & Customers
- Robinson-Patman Act
- Purchasing Issues
- Trade Associations
- Antitrust Guidelines for Trade Associations

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Antitrust Law Overview

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History of Antitrust Laws

- **Pre-Civil War**
 - Agricultural Economy
 - Pure Competition
 - Free Markets
- **Post-Civil War**
 - Corporations - Voting Trusts
 - Monopoly Power
 - Controlled Markets

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U.S. Antitrust Laws

- **1890 Sherman Act**
 - Sec. 1 - Contracts, Combinations and Conspiracies that Restrain Trade
 - Sec. 2 - Monopolization and Attempts to Monopolize
- **1914 Clayton Act**
 - Specific Acts that Lessen Competition
 - Exclusive Dealing/Tying/Mergers
- **1914 Federal Trade Commission Act**
 - Unfair Methods of Competition
- **1936 Robinson-Patman Act**
 - Price Discrimination

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Enforcement

- **Federal**
 - FTC - Civil Cases
 - DOJ - Civil and Criminal Cases
- **State Attorneys General**
- **International**
 - Over 100 countries
 - Not Uniform
- **Private Suits**

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Penalties

- **Government Enforcement**
 - Criminal
 - Felonies (10 years prison)
 - Fines (\$100 million for firms, \$1 million for individuals) Alternate Fines – Twice the gains
 - Civil Suits
 - Injunctions and Consent Decrees
 - State Penalties
- **Private Cases**
 - Treble Damages
 - Attorneys' Fees

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Key Antitrust Concepts

- **Per se v. Rule of Reason**
- **Market Power**
 - Relevant Geographic Market
 - Relevant Product Market
- **Antitrust Injury**

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Dealings with Competitors

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Relationships With Competitors Involving Prices

- Price Fixing
- Price Signaling
- Bid Rigging
- Per se violations

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Price Fixing

- No Formal Agreement Required
- Any Price Level
- Does Not Have To Be Put Into Effect
- Applies To Any Aspect Of Price
 - Credit Terms
 - Interest Rates
 - Rebates
 - Store Hours

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Relationships With Competitors Not Involving Prices

- Allocation of Markets or Customers (Product – Geographic)
- Group Boycotts
- Commercial Relationships With Competitors

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Information Exchanges

- **Do Not Discuss With Competitors**
 - Discounts
 - Customer Lists
 - Promotional Programs
 - Future Plans
 - Marketing or Products
 - Production Plans

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Anti-Competitive Sharing of Information

- Price Signaling
- Conduit
- Parallel Conduct
- Plus Factors

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Surveys and Questionnaires

- **FTC/DOJ Guidelines**
- **Safety Zones:**
 - Survey managed by third party
 - More than 3 months old
 - No one over 25% market share
 - Data is aggregated – not individually recognizable
 - Valid reason for sharing

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Competitors as Customers or Suppliers

- Limit information exchange to transaction
- Restrict access to those with need to know
- Non-disclosure agreement

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Dealings With Suppliers, Distributors, & Customers

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Relationships With Suppliers, Distributors and Customers

- Vertical vs. Horizontal
- Usually Rule of Reason not Per Se
- Price vs. Non-Price Restraints
- Intra v. Interbrand Competition

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Vertical Restraints on Pricing

- **Resale Price Maintenance**

- When there is agreement on minimum price: per se illegal
- Manufacturer may announce resale prices in advance and refuse to deal with those who fail to comply.
 - United States v. Colgate (1919)
- MSRP, Ad Co-ops, MAP

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Leegin Case

- Resale Price Maintenance per se illegal Dr. Miles 1911
- Maximum resale price – Khan 1997
- Minimum Resale prices – Leegin 2007

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Current RPM Status

- Rule of Reason – test case
- State Laws – some not tied to federal law
- Proposed Legislation – Kohl-Clinton-Biden bill.
- Maryland Statute

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Vertical Restraints Not Involving Prices

- **Exclusive Dealing**
 - Supply
 - Distributorships
- **Territorial Restrictions**
- **Refusals to Deal**
- **Tying Arrangements**

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Vertical Non Price Restraints

- Elements of rule of reason analysis
 - Does the defendant have market power?
 - What is the relevant product market?
 - What is the relevant geographic market?
 - Does defendant have power to raise prices above a competitive level?
 - Do the adverse effects on competition outweigh the pro-competitive justifications for the restraint?

