

ANTITRUST

PROHIBITED AREAS OF DISCUSSION

There are several topics that a businessman/woman should never discuss with other industry members. This applies if the discussions take place in correspondence or on the telephone, in an office, at a convention, or anywhere else where two or more industry members may get together.

All participants should take note of the antitrust compliance rules, which must be strictly observed. Violation of the antitrust laws is a serious matter and may involve a felony conviction and jail sentence. The government has increased its scrutiny of meetings, and its prosecution of small businessmen/women. Prudence dictates extreme care in avoiding discussion of prohibited or questionable subjects. Although this list of prohibited topics may seem very comprehensive and forbidding, it still leaves open a wide range of legitimate subjects for constructive discussion.

The following topics of subjects are outside the scope of these discussions. We ask all participants to refrain from making remarks or references regarding the following:

1. Current or futures prices. (the only safe policy is to avoid any mention whatever of prices, even past prices.)
2. What constitutes a "fair" profit-level.
3. Possible increases or decreases in prices.
4. Standardization or stabilization of prices.
5. Pricing procedures, including wholesalers' margins, markups cost percentages, or formulas or policies for arriving at prices, or brokers' fees or commissions.
6. Cash discounts
7. Credit terms
8. Allocation of Markets
9. Other restraints on distribution or competition.
10. Refusal to deal with a supplier because of its pricing or distribution practices.
11. Whether or not the pricing practices of any industry member or supplier are unethical or constitute an unfair trade practice.

ANTITRUST LAW INFORMATION FOR WHOLESALERS

With current government scrutiny of all small business activity and enforcement of antitrust law, all businesses, including candy and tobacco wholesalers, should take even greater care that they maintain strict compliance with these laws.

I Provisions of the Antitrust Laws – The most important Federal Antitrust Statutes relating to business activities are in Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act. Section 1 of the Sherman Act prohibits a "contract, combination... or conspiracy... in restraint of trade or commerce..." This means that at any meetings of trade association members, or any other meetings of two or more members of an industry, or in any private communications, agreements that would "restrain trade" would be illegal.

The Sherman Act prohibits any understanding affecting the price of a product regardless of the purpose of the understanding. For example, if businessmen/women reach any form of an understanding or agreement concerning price, they cannot justify the understanding by showing that it is reasonable or will benefit consumers or other customers.

Mere attendance at a meeting where businessmen/women engaged in an illegal discussion concerning price