

# A BUSINESS GUIDE TO ANTITRUST FOR CREDIT PROFESSIONALS

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## COMPETITION AND THE ANTITRUST LAWS

Competition creates significant consumer benefits including increased innovation, increased efficiency of companies making and selling products and services, greater variety and higher quality of goods and services, and lower prices.

The competitive process, left free of interference, makes life harder for businesses by increasing their uncertainty. That uncertainty forces suppliers to be more efficient and more creative to avoid losing

business to competitors that *are* more efficient and more creative.

Antitrust laws protect consumers by protecting the competitive process from interference either by companies acting together to avoid having to compete or by individual companies with substantial market power of their own taking improper actions in order to avoid having to compete.

## ANTITRUST LAWS AND ENFORCEMENT

Federal antitrust laws are enforced by both the Antitrust Division of the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC).

The DOJ enforces antitrust laws by bringing both civil and criminal antitrust cases in federal courts against companies and individuals violating federal antitrust statutes. The FTC enforces the same

federal statutes by bringing civil actions either in federal courts or before the agency itself; the FTC has no authority to bring criminal cases. In addition to its authority to file cases in federal courts, the FTC includes a branch that brings cases and a separate group of five commissioners who can decide cases brought before them and impose

certain civil measures such as injunctions. The FTC also has a consumer protection mandate under which it enforces laws and regulations relating to privacy, deception, fraud, and unfair business practices.

In addition to the federal antitrust laws, each state and the District of Columbia has its own antitrust statutes, which are usually similar—but not identical—to federal antitrust statutes. Because the state laws are not identical, they can, and do, make illegal certain conduct that is not necessarily illegal under federal law. State antitrust laws are enforced

by state attorneys general, who can file both civil and criminal antitrust actions in state courts. State attorneys general also can file federal antitrust claims on behalf of citizens of their states.

Finally, private parties also can bring antitrust actions. Both consumers and competing businesses that believe they have been harmed by anticompetitive conduct can bring civil antitrust cases seeking to enforce both federal and state antitrust laws and to recover money for the damages they have suffered.

## I FEDERAL ANTITRUST LAWS

The main federal antitrust statute is the **Sherman Act**. The Sherman Act is written as a criminal statute: It defines particular anticompetitive conduct as a crime, which is the source of the DOJ's ability to bring criminal cases. It also is the source of the DOJ's right to enforce the same statutes by bringing civil cases. The DOJ uses its discretion to decide whether a civil action or a criminal action is the best way to enforce against any particular violation of the antitrust laws. By tradition, the DOJ pursues criminal actions against a narrow range of conduct that the courts have determined to be so overwhelmingly likely to result in competitive harm that the conduct itself is illegal without any need to examine its actual effects. This category of "per se" anticompetitive conduct is also the source of many private lawsuits that consumers and business customers have brought against companies that violate the antitrust laws.

Section 1 of the Sherman Act prohibits "every contract, combination ... or conspiracy, in restraint of trade." This is the federal antitrust statute that is most often used to punish conduct by two or more entities, for example, agreements to fix prices, to rig bids, or to refuse to deal with certain suppliers or customers ("boycotts").

Section 2 of the Sherman Act prohibits acts to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any portion of [interstate] trade or commerce." This is the federal antitrust statute that is most often used to punish conduct by a single entity, or so-called "unilateral conduct," although it also prohibits agreements to monopolize, overlapping with Section 1.

The **Robinson-Patman Act** makes it unlawful to discriminate in price in the sale of commodities (meaning goods, not services) of "like grade and quality to different purchasers" at the wholesale

level where that discrimination causes competitive problems downstream in the retail sales of those goods.

The **Federal Trade Commission Act** is the federal statute that created and provides enforcement authority for the FTC. Although the FTC cannot

directly enforce the Sherman Act, it can prohibit conduct that violates the Sherman Act as an “unfair method of competition” under Section 5 of the FTC Act. Section 5 also prohibits “deceptive acts and practices,” which is the basis of the FTC’s consumer protection enforcement mandate.

## WHY ANTITRUST COMPLIANCE MATTERS

**Antitrust violations can lead to significant consequences.**

**Criminal antitrust violations can end with jail sentences, fines, and other problems.**

- Individuals can be sent to jail for up to 10 years for antitrust violations.
- Individuals also face fines of up to \$1 million, in addition to jail sentences of up to 10 years.
- Corporations can face fines of an amount calculated as the *highest* of
  - up to \$100 million, or
  - twice the loss inflicted on customers or,
  - twice the unlawful gain to the offending corporation.

- For example, Citicorp paid \$925 million in fines in 2015 for fixing the prices of U.S. dollars and euros exchanged in the foreign currency spot market.

Companies committing antitrust violations can also face future business restrictions. Companies convicted of criminal violations of the antitrust laws can be barred from federal and state business, and can lose commercial customers as well.

Antitrust violations also can result in treble damages in civil lawsuits. This means that if a company is found to have violated the antitrust laws in a lawsuit brought by consumers or by companies that were customers or competitors (or both), the company may have to pay those customers or competitors not just the full amount by which they were damaged—for example, the full amount that they were overcharged by a company

engaged in price fixing—but **three times** the amount of those actual damages.

Finally, a company that violates the antitrust laws faces consequences beyond fines, jail sentences, and civil damages.

- Defending against antitrust claims is expensive, not only in legal fees but also in payments to expert witnesses and consultants.
- Defending against antitrust claims also involves analyzing years of emails, memos, and financial information, with data analysis expenses that can run to millions of dollars per year.

- Defending against antitrust claims is extremely disruptive. It frequently involves a large number of a company's key employees, taking up a great deal of their time at an enormous cost in emotional energy. This disruption can often be the highest—and most expensive—cost to the company in terms of its effect on the company's ability to do business.

In addition, involved individuals may be fired, and it is often difficult for people in these situations to get a new job of the same type or level in the future.

## ! BOTTOM-LINE TAKEAWAYS

- The DOJ will insist on jail sentences for all defendants, domestic and foreign.
- If you are convicted of a criminal antitrust violation, you should assume you will go to jail, pay a fine, *and* lose your job. And it is often difficult for fired employees to get another job in the industry.

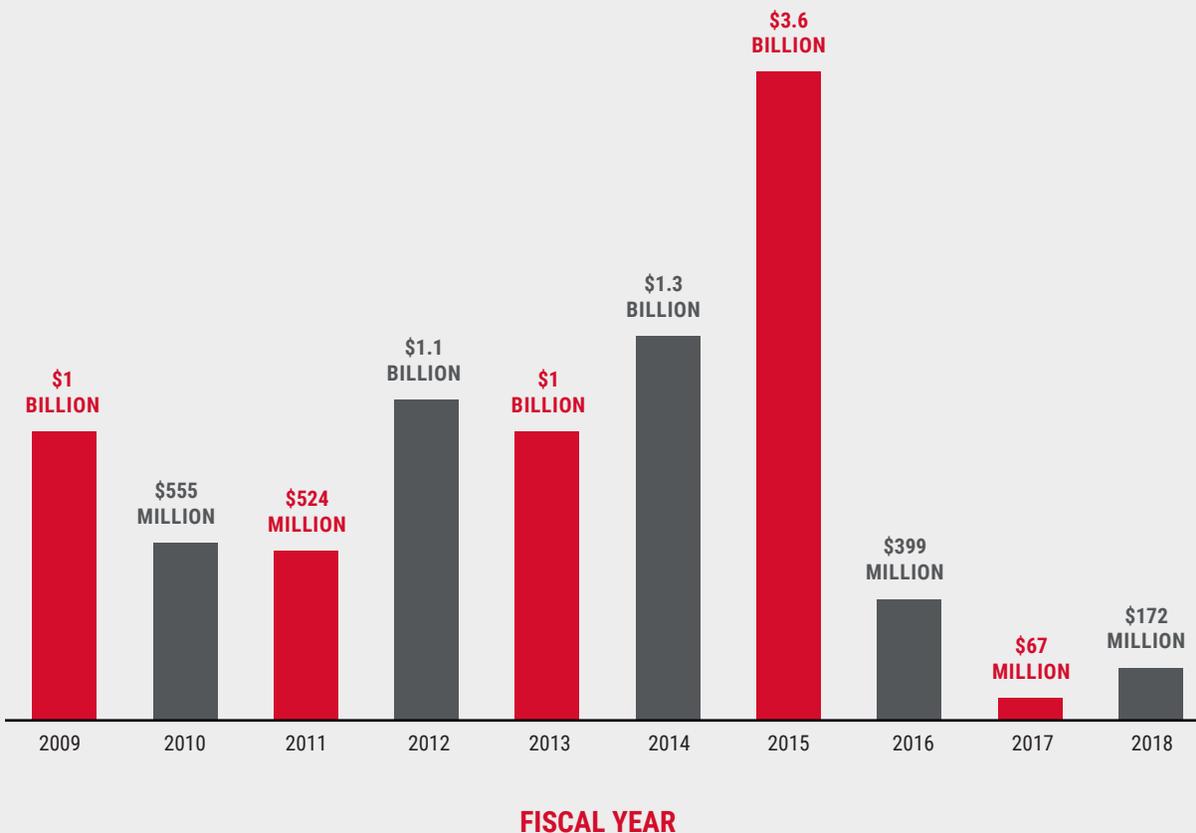


# I U.S. CRIMINAL ENFORCEMENT

In fiscal year 2019, the DOJ Antitrust Division filed criminal cases against 15 corporations and 41 individuals. The DOJ lost only one of the criminal antitrust cases it brought! Total criminal fines and penalties were nearly \$200 million, and at the end of the fiscal year, the DOJ had 91 open grand jury investigations of criminal antitrust activity. From 2010 to 2018, the average prison sentence for an individual convicted of or pleading guilty to an antitrust offense was 19 months.