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Exclusive Dealing

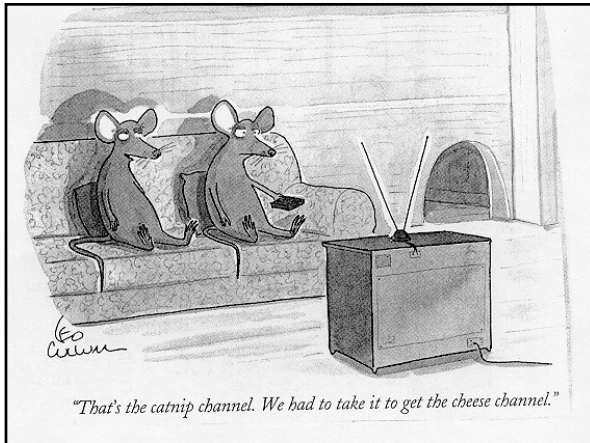
- **Usually upheld if:**
 - No market power
 - Alternative sources or outlets
 - Limited in time (1-3 years)

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Tying Arrangements

- Elements
 - Must be two separate and distinct products or services
 - Not available separately
 - Seller must condition sale of tying product on the purchase of tied product (*coercion*)
 - Not made economically unfeasible to buy separately
 - Seller must possess market power in the tying product

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Robinson-Patman Act

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Price Discrimination and the Robinson-Patman Act

- **History**
 - 1936 Economic Transition
 - Chain Store Buying Power
- **Purpose**
 - Protect Competitors – Not Competition
 - Preserve Equal Opportunity for Small Businesses
- **Commentary**
 - Wholly Mistaken Economic Theory
 - Widely Criticized

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Statutes

- **Federal**
 - 2(a) Price Discrimination
 - 2(b) Meeting Competition Defense
 - 2(c) Advertising & Promotion
 - 2(f) Buyer Liability
- **States**
 - Patterned After Robinson Patman
 - Missouri and Illinois

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Enforcement

- **Federal**
 - DOJ - defers enforcement to FTC
 - FTC - 1960 - 1972
 - Backlash
 - Reagan & Clinton Eras
- **State**
 - Minimal enforcement
- **Private Suits**
 - Majority - Attorney's Fee & Treble Damages
 - Standing - Actual Injury, Antitrust Injury

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Jurisdiction

- **Interstate Commerce**
 - At least one sale across state line
 - Being interstate seller not sufficient
- **Foreign sales - only if for use in U.S.**
- **Federal Courts have exclusive jurisdiction**

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Exemptions

- **Co-Ops**
 - Return earnings to members based on purchases
- **Charitable Institutions**
 - 1938 Amendments
 - Sales & Purchases
- **Government**
 - Sales to Federal Government & Agencies
 - States not covered if resell in competition

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Price Discrimination

“Unlawful...to discriminate in price between different purchasers of commodities of like grade and quality ...where the effect...may be substantially to lessen competition.”

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Price

- **Price = actual amount paid**
 - Net of all discounts, rebates & allowances
- **Includes:**
 - Freight & Delivery Preferences
 - Credit Terms
 - Business reasons
 - Promotional Allowances
 - Hidden Charges & Rebates
- **Discrimination means difference**

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Elements of Robinson-Patman Violation

- **Only One Seller**
- **At Least Two Different Buyers**
- **Actual Sale – (Not Bid or Quote)**
- **Commodity**
- **Like Grade And Quality**

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Commodity

- **Services not covered**
- **Advertising, telephone, cable TV, insurance, medical services**
- **Electricity - 8th Circuit**
- **Mixed - predominant aspect**
- **Like Grade & Quality**
 - Differences that affect marketability
 - Physically identical same
 - Private label brands

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Sale

- **Actual Sale**
 - Not swapping, bartering
 - Not refusal to deal
- **Consummated Sale**
 - Not bids, offers, subcontractors
- **Legal Sales**
 - Not lease, agency, license
- **Reasonably Contemporaneous**
 - Depends on business
 - Reasonably simultaneous delivery
 - When contact entered - not product delivered

