



Portfolio Media. Inc. | 648 Broadway, Suite 200 | New York, NY 10012 | www.law360.com
Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Ensuring Antitrust Compliance In A Small Business

Law360, New York (October 29, 2008) -- Every year, the owners of small supply companies may meet to divide up their local marketplace while, in another city, members of a regional trade association discuss what rates to charge for their services.

Such cooperative practices make life much easier - unless they find themselves suddenly slapped with an expensive antitrust lawsuit.

Much of the press on antitrust focuses on the activities of major national and multinational corporations but they are every bit as applicable to small business, depending on where they operate and what "market" they may influence.

For small businesses, becoming the target of an antitrust lawsuit can cripple normal operations, subject the business to heavy fines, criminal charges and harsh sentences if convicted.

Under the Antitrust Criminal Penalty Enhancement Act of 2004, fines can run up to \$100 million, individual fines up to \$1 million and prison sentences up to 10 years.

Another threat is a civil action for antitrust violations or unfair and deceptive trade practices filed under the Federal Trade Commission Act and a state's "Little FTC" Act.

In these civil actions, a defendant may face the threat of three times the actual damages, as well as injunctions that may void existing contracts or transactions.

If a small business dominates a local market or is involved with a competitor in a joint venture, marketing program, production agreement, territorial division or research and development activities, consider establishing an antitrust compliance program.

The first step toward crafting an effective compliance program is to conduct an antitrust audit involving an outside attorney familiar with recent antitrust court decisions and enforcement actions.

They will identify potential antitrust problem areas by interviewing the company's decision-makers and reviewing business practices relating to competitors, customers, suppliers and distributors.

The audit may also determine if company employees have been needlessly restricting certain sales or marketing activities under the mistaken impression that they violate antitrust laws.

An antitrust compliance program should have two objectives: prevention and detection.

A compliance program generally will not protect the company from possible persecution and certainly will not protect it from potential devastating trouble damage liability.

Therefore, every company's first objective in its compliance program should be to prevent wrong doing.

A second important objective of a compliance program is to detect wrongdoing as early as possible, while the damages are still small.

Having an antitrust compliance program in place can also go a long way toward reducing potential fines or jail sentences.

The antitrust act also limits the liability for companies that cooperate with the government or with claimants in civil lawsuits.

Following are six suggested steps in creating an effective antitrust compliance program:

1. Clearly establish compliance standards within federal antitrust compliance guidelines.

Every compliance program should include a clear statement of the company's commitment to comply with the antitrust laws, accompanied by set of practical do's and don'ts written in plain English so that every employee can understand them.

Further, the company should have an active training program that includes in-person instruction by knowledgeable counsel.

While training is important it is not sufficient to ensure compliance with the antitrust laws. To achieve that goal a company must have a pro-active executive department and law department/or counsel that is dedicated to practicing preventive law.

It is critical that the company have its lawyers visit the company's facilities so that the employees know whom to call if they have a question or problem.

It is also important that the lawyers chosen win the respect of their clients by responding quickly to questions with sound legal advice that takes full account of the practical business issues the client faces.

2. Assign overall program development responsibility to high-level executives within the company.
3. Communicate standards and procedures effectively to all employees through training. This typically involves creating a written policy, statement or guidebook that should be distributed to all employees, owners and directors.
4. Take reasonable steps to achieve compliance through monitoring and auditing.

A company should conduct regular antitrust audits, preferably unannounced, to monitor compliance. These audits can be kept informal, but should include a review of both the paper and computer files, especially e-mails (of employees with competitive decision making authority or sales and marketing responsibilities).

It is also important to interview employees about their business and their contact with competitors. When a problem occurs and you discover that your company has committed a possible antitrust violation, it is important that the company respond promptly and energetically. This includes initiating an immediate investigation.

The company should also reexamine its compliance program in order to learn from its mistakes and make whatever modifications are necessary to assure the future violations do not occur.

5. Be consistent in enforcing compliance through appropriate standards and discipline.
6. Respond in a reasonable manner when an offense occurs, to prevent future violations.

The following areas should be of particular sensitivity and are areas that merit special attention:

1. Trade association activity. Verify that the jobs of attendees at trade association meetings match the ostensible purpose of the meeting. Note whether the association is gathering industry data, especially transaction data that involves pricing or output data. Most importantly look to see what it means are attended by counsel and a record of what is discussed.
2. Note sales transactions between your company and its competitors, particularly around the end of the year. Such transactions may involve an effort to even out a market allocation scheme.
3. Data on market shares. Note the company's market shares to see if they are more stable than it should be in a competitive market. Market shares that are stable over a long period of time are a possible indicator of collusion.
4. Persons, executives in sales who receives calls at home or from callers giving fictitious names or refusing to identify themselves.

5. Sudden unexplained price increases, copies of competitors price announcements in your company files.

Throughout this process, the business should be able to document and demonstrate its commitment to a competitive process in its defined marketplace.

This should include ongoing monitoring to detect criminal conduct and a "whistle-blower" system that allows employees or outside business associates to report illegal activities without fear of retribution.

By building a strong compliance and ethics program, a small business can minimize the risk of an expensive antitrust lawsuit and direct its financial resources into more productive investments and activities.

--By Ronald B. Ravikoff, Akerman Senterfitt

Ronald Ravikoff is a shareholder of Akerman Senterfitt in the firm's Miami office.