In 2012-2015, due largely to investigations into collusion in the auto parts and financial services industries, the DOJ obtained criminal fines of more than \$1 billion each year, with a record high of \$3.6 billion in 2015.

## TOTAL CRIMINAL FINES & PENALTIES



# RECENT DOJ CRIMINAL ANTITRUST CASES

A former president of an **ocean shipping** company was convicted for his role in a price-fixing conspiracy and sentenced to five years in prison.

Also, AU Optronics Corp., a Taiwanese company, was fined \$500 million after it was found guilty of fixing the prices of **liquid crystal display screens**.

The DOJ Antitrust Division's investigation into price fixing in **packaged seafood** (e.g., canned tuna) led to criminal charges against two companies and four executives. StarKist Co. and Bumble Bee pled guilty and paid fines of \$100 million and \$25 million, respectively. Chicken of the Sea was the leniency candidate, admitting to criminal conduct and cooperating with the government's investigation; as a result, neither the company nor any executives faced criminal charges.

Bumble Bee's former Senior Vice President of Trade Marketing and former Senior Vice President of Sales, and StarKist's former Senior Vice President of Sales and Trade Marketing, have all pled guilty and been sentenced to pay fines and

serve jail terms. The former Chief Executive Officer of Bumble Bee was found guilty on December 3, 2019, after a four-week jury trial. As of this writing, he was awaiting sentencing. As a result of the fine, damages in private civil cases, and legal fees, Bumble Bee filed a Chapter 11 bankruptcy case in November 2019.

The DOJ Antitrust Division's investigation into a conspiracy to fix prices and rig bids for **electrolytic capacitors**—a ubiquitous component of consumer electronics—has led to charges against eight companies and 10 individuals. All charged companies have pled guilty. Most recently, in October 2018, Nippon Chemi-Con was sentenced to pay a \$60 million criminal fine, the largest fine imposed in the conspiracy, along with a five-year term of probation. Altogether, the eight corporations have been fined more than \$150 million for their participation in the capacitors' conspiracy. Two executives have pled guilty and each was sentenced to serve a prison term of a year and a day.

## SECTION 1 OF THE SHERMAN ACT

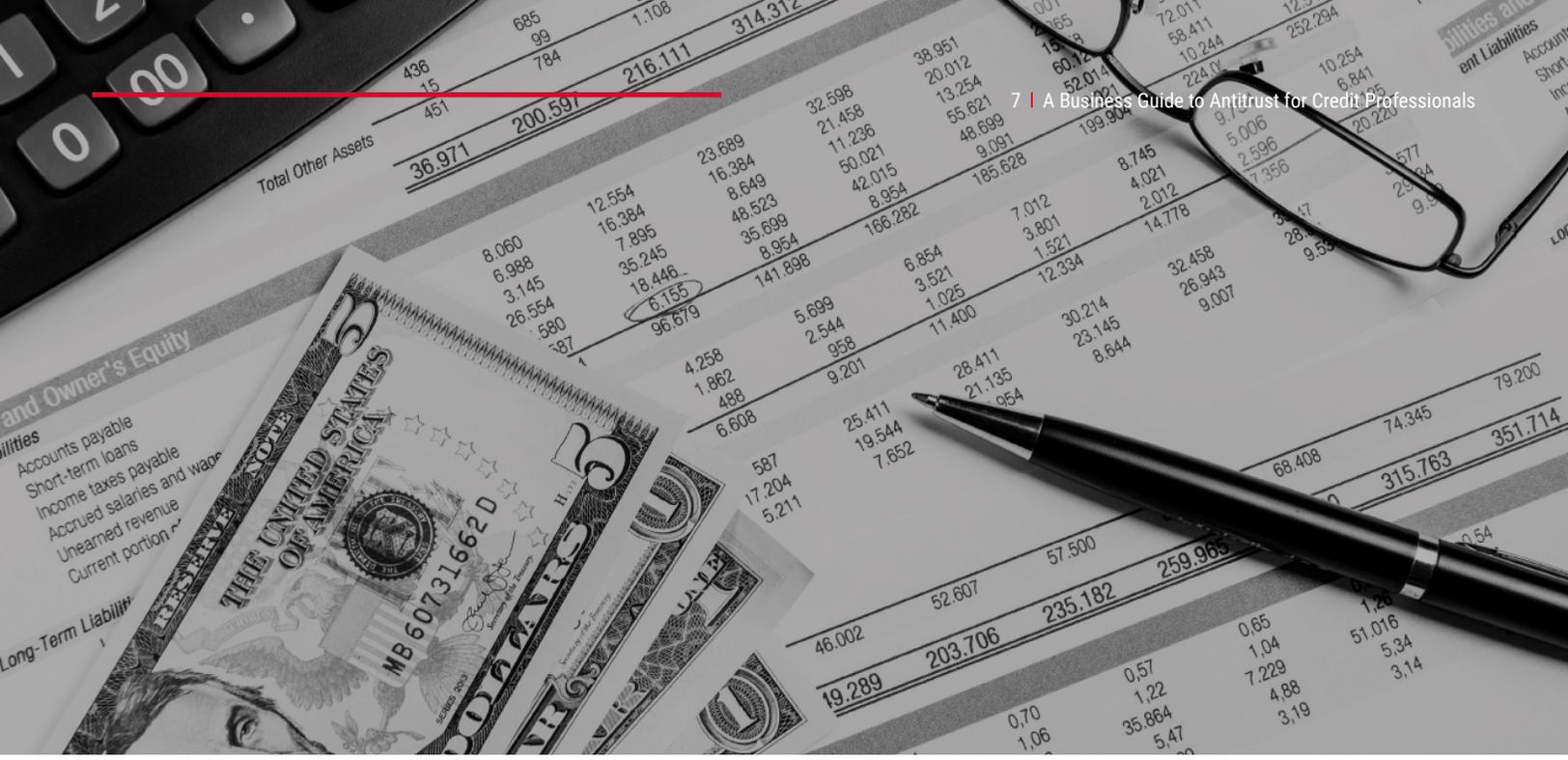
As briefly discussed earlier, Section 1 prohibits:

- an agreement ("contract, combination, or conspiracy")
- between or among two or more entities
- that unreasonably restrains/restricts trade.

Some Section 1 violations are per se unlawful. The courts have determined that these practices invariably have anticompetitive effects, such as raising prices to consumers; have no legitimate justification; and lack any redeeming competitive

purpose. As a result, these practices are considered unlawful without any further analysis of their reasonableness, economic justification, or other factors.

In practice, that means a company or individual cannot defend against a per se claim by trying to prove that the conduct did not have any actual anticompetitive effect. And it also means that arguments based on the size of the market, the size of the companies, and other factors taken into account in "rule of reason" antitrust cases do not



matter in a per se case. Even a small company, with no market power, can be convicted in a criminal case or found liable in a civil case by customers or competitors that were harmed by conduct amounting to a per se antitrust violation.

Examples of conduct that is a per se violation of Section 1 when engaged in by competing entities include:

- price fixing (agreeing on prices, credit, and other terms or conditions of sale)
- bid rigging (agreeing on bid prices, or to avoid competing on certain bids)
- customer allocation (agreeing not to compete for each other's customers)
- market allocation (agreeing not to compete in each other's markets)
- capacity coordination (agreeing to cut back capacity, which has the effect of increasing prices)
- group boycotts (agreeing to refuse to deal with certain suppliers or customers)

Defending against per se antitrust violations is even more challenging because of a difference in the way the law treats agreements that are illegal under antitrust laws compared with other kinds of illegal agreements or conspiracies.

- To be convicted of participating in an illegal conspiracy under other federal criminal laws, the government must prove that at least one member of the conspiracy committed some act "in furtherance" of the conspiracy, meaning an act undertaken to help accomplish the purpose of the conspiracy.
- That is not true for antitrust conspiracies. Under the antitrust laws, the crime is committed when the people involved reach agreement, even if none of them ever acts on that agreement in any way and even if the agreement never has any effect. In other words, as soon as the people involved agree with each other they are all guilty.

**So what is an "agreement" for purposes of the antitrust laws?**

# WHAT IS AN AGREEMENT?

In *Monsanto Co. v. Spray-Rite Service Corp.* (U.S. Supreme Court, 1984), the Supreme Court set out clear and useful guidance on what is needed to prove that an agreement was reached among a set of actors:

“To show agreement ... there must be evidence that tends to exclude the possibility of independent action” by the parties. That is, there must be

- *direct or circumstantial evidence*
- that *reasonably tends to prove*
- that the parties had
- a *conscious commitment*
- to a *common scheme*
- designed to *achieve*
- an *unlawful objective.*”

# HOW CAN AN AGREEMENT BE PROVEN?

There are various ways in which the government, or a plaintiff in a civil antitrust case, can demonstrate an agreement, ranging from the very explicit to the not-at-all explicit.

One way, of course, is to show there was an *explicit agreement*.

- Obvious and direct expressions of agreement among the actors – each saying “I agree” is the clearest proof of an agreement.

A less direct way to demonstrate an agreement is to show there was *tacit collusion*—actions that demonstrate that those involved were, in fact, acting under an agreement even where there is no proof that they all said the equivalent of “I agree.” This could consist of:

- indirect subtle exchanges of a promise or an agreement
- communicating through customers or suppliers
- failing to disagree with a proposed course of action and later acting as proposed
- what the other person later says you really meant

An even less direct way the government or a civil plaintiff can show an agreement is in the form of *conscious parallelism*, where a group of companies are all acting in the same way with respect to some dimension of competition. Such parallel conduct is not itself illegal, and is not illegal if there is or was no agreement among the actors. But conscious parallelism can rise to the level of an antitrust violation based on an illegal agreement where, in addition to parallel conduct, there are “plus factors,” such as:

- opportunities to meet and conspire, e.g., industry meetings or one-on-one social events
- parallel and roughly simultaneous conduct by multiple parties such as increasing prices or imposing new credit restrictions after opportunities to meet and conspire
- regular price announcements made publicly after such opportunities

## I WHAT IS “PRICE”?

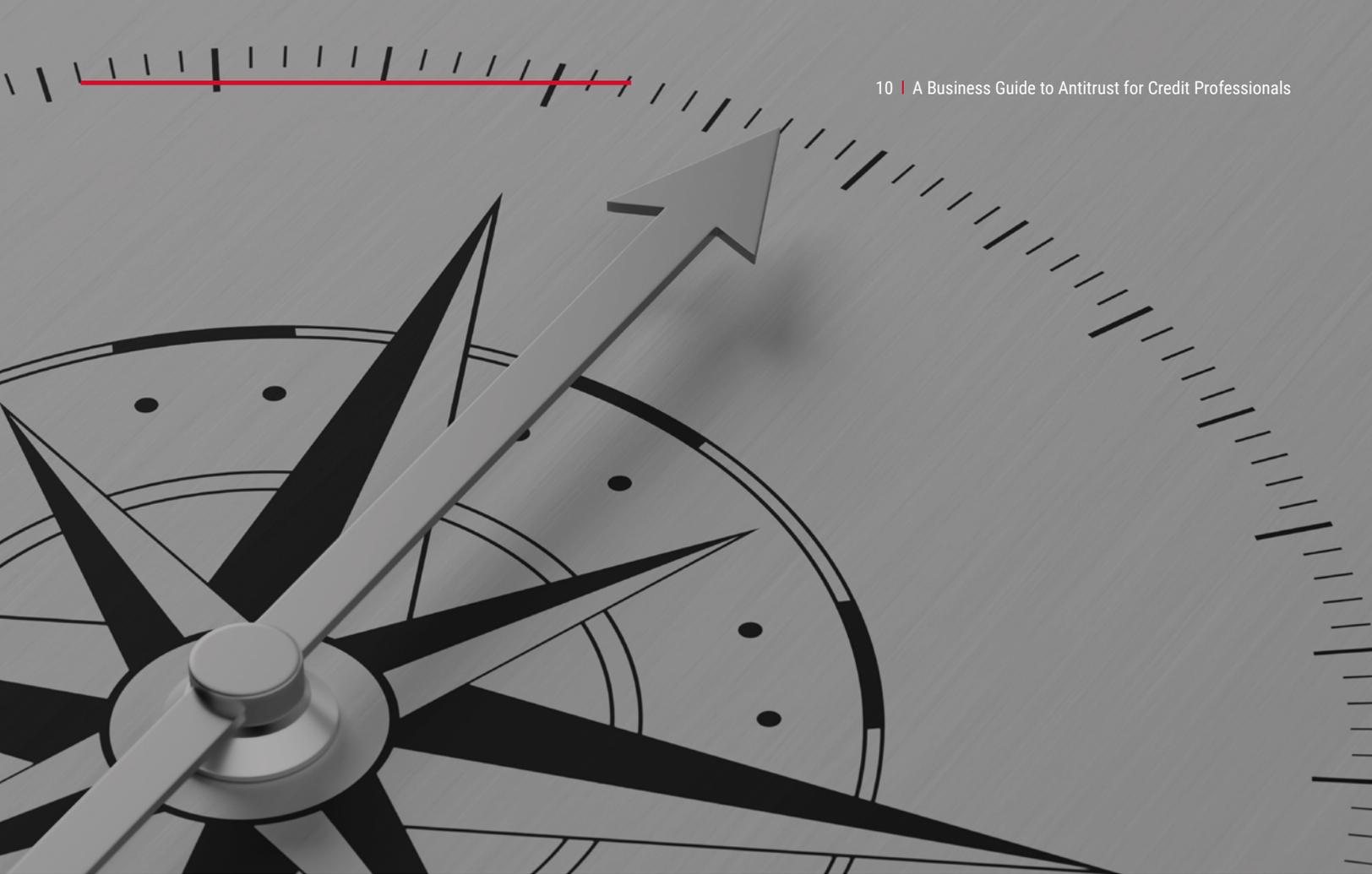
In the context of antitrust law, when analyzing whether there was “price fixing,” price is any factor in the commercial terms that affects the total cost to the customer, which includes at least the following:

- purchase price of goods and/or services
- discounts, rebates, and allowances and similar charges
- credit/payment terms (in advance, current/cash on delivery, 30/45/60 days)
- handling, transportation, and similar “add on” charges

## I WHAT IS “PRICE FIXING”?

The “fixing” component of price fixing is satisfied when companies that compete agree:

- on a specific price or set of prices
- on a formula to determine price
- not to discount from published prices
- to limit the range of discounts from published or announced prices
- to account for certain costs by adding a “surcharge”
- to set credit terms
- on a formula for setting credit terms
- to conform their credit terms to those announced by a competitor
- to honor each other’s “deadbeat” lists in terms of extending credit or willingness to do business



## I I'VE ALWAYS WANTED TO ASK ...

Q: *"I'm in a credit group setting and someone suggests we band together and offer similar terms. What should I do?"*

A: This is the perfect example of where the "noisy withdrawal" is the appropriate response. "Band[ing] together and offer[ing] similar terms" is a per se violation of the antitrust laws and would be prosecuted as a criminal case. In fact, as discussed above, *agreeing* to band together to offer similar terms is a criminal violation of the antitrust laws even if you never *offer* similar terms. Even worse for you if you don't noisily withdraw is that if you and others in that credit group discussion later *offer* similar terms, you and your company could be convicted of a criminal antitrust violation even if you did not say "I agree" at that credit group discussion or never even said a word at that credit group discussion.

Q: *"Who is liable, and to what extent (fines, imprisonment, etc.), if an unfair trade practice is identified, divulged, and prosecuted?"*

A: If the unfair trade practice is a criminal violation of the antitrust laws, the company is liable and could be subject to fines of up to \$100 million or twice the amount of profit from the conduct or loss to the victims, whichever is greater. In addition, the individuals who participate in the conduct are liable and could *each* be subject to fines of up to \$1 million and prison sentences of up to 10 years.