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Injury to Competition

- **Geographical Market**
- **Primary Injury**
 - Seller Level
- **Secondary Injury**
 - Customer Level
- **Indirect Purchaser**
 - Illinois Brick – Not Recoverable

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Defenses

- **Changing Conditions**
- **Cost Justification**
- **Functional Discounts**
- **Meeting Competition**
- **Proportional**
- **Availability**

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Meeting Competition

- Allowed to “meet not beat”
- Must be lawful price
- Good faith
- Verification - document
- Market wide pricing
- Do not contact competitors

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Changing Conditions

- Changes in Marketability
 - Perishable
 - Outmoded
 - Discontinued
 - Seasonal
 - Not Intentionally Inflicted

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Proportional Availability

- Advertising allowances prohibited unless proportionally available
- Can not create class for one purchaser

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Buyer Liability

- Must be actual discrimination
- Buyer knows prices unlawful
- Pressures seller for price
- Rarely enforced

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Purchasing Issues

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Purchasing Issues – Joint Activity with Competitors

- Group Purchasing – Buying Coops
- Refusals to Deal – Boycotts
Agreed Upon Terms & Conditions
- Bids, Quotes and RFPs

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Purchasing Issues – Single Firm Conduct

- Exclusive Arrangements
- Tying
- Price Discrimination
- Resale Price Maintenance

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Purchasing Monopolies – Monopsony Power

- Few Buyers – Many Sellers
- Toys-R-Us case
- Conditioned Purchases
- Hot Issue
- Predation

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Predatory Buying – Weyerhaeuser v. Ross-Simmon

- Competitor claimed Weyerhaeuser
 - Paid too much for logs
 - Bought more logs than it needed
- Prevented plaintiff from buying logs at a reasonable price.
- Plaintiff won – awarded \$79 million.
- Supreme Court reversed – no recoupment

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Request for Quotes

- **Competitive Sensitive Information**
- **Non-disclosure agreements**
- **Essential information to arrangement**
- **Price Signaling**

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Trade Associations

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Trade Associations' Valuable Functions

- **Lobbying – Legislation/Regulations**
- **Industry Standards**
- **Industry Image – Public Relations**
- **Collecting Data**

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Trade Associations Concerns

- **Communication among Competitors**
 - Competitively Sensitive
 - Pricing, marketing plans
 - Relationship with customers
 - Appropriate Data
 - Credit history, historical production
 - Surveys & data exchanges
- **Membership Restrictions - Exclusion of Competitors**
- **Standard Setting and Standardization of Products**

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Trade Association Concerns

- **Opportunities for Collusive Activity**
 - Association Functions
 - Social Settings
- **Government Suspicions**
- **Precautions**
 - Lawyer Present
 - Object to Inappropriate Behavior

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**Antitrust Compliance
Guidelines For Trade
Association Members**

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Recent FTC Guidance for Trade Association Members

- FTC’s Music Industry Trade Association decision (March 4, 2009)
- FTC alleged that association “crossed the line that divides legitimate trade associations activities from unfair methods of competition.”

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- Enabling competitors to coordinate higher prices for products “*is not a legitimate function*” for trade associations.

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FTC Concerns Re Trade Associations

- Potential for Competitive harm from industry-wide discussions
- Weighed against the prospect of legitimate efficiency benefits
- FTC considers “the type of information [exchanged], the level of detail, the absence of procedural safeguards, and overall market conditions” when determining whether to take enforcement action.

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FTC Consent Order with Music Industry Ass'n.

- Prohibits NAMM from coordinating the exchange of price information among members.
- Prohibits NAMM from helping members form an anticompetitive agreement.

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FTC's Recommendation for Antitrust Compliance Program

- Appoint antitrust counsel
- Conduct annual antitrust training for the association's board, agents, and employees
- Antitrust counsel must review and approve final agendas and materials prior to distribution at association meetings.

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FTC's Recommendation...

- Antitrust counsel must review and approve all written materials and prepared remarks by association representatives related to pricing policies.
- Antitrust counsel must be present at all association meetings and events.
- Antitrust compliance statement must be read at the beginning of every association meeting.

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Antitrust Compliance

- **Increased Enforcement and Penalties**
- **Avoid Litigation**
 - Government - Business Under Scrutiny
 - Civil - Many Potential Plaintiffs
- **Avoid Cost and Disruption, Even if Win**

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