## I BOTTOM-LINE TAKEAWAYS

- Whenever meeting with competitors, be very careful that you:
  - Do not agree on how you will treat any particular customer.
  - Do not do or say anything that others could later report indicated that you were agreeing with others on how you will treat any particular customer.
- If the conversation is headed into an area of risk:
  - Object loudly and forcefully that the conversation must stop and return to appropriate and legitimate topics, or
  - Object loudly and forcefully that your company prohibits you from participating in such dangerous conversation and (noisily) gather your things and leave the room.
- That “noisy exit” may be embarrassing, but it will guarantee that everyone else remembers you did it.
- Immediately call the appropriate person at your company to report the conversation and the facts about your reaction.
  - Your company will then have to consider whether it should act in the way that was being suggested at the meeting, because that action could result in criminal liability for you and the company *even if your company had been planning that action before the meeting.*
- All industry group activities—both formal and informal—create antitrust risks, whether one-on-one or as a large group, such as:
  - industry events
  - working group discussions
  - standards setting/best practices
  - government lobbying
  - volunteer organizations
  - lunches
  - drinks
  - trade association meetings
  - statistical programs
  - joint research
  - civic groups
  - breakfasts
  - dinners
  - golf

# U.S. CRIMINAL ENFORCEMENT: DOJ'S AMNESTY/LENIENCY PROGRAMS

Amnesty and leniency programs work by changing the cost/benefit calculation of reporting price fixing *by the companies doing the price fixing!*

Why would a company engaging in a price-fixing agreement with other companies report its co-conspirators—and itself—to the DOJ? The answer is simple: The first company that reports to the DOJ on price-fixing activity that the DOJ did not already know about, admits its own guilt, and agrees to full cooperation with the DOJ gets *complete amnesty*—a guarantee of no prosecution—for itself and all its officers and employees. That deal is *only* available to the company that gets to the DOJ first.

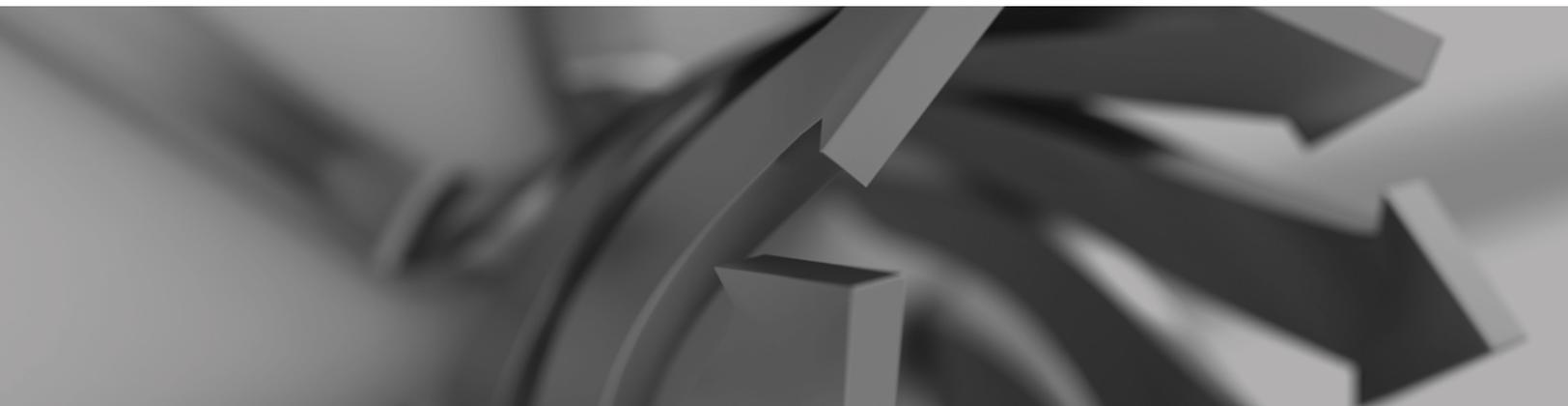
In the first generation of the DOJ amnesty program, no company got credit for reporting if another had won the race to be first. More recently, the DOJ has expanded its leniency program to give specific benefits to companies that report or provide information after the first. As a result, the DOJ learns more information more quickly about the conspiracy and about all the other companies participating in it.

By changing the cost/benefit calculation of reporting on the conspiracy, the amnesty/leniency program creates a genuine fear of detection among

all the conspirators: It creates the potential for an amnesty race to see who can be first, or at least early, in reporting to the DOJ on the conspiracy between and among the companies in the conspiracy in order to gain the benefits offered by the leniency program.

In addition, amnesty and leniency are offered to *individuals* who participate in antitrust violations, which is entirely logical since a company can violate the antitrust law only through its employees.

As a result, the amnesty/leniency race ratchets up the incentives to win that race not only between and among the companies in the conspiracy, but also *between a company and its own culpable employees and between and among each of those culpable employees*. One of the most successful methods by which the DOJ gets information and convictions of high-level officers of a company is employees who are participating in the conspiracy and can provide information about the role their bosses are playing in the same conspiracy. And from the DOJ's standpoint, the higher the level of the officers implicated, the better.



# INFORMATION EXCHANGE UNDER U.S. ANTITRUST LAW

Gathering and analyzing competitive intelligence is important, not just in your industry, but in any industry. It is impossible to run a successful business without knowing what is going on in the industry. The more a company knows, the better it is able to compete successfully.

## None of that is open to question.

What is open to question—as well as to antitrust enforcement—is how a company gathers that information and what it does with that information, particularly where the information is competitively sensitive. Competitively sensitive information includes information on a company’s current or future prices, its current or future production capacity or plans, its strategic plans, its products or services in development, and any information identifiable to any particular customer of (or supplier to) a company on price or any other terms of trade that are related to price, meaning terms that affect the overall cost of a product or service to the customer (or value paid to the supplier).

Information sources such as industry publications, market analyst publications, and specialty newsletters and blogs are all customary and safe ways of gathering competitive intelligence. One-on-one conversations with others in the industry can provide more detailed information, but can also be higher risk.

In general, exchanging information does not, by itself, violate the antitrust laws in the United States.<sup>1</sup> And courts treat information exchange under the “rule of reason,” meaning that they take

into account a large number of factors about the nature of the product at issue, the market in which it is made and sold, the number of companies and level of competition in the market, the specific information exchanged, and the effects of the information exchanged.

But there are antitrust-based *concerns* about sharing competitively sensitive information, and the reason is simple: antitrust enforcers know that companies are very aggressive about protecting their competitively sensitive information, particularly from their competitors, because that information is what enables a company to compete effectively, that is, to be “better” than its competitors. Therefore, when antitrust enforcers see competitors voluntarily sharing such information, they assume—or at least suspect—that the sharing is designed to accomplish some purpose different from competing effectively and, therefore, is potentially anticompetitive.

And the suspicion of the antitrust enforcers is based on ample historical evidence: Literally every price-fixing conspiracy ever investigated by the antitrust agencies everywhere in the world has involved the exchange among the conspirators of competitively sensitive information to serve as the basis for agreeing on and enforcing the illegal agreement.

So while exchanging competitively sensitive information is not itself illegal, those exchanges do involve risks. And of course, the more competitively sensitive that information is, the greater the potential risk.

<sup>1</sup> The law is or may be different in jurisdictions other than the United States, and any company with customers outside the United States should seek specific guidance from knowledgeable counsel about the law on information exchange in each jurisdiction in which a company is extending credit terms to customers.

In general, guidance on exchanging competitively sensitive information among competitors in an industry includes caution on at least two dimensions:

- Such information should be exchanged only in “aggregated” and “anonymized” form.
- Such information should include only historical information and not current or planned/future information.

This is an example of aggregated and anonymized information:

**WIDGET INDUSTRY**  
**Q2 2019**  
**DATE OF REPORT: AUG. 1, 2019**

CUSTOMER SEGMENT	NUMBER OF CUSTOMERS	AVG. NUMBER OF WIDGETS/ MONTH/CUSTOMER	AVG. WHOLESALE PRICES CHARGED
<b>INDUSTRIAL/ COMMERCIAL</b>	<b>107</b>	<b>742</b>	<b>\$8.43</b>
<b>CONSUMER</b>	<b>1,457</b>	<b>49</b>	<b>\$12.57</b>
<b>NUCLEAR ENERGY</b>	<b>3</b>	-	-

Notice several features of the chart:

- It reports data from the second quarter of 2019—April, May, and June—satisfying the requirement that the information be “historical” rather than current or future, as of the Aug. 1, 2019, reporting date.
- It reports average data across all the companies in a particular segment, so it is aggregated information.
- It does not report the names of any particular companies, so it is anonymized.
- For the category of “Nuclear Energy,” in which there are only three customers, it does not report any data because if it did, any one company in that segment would be able to derive a pretty accurate estimate of the volume of business of each of its competitors, which is competitively sensitive.

# INFORMATION EXCHANGE AMONG TRADE CREDITORS

Trade creditors in many industries have a long history of exchanging credit information within credit groups at a much more granular level, including credit information about specific customers. That is accounted for by a single, simple, and crucial fact: information on credit history is useful *only* if it is specific information about a specific customer.

There are many procompetitive reasons for and benefits of this practice, as credit group information exchanges can help achieve lower prices for consumers by:

- reducing fraud
- enabling better-informed credit decisions
  - encouraging more generous credit terms to creditworthy customers
  - ensuring less generous credit terms for less-creditworthy customers
- reducing uncollectible debts
- reducing costs
- allowing better credit terms—lower prices—with no loss of margin

These results of credit group information exchanges are procompetitive and consistent with the purposes of the antitrust laws. Therefore, generally speaking, exchanging credit information among members of a credit group is permissible:

- where the information exchanged is purely factual and accurate
- where the information exchanged is historical
- where the exchange is designed to provide members with information that allows each of them to make its own credit decisions
- where each member makes its own credit decisions based on its own knowledge of accurate facts

Court cases reach the same conclusions.

# SOME COURT DECISIONS ON INFORMATION EXCHANGE FOR CREDIT GROUPS

In *Cement Mfrs Protective Ass'n* (U.S. Supreme Court, 1925), the government challenged a cement manufacturers association's exchange of credit information. The association distributed monthly reports that identified:

- all customers with accounts that were more than 60 days past due
- customers with amounts overdue
- whether customers had accounts in collection

The Supreme Court held that the association's exchange of credit information—including on specific identified customers—was not unlawful because the members did not enter into any agreement as to how the information would be used.

The Court said:

"The evidence falls far short of establishing

- any understanding on the basis of which credit was to be extended to customers,
- or that any co-operation resulted from the distribution of this information,
- or that there were any consequences from it other than such as would naturally ensue from the exercise of the individual judgment of manufacturers in determining, on the basis of available information, whether to extend credit or require cash or security from any given customer."

The conclusions of the Supreme Court in *Cement Mfrs* have never been overturned or questioned. But the antitrust analysis of information exchange has changed since the date of that decision.

At the time of the *Cement Mfrs* decision, the focus of the analysis was on the *purpose* of the information exchange. More recently, the courts have focused on the *effect* of the information exchange, particularly whether it has had, or was likely to have, an anticompetitive effect.

For example, in *United States v. Container Corp. of America*, (U.S. Supreme Court, 1969), the Supreme Court noted that the case was "unlike any other" information exchange case it had seen, in that there was "an exchange of price information but no agreement to adhere to a price schedule." But the Court also held that exchanging information about the "most recent prices charged or quoted" among manufacturers of corrugated cardboard shipping containers, even on an irregular basis, "had an anticompetitive effect in the industry, chilling the vigor of price competition." The Court noted there was no special circumstance in *Container Corp.*, such as the need for protection from fraudulent buyers, as there was in *Cement Mfrs*.

Given the passage of time and the change in antitrust analysis since *Cement Mfrs*, as well as the enormous number of criminal price-fixing cases that have been uncovered and prosecuted in the United States and around the world in the nearly 100 years since that decision, *Cement Mfrs* should *not* be read as holding that information exchange on specific customers is "per se lawful." **There is no such thing as per se lawful in antitrust law.** Rather, *Cement Mfrs* should be read, along with more recent precedent, for its specific holdings:

- There are potential procompetitive benefits from an exchange of information among members of a credit group, particularly protection from fraudulent buyers.
- The information exchange *in that case* was not an antitrust issue because there was *no evidence* that:
  - the companies had reached any understanding on what credit decisions to make;
  - there was any cooperation among them that resulted from the credit information exchange; or
  - there were any consequences of the credit information exchange other than what one would expect to see if each company had made its own credit decisions.

A different set of facts was presented in ***United States v. United States Gypsum Co.***, (U.S. Supreme Court, 1978), which was brought as a criminal case involving companies that claimed they needed to exchange price information to support a “meeting competition” defense under the Robinson-Patman Act. The Supreme Court held that there was no need for the companies to verify price with each other to establish that defense, because the defense required only a “good faith basis” for believing that a competitor was offering a lower price. Therefore, as in *Container Corp.*, there was

no procompetitive special circumstance of the type that was the basis of the *Cement Mfrs* decision.

The plaintiff in ***Burtch v. Milberg Factors*** (Third Circuit, 2011) was a Chapter 7 trustee of a garment retailer (Factory 2-U) in bankruptcy. The complaint alleged that Milberg Factors had entered into a per se illegal agreement with other factors by sharing credit information concerning Factory 2-U and agreeing with the other factors on setting credit terms they would extend to Factory 2-U.

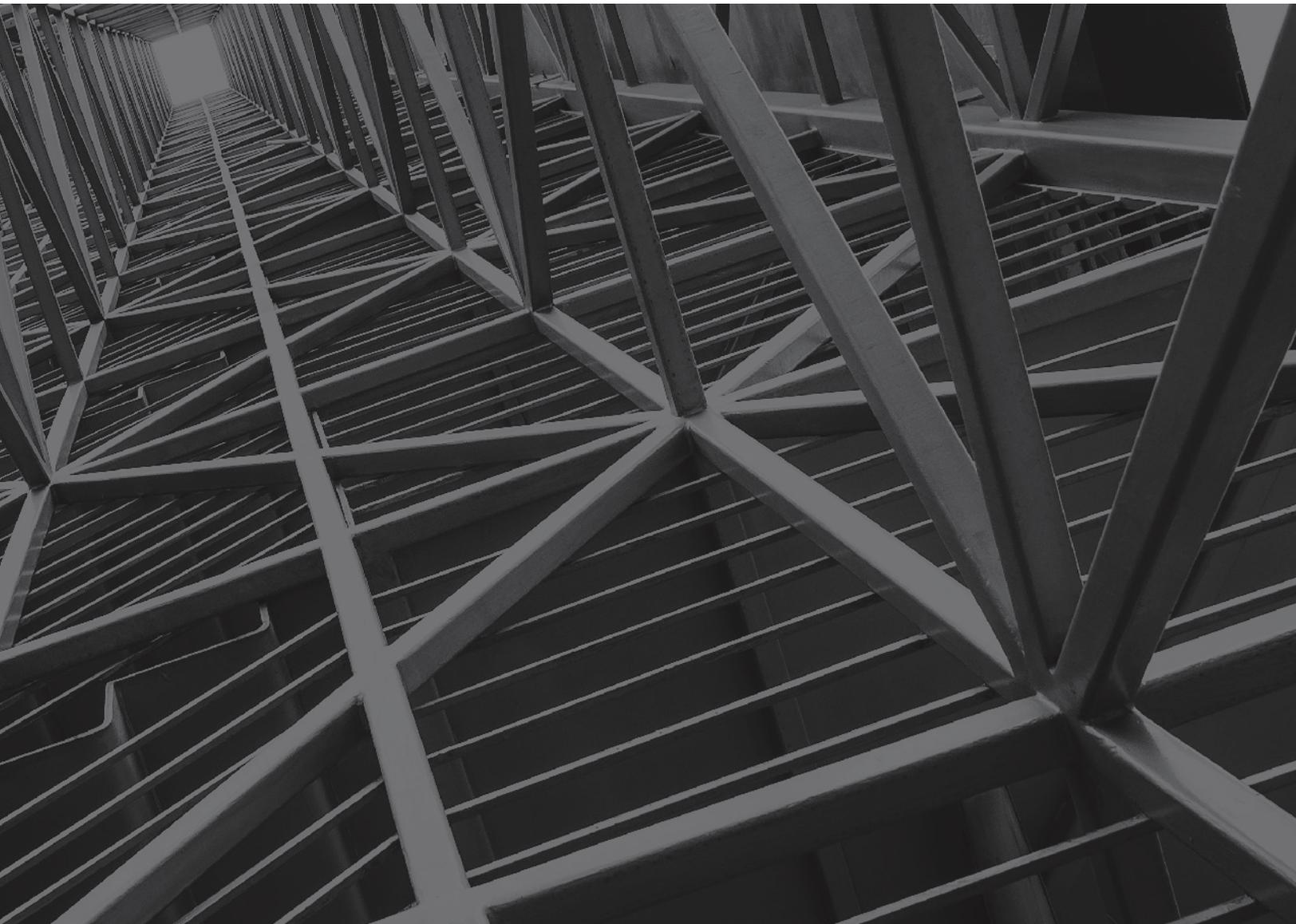
The Third Circuit held that the exchange of credit information in that case was not per se illegal because the exchange could have had procompetitive benefits by protecting suppliers (in this case, Milberg Factors) from insolvent customers. The court upheld the trial court’s dismissal of the complaint for lack of evidence. The court found that there were no facts alleged in the complaint that supported a plausible conclusion that parallel conduct among the factors had resulted from an agreement among them rather than from independent decisions based on their common perception of Factory 2-U’s deteriorating financial condition.

The plaintiffs in ***In re Baby Food Antitrust Litigation*** (Third Circuit, 1999) were retailers of baby food that alleged an 18-year price-fixing conspiracy by the manufacturers. The evidence in their complaint

pointed primarily to a long history of parallel pricing.

The Third Circuit noted that “when two or more competitors ... act separately but in parallel fashion in their pricing decisions, this may provide probative evidence of the existence of an understanding by the competitors to fix prices.” But despite that comment, the court upheld the trial court’s dismissal of the complaint on the grounds that:

- “[The Complaint provided] *no evidence ... showing reciprocal exchange of information by any executive of the defendants with price-fixing authority.*”
- “[The Complaint provided] *no evidence ... that ... any executive of any of the defendants with price fixing authority communicated with executives of the other defendants, either by writing, telephone or meeting.*”
- “Whatever information sales representatives culled from the trade or from each other amounted to no more than an accumulation of sporadic market snippets, *not an organized, concerted exchange of information among company executives or their authorized agents.*”



## I BOTTOM-LINE TAKEAWAYS

- The exchange of price information is more indicative of a per se illegal agreement and is riskier than the exchange of credit information.
- The exchange of credit information is NOT per se illegal.
- But the exchange of credit information is NOT risk free and is certainly not per se lawful.
- **There is no such thing in antitrust law as per se lawful.**
- The exchange of information is lower risk where:
  - It has a legitimate purpose.
  - There is no agreement reached on price.
  - It is not part of a price-fixing scheme.
  - It is unlikely to have an effect on price or where, in a rule of reason analysis of all the facts, the legitimate purpose is procompetitive and offsets any likely anticompetitive effects.
  - Each company in the exchange makes an independent decision about the credit terms it extends and can document that from its contemporaneous records.

## I PRACTICAL GUIDANCE ON INFORMATION EXCHANGES IN CREDIT GROUPS

Of course, the keys to reducing risk are to report only factually accurate payment information, not report credit actions taken for that customer, and for each company to make *its own* credit decisions, *independently* of any other member of the credit group.

With respect to what constitutes an agreement under the antitrust laws, each company must make *its own independent* credit decisions. In addition, each company must be *seen by the others* to be doing nothing more than reporting and passively receiving specific, factual information on a customer's payment history during the

credit group's exchange of information. It is also important to keep in mind that the antitrust treatment afforded to credit groups historically is different from the treatment of information exchange generally. Therefore, it is important to be careful about what each company's representative says and does when exchanging credit information while participating in credit groups.

Here is some guidance on what is "OK" and is "Not OK" for a company to say while reporting during such credit group exchanges:

NOT OK	OK
"Company X has been kind of a late pay for a while, so we're getting worried."	"Company X was late by more than 10 days in each of the past three months."
"We've put Company X on 'cash in advance' terms."	"Company X was late by more than 10 days in each of the past three months."
"We'll be watching Company X closely and may have to cut it off until it comes current on payables."	"Company X was late by more than 10 days in each of the past three months."
"We've been worried about Company X because it has some history with us, so what's happening now is no surprise to us."	"Company X was late by more than 10 days in each of the past three months. Eighteen months ago, it was late by 10 or fewer days for two months in a row."

And here is some guidance on what is "OK" and is "Not OK" for a company to say while listening to a report during such credit group exchanges:

NOT OK	OK
"Good information. Now we'll know what to do."	"Company X was late with us by more than 20 days in each of the past two months."
"We've had a lot of the same problems with Company X."	"Company X was late with us by more than 20 days in each of the past two months."
"Good information. Now we'll know what to do."	"My company forbids me to be part of any such discussion, so I am leaving."
"What are you planning to do about Company X?"	"My company forbids me to be part of any such discussion, so I am leaving."

And of course, it is not OK if every company puts Company X on cash in advance shortly after the meeting. Why is that not OK? For the simple reason that none of the companies will be able to show—by pointing to contemporaneous documents, memos, and emails—that it made an independent credit decision. If all, or even many, of the companies put Company X on cash in advance immediately after the meeting without each performing and documenting its own independent analysis, the logical conclusion will be that all the companies

reached (at least) a tacit agreement at the meeting to adopt the same credit terms for Company X.

At a minimum, each company will have to show that it examined its own records for Company X's payment history, considered the possibility of noncredit-related factors—such as that Company X has been arguing with the reporting company over the quality of merchandise or some other business issue—and made its own decision about the credit terms for Company X, which was consistent with decisions it had made regarding other similar facts.

## I'VE ALWAYS WANTED TO ASK . . .

*Q: "What about antitrust laws in other countries (similarities/differences from the U.S.)? For example, does Canada have the same antitrust rules and regulations, and what, if anything, should a credit professional do differently when discussing Canadian accounts?"*

A: The law is or may be different in jurisdictions other than the United States, and any company with customers outside the United States should seek specific guidance from knowledgeable counsel about the law on information exchanges in each jurisdiction in which a company is extending credit terms to customers. Often, U.S. counsel will be familiar with antitrust laws and regulations in at least some jurisdictions other than the United States, particularly for major jurisdictions such as the EU, the UK, Japan, Korea, and, increasingly, China. In addition, U.S. counsel likely will have relationships with antitrust lawyers in those other jurisdictions who can provide general guidance and answer specific questions.

*Q: "I'm using an online account interchange service and all my competitors input and share their terms. What actions should I take?"*

A: You should avoid sharing current credit terms for a particular customer. As discussed above, sharing factual and accurate information on which a company can make its own credit decisions is recognized as serving a procompetitive purpose and is lower risk when each company, in fact, sets its own credit terms based on its own research into the customer, its own payment history from that customer, and its own

analysis of its credit risk with that customer. But sharing current credit terms for particular customers is higher risk because it could appear to antitrust authorities as a set of mutual invitations to coordinate those terms.

*Q: “Many credit reference requests include a question about our payment terms. Can we answer them? How should we handle them? Are companies at risk if they ask for this on their credit reference forms?”*

A: As discussed above, the antitrust authorities would ask why a company would want to share its payment terms, since a company’s payment terms provide information about the credit quality of its customers, which is competitively sensitive information. So the safer course is to not share such information.

*Q: “If a company takes action to mitigate risk (by reducing terms or withdrawing credit), when can this action be shared, if ever, to credit reporting groups or other credit professionals?”*

A: As discussed, it is appropriate for a company to share accurate factual information about a customer’s payment history. But each company must make its own decision about what credit action to take based on that information. Therefore, there is less procompetitive justification for, and higher antitrust risk in, a company sharing any credit action—as distinct from payment experience—because sharing a credit action could be seen as an invitation to agree on what action to take.

*Q: “What information might I be able to exchange with my competitors in a benchmarking study? How must/should the results of the study be published to participants? Should there be a minimum number of participants?”*

A: Benchmarking studies are very interesting in antitrust terms. On the one hand, they can provide each participant with information that would help it compete more effectively or, if on a topic that relates to safety, would help each company offer a safer workplace to its employees or safer products to its customers. On the other hand, if a particular participant believes it has a superior approach/process/method for the issue being benchmarked, the antitrust authorities might well ask why that company would want to share such competitively sensitive information in a forum that would allow other companies to “catch up” with it. So a company should be very thoughtful about whether to participate.

In addition, if the participants in a benchmarking study meet and discuss issues together during that study, those discussions provide opportunities for employees of competing companies to share information over and above the information specific to the study. Therefore, any employee participating in such meetings or discussions should seek guidance from his or her company’s legal department about the limits of the employee’s participation, including what the employee should and should not say at those meetings.

If the results of the study are published, they should be aggregated and anonymized as in the example and discussion above and should not identify any particular practices to any particular company. And as also discussed above, the number of companies participating should be large enough that it is not possible for any reader—including any participant—to extrapolate any specific information about any particular participant.

# I BOTTOM-LINE TAKEAWAYS

- Three words sum things up best about the nature of information that can be exchanged with lower risk: historical, factual, and unemotional.
- It is not unlawful to exchange factually accurate, customer-specific, credit-related historical payment information as has been done historically in credit groups, *but be careful what else you discuss, what else you say, and what you do.*
- It is *not OK* to discuss current or future/planned credit terms.
- It is *not OK* to agree on or even discuss intended actions or future credit policies or actions.
- It is *not OK* to agree on credit actions.



## REDUCING ANTITRUST RISK AT CREDIT GROUP MEETINGS: DO'S

- Use an experienced “monitor” at credit group meetings to demonstrate commitment to complying with the law and to ensure compliance with the law.
  - An experienced and effective monitor is important both for the substantive discipline the monitor will provide, as well as to make it apparent that the participants take their antitrust obligations seriously.
  - A monitor is effective on the substance of what is discussed at the meetings only if the monitor can detect risky conduct in real time. Therefore, the monitor must be well trained and must attend meetings in person if others do.
- Handouts for the meeting should be reviewed in advance by counsel for each company.
- Stick to the written agenda that is circulated and reviewed in advance of the meeting.
- The meeting organizer should generate minutes of all meetings.
- After the meeting, each company should review the minutes and make sure they accurately reflect what transpired at the meeting.

## REDUCING ANTITRUST RISK AT CREDIT GROUP MEETINGS: DON'TS

- Do NOT exchange price information or payment terms.
- Do NOT agree on credit terms.
- Do NOT discuss current or forward credit terms.
- Do NOT discuss opinions and rumors about customers.
- Do NOT exchange forward-looking information (historical, factual information only).
- Do NOT share information from groups with anyone in your company not involved in the credit function.
- Do NOT discuss information learned at the meeting after the conclusion of the meeting.
- Do NOT have “follow on” discussions with other companies, and remember that emails transmitting improper information that are then deleted can always be retrieved.

# I EXTENDED CREDIT TERMS

Finance 101 tells us that there are three sources of corporate capital: debt, equity, and retained earnings. But over more than the past 10 years, an ever-increasing number of companies have “discovered” a fourth source: extended credit terms, sometimes also known as working capital optimization, working capital improvement, liquidity management, days payable optimization, or terms pushback. These are all formal-sounding names for a very simple concept: by stretching out payments to their vendors, companies improve their own cash flow at the expense of their vendors. These companies are literally using the money they owe the vendors as working capital for their own business needs; or even more simply, obtaining an involuntary loan from their vendors. The key question for a credit professional—the question that will help determine the response—is whether a company is seeking extended terms from its vendors to increase working capital or to improve liquidity in response to financial problems.

Since 2011, for example (according to JPMorgan’s “Working Capital Index” report of July 2019), days payable outstanding (DPO) for small companies has grown from an average of 40.7 to 42.2, and even more aggressively, for large companies it has grown from an average of 51.1 to 55.5. Outside the United States, the increase in DPO has been even more significant, showing (according to PricewaterhouseCoopers’ annual “Working Capital Study 2018/19,” released Nov. 8, 2019) a growth from 58.8 in 2013 to 67.7 in 2017.

Whether the extended credit terms are actually requested and negotiated by a customer or are simply “self-awarded,” the growth of the practice is real. A recent informal survey of credit professionals revealed that 98% of them had seen a trend toward demands for extended credit terms or “self awards” during the prior year, while 77% of

them reported increased frequency of customer requests for extended credit terms, with only 2% reporting a decrease of such requests.

Extended credit terms, or terms pushback, is a current and “hot” topic. There have been, and will continue to be, numerous industry meetings, conferences, and programs at which credit professionals exchange information on how each company is responding to terms pushback by its customers and discuss how the industry should respond.

Exchanging information is not itself illegal. But it is illegal for companies to agree on a course of action that affects price, including how those companies deal with the issue of extended credit terms. So exchanges and discussions create antitrust risk, especially if after discussing with each other how to respond, the companies all adopt the response they had discussed.

As with every issue affecting price, each company must decide *independently* how it will respond to a request for extended terms. Discussions with other companies of how to respond should be avoided, unless the company’s legal department provides clear guidance on a course of action.

A company’s first step for responding to a request for extended terms should be for the business and legal teams to establish clear policies on whether and how to engage in discussions about extended credit terms with credit professionals from other companies.

Policies governing discussions with other credit professionals will help ensure that the company and each of its employees will be very careful about whether they discuss potential responses with other vendors. And if the company and/or employees engage in such discussions, the policies

should ensure both that those discussions comply with the law and that they do not bleed over into illegal agreements—tacit or explicit—on a common or “industry” response. Finally, well-thought-out, and well-enforced, policies on discussions with customers will ensure both that the substance of such discussions is consistent with the law and with the company’s business needs and also that the company’s response will be correctly understood by the customer as having been independently determined.

Each company also should consider whether to adopt a formal program governing how to respond to requests for extended credit terms. Responding—or perhaps continuing to respond—on an ad hoc basis to each request for extended terms will result in inconsistent responses, which in turn will increase legal risk. A formal program for responding to customers’ requests for extended terms, one with clearly articulated policies, procedures, and metrics, will better enable companies to independently reach and defend decisions on extended credit terms and ensure that their policies and procedures are applied in the same manner to similarly situated customers. A formal program will also help ensure that the customer leaves the discussion with a clear understanding that the company determined its response independently, and consistently with its own business practices.

A company establishing a formal program for responding to requests for extended credit terms should start with a clearly articulated set of principles formulated by the business and legal teams. A policy that reflects a company’s particular business, finances, and historical practice is more likely to be the result of that company’s independent decisions and, therefore, also will be easier to defend.

In formulating a program for responding to requests for extended credit terms, a company also should take into account potential antitrust risks under the Robinson-Patman Act. As discussed in the following section, the Robinson-Patman Act prohibits a company from discriminating in pricing between similarly situated wholesale customers that compete with each other in a downstream market, where the differential in pricing harms the ability of the customer with the less-favorable terms to compete in the downstream market. The Robinson-Patman Act applies only to the sale of goods and not services. But for companies that sell goods, since credit terms affect the total cost of the goods to the customer, the Robinson-Patman Act potentially will apply to differential responses to requests for extended credit terms by similarly situated customers who compete with each other in the downstream market.

The same reasoning—and antitrust risks—apply where companies confronting requests for extended credit terms consider alternative responses, such as:

- offering early payment discounts or charging increased prices to customers seeking extended credit terms
- offering supply chain financing where, for a fee, a participating bank, such as the customer’s bank, agrees to pay the company on an expedited basis in exchange for the customer’s agreement to reimburse the bank<sup>2</sup>

To the extent that these—or any other alternatives—create a differential to a customer (in the overall cost of the affected goods), the company must assess the antitrust risks including, potentially, risks under the Robinson-Patman Act.

<sup>2</sup> Of course, the company also should carefully review all agreements that must be executed as part of any supply chain financing arrangement.

## I I'VE ALWAYS WANTED TO ASK . . .

*Q: "Our credit group just circulated the agenda for our next meeting and it includes a discussion of extended credit terms. Is there anything I should do to prepare for that discussion?"*

A: As always when you have any question about a credit group meeting, you should first consult with your company's legal department for guidance. Be sure to spend time thinking about what kinds of comments and discussions you anticipate coming up and then ask the legal department for very practical and specific guidance on what you should say or do in response to each situation you can predict.

*Q: "I reviewed the agenda for our last credit group meeting like I always do and then talked it over with our legal department, so I felt pretty confident going into the meeting. But during the meeting, as we were discussing one customer, one company representative said something like 'And they just asked me for extended credit terms. I've suspected for a while that they were in trouble, so that was a real red flag for me. What do you all think?' What should I have done? Or I guess, I mean, what should I do if it happens again?"*

A: If your company had already determined what your response should be in that situation, then of course you should follow that advice. In any event, particularly where you do not have a company response to fall back on, the safest course is the noisy withdrawal. That means you stand up, you noisily gather up all your belongings, and you say in a strong voice, "My company prohibits me from being in a conversation on this topic, so I'm leaving." Then you actually leave.

A slightly less embarrassing but slightly higher-risk response is to stand up, noisily gather up all your belongings, and say in a strong voice, "My company prohibits me from being in a conversation on this topic, so unless we stop this discussion immediately, I'm leaving." If the discussion of extended credit terms stops immediately, then you may stay.

But either way, be sure your notes and/or memo of the meeting accurately reflect what happened, either that the discussion of extended terms did immediately stop or that you left, whichever is the case.

## I BOTTOM-LINE TAKEAWAYS

- Extended credit terms—or terms pushback—is a hot topic for credit professionals, so it is likely to be a topic of discussion not only at credit group meetings but also in any situation in which credit professionals get together.
- Credit terms are an element of price, so any discussion of extended credit terms is a discussion of price.
- Each company should independently formulate its own individual policy on how it will respond to customers that request extended credit terms or effectively award themselves extended credit terms.
- That policy should reflect the specific factors of each company’s business and standard practices and attempt to predict and prepare for how its customers will act.
- Each company should also determine independently how its credit professionals should respond to customers when they raise the issue and how they should respond to other credit professionals who may raise the issue in any context.
- Each company should train its credit professionals to respond according to the company’s policies.

## I PARTICIPATING IN INVOLUNTARY BANKRUPTCY

Creditors are permitted to act together to join in filing an involuntary bankruptcy petition. However, they should be guided by experienced bankruptcy counsel to determine whether the creditors should participate and the risks of their participation. As with any other situation in which companies that are or could become competitors are collaborating, there are real risks in the discussions that take place among them.

In addition to the general guidance provided above, here are some guidelines specific to participating in involuntary bankruptcy proceedings involving a customer:

- Retain an attorney for your company and have the attorney contact the other creditors, rather than having businesspeople reach out to the other creditors.
- Avoid credit group discussions directly among the participating companies, as well as one-on-one individual discussions, about an involuntary petition.
- Avoid credit group discussions directly among the participating companies, as well as one-on-one individual discussions, about continuing to do business with the debtor.
- Avoid credit group discussions directly among the participating companies, as well as one-on-one individual discussions, about the “appropriate” credit treatment of the debtor by individual creditors.
- Do not agree, or indicate in any way that you agree, with any other company’s approach on the appropriate credit treatment or other matters concerning the debtor.

- The petitioning creditors must each make an independent decision whether (or not) to join an involuntary petition and on all credit and other decisions concerning the debtor.

The risk is that collective, or similar, action by the creditors toward the distressed company—in credit treatment, changing business terms, and/or refusing to deal with the customer—could be seen as an illegal agreement on price or a group boycott, which is per se illegal, just as is price fixing.

## I'VE ALWAYS WANTED TO ASK . . .

Q: *"How might I approach other creditors with a proposal to file an involuntary bankruptcy petition against a common debtor without risk of violating antitrust laws?"*

A: The short answer—and the right answer—is through your attorney. It is much safer to initiate such intercompany discussions through discussions among the attorneys for the companies than through direct discussions among the businesspeople.

## PARTICIPATING ON CHAPTER 11 CREDITORS' COMMITTEES

Creditors' committees are a major player in many Chapter 11 cases. Committees could impact the direction of a Chapter 11 case and increase recoveries for trade creditors.

Creditors' committee members have qualified immunity for actions within the scope of their official committee duties. However, there is no immunity for improper collective actions. As a result, the same rules governing participation in a credit group apply to creditors serving on a creditors' committee. Committee members should be guided by experienced bankruptcy counsel in their communications with other committee members and other issues arising from their committee membership. As with any other situation in which companies that are or could become competitors are collaborating, there are real risks in the discussions that take place among them. And the same do's and don'ts as discussed above for participating in credit group meetings and involuntary bankruptcy petitions apply to committee members.



## I I'VE ALWAYS WANTED TO ASK . . .

Q: *"A group of credit professionals are considering joining a creditors' committee. What can and can't they do?"*

A: The most important rule, of course, as in anything related to bankruptcy, is to be guided by experienced bankruptcy counsel in every facet of your participation. And, in particular, you cannot discuss prices, including credit terms, with other committee members.

## I BOTTOM-LINE TAKEAWAYS

- Unsecured creditors' committees play an important role in bankruptcy and have a significant voice in every issue in the bankruptcy.
- Members of a creditors' committee have limited immunity to act collectively on the issues that are legitimate creditors' committee issues, but members face the same risks as in any setting where companies that are or could compete come together for discussions.
  - The people and companies could use those discussions as an opportunity to discuss and agree on issues that create antitrust liability for them.
- Members of a creditors' committee should:
  - confine their discussions to the legitimate issues of the committee
  - avoid revealing any competitively sensitive information of their own company
  - avoid asking about any competitively sensitive information of any other company
  - avoid any discussions on your company's or any other company's
    - prices
    - credit terms
    - individual actions being taken or contemplated toward the debtor

# I ROBINSON-PATMAN ACT

The Robinson-Patman Act<sup>3</sup> prohibits disparate or discriminatory terms of distribution that favor one wholesale customer over a competing wholesale customer. This applies to both direct discriminatory terms, such as price, and “indirect” discriminatory terms, such as promotional allowances, coop advertising, or services provided by the seller relating to sales of goods for which no charge is assessed. The Robinson-Patman Act is most frequently invoked by a wholesale customer complaining that a competing wholesale customer is receiving more favorable terms, hurting the complaining customer’s ability to compete in the downstream market. Courts have set out four conditions that must be met for a “disfavored” customer—the one receiving less-favorable terms—to make a valid claim that seller has violated the Robinson-Patman Act:

- The disfavored company must be a direct competitor of the favored company in the downstream market (i.e., the market in which the favored and disfavored companies compete with each other to make sales).
- The transaction must involve a sale of goods, not services, and not involve leases.
- The goods at issue must be of “like kind and quality.”
- The sale must be made “in commerce,” meaning in interstate commerce.

To succeed on a claim under the Robinson-Patman Act, the plaintiff must show that:

- The commodities at issue were of “like kind and quality.”
- The defendant discriminated in price between or among its wholesale customers.
- The plaintiff (disfavored customer) competes in the downstream market with the more-favored customer.
- The price (or other) difference caused an injury to competition in the downstream market, such as lost sales or profits by the plaintiff disfavored customer as a result of the discrimination.

But note that there is a presumption that a substantial price difference over a substantial period of time creates an inference of injury to competition.

In this context, as in most others for antitrust analysis, credit is a component of price. Therefore, offering differential credit terms to wholesale customers that compete with each other in a downstream market raises the same issues under the Robinson-Patman Act as are raised by any other offer of different prices or terms that affect the wholesale customer’s total cost.

But sellers can offer different credit terms to competing wholesale customers based on legitimate customer-specific factors as described below, such as:

- cost differences in supplying the customers
- financial strength of the customers
- prior payment history of the customers

<sup>3</sup> Note that this discussion applies to the Robinson-Patman Act, which is a federal statute. Some states have laws directed at similar issues, which are enforced in state court, and which may result in different “rules” than those discussed here. Note also that the Robinson-Patman Act does not apply to prices charged by a retailer to retail customers.

# DEFENSES TO ROBINSON-PATMAN ACT CLAIMS

## *Meeting Competition*

Disparate treatment of customers by a wholesale supplier does not violate the Robinson-Patman Act when the supplier acts in good faith to match—not beat—a competing supplier’s lower price. But be sure that you do *not* directly communicate with that competing supplier to determine the price it is charging. You do not need written or other absolute proof to satisfy the “meeting competition” defense. You need only a good-faith basis for believing that there is a better competing offer. To protect your company, it is good practice to make a written record of the basis of your good-faith belief and the price you believe you must meet.

## *Changing Conditions*

Differences in price are permissible if they are due to changes in the marketplace for the goods at issue, including, for example, whether the products at issue are perishable goods, seasonal goods, or distress sales under a court process.

## *Cost Justification*

A difference in price is permissible if the difference corresponds to differing costs of manufacturing, sale, or delivery for particular purchasers.

### *Functional Availability*

A difference in price is permissible if the supplier has made a lower price available to allegedly disfavored purchasers and done so without tying the lower price to the volume of purchases.

### *Not in Commerce*

Since the Robinson-Patman Act is a federal statute, it applies only to goods sold “in commerce,” meaning goods that cross state lines.

## I I’VE ALWAYS WANTED TO ASK . . .

*Q: “If a customer pushes back on my terms and will not buy from my company unless I give them their terms, do I need to offer those same terms to all my customers?”*

A: The Robinson-Patman Act prohibits discrimination in selling at wholesale to companies that compete against each other downstream where that difference (or discrimination) makes it harder for the disadvantaged company to compete in that downstream market. So the answer is:

- If another customer (customer B) is a competitor of the customer (customer A) that got “their terms” (as phrased in the question), and
- if the terms given to customer A are more favorable, and
- if the terms extended to customer A would hurt the ability of customer B to compete with customer A unless customer B got the same terms,
- then those terms would have to be extended to customer B,
- *unless* you can satisfy one of the defenses to the Robinson-Patman Act claims listed above.



Q: *“When new customers are not granted the credit terms they request, they sometimes provide copies of invoices from our competitors showing their credit terms. How should I handle this?”*

A: If a customer unilaterally supplies an invoice from a competitor, you are allowed to take that information into account in setting your terms for dealing with that customer. Under the Robinson-Patman Act, that would satisfy the meeting competition defense. But it can be risky to ask customers to supply competitors’ invoices: That can be a mechanism for suppliers to those customers to coordinate their terms to those customers using the demand to see each other’s invoices as the mechanism by which they coordinate.

Q: *“How can I benchmark terms for defense without violating antitrust laws?”*

A: This question directly raises the issue of how a company can satisfy the meeting competition defense. As should be clear from the prior material, the correct answer is *not* “call your competitor and ask.” If you are not willing to take the customer’s word, it is permissible to ask the customer to provide some evidence as to the other supplier’s terms. But as noted in the answer to the previous question, while asking one customer to do that is low risk, consistently asking every customer for evidence of other suppliers’ terms

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As outside counsel, in-house general counsel, board director, and litigator, Jeff represents companies and their investors in both advisory and litigation roles on a broad range of competition issues, including criminal antitrust matters (investigations and trials), class action antitrust lawsuits, actions brought by customers and suppliers, actions by or against competitors, monopolization cases, and transactions. Understanding that legal strategy must serve business strategy, Jeff functions as an integral part of his clients' business teams, from major brands to early-stage, venture-backed tech companies.

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Among his various legal recognitions, Bruce received the Top Hat Award in 2011, a prestigious annual award honoring extraordinary executives and professionals in the credit industry. He was Co-chair of the Avoiding Powers Committee that worked with the American Bankruptcy Institute's (ABI) Commission to Study the Reform of Chapter 11, participated in the ABI's Great Debates at its 2010 Annual Spring Meeting—arguing against repeal of the special Bankruptcy Abuse Prevention and Consumer Protection Act protections for goods providers and commercial lessors—and was a panelist for a session sponsored by the ABI. He is a frequent presenter at industry conferences throughout the country as well as a prolific author regarding bankruptcy and creditors' rights topics in various legal and trade publications.

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## I ABOUT LOWENSTEIN SANDLER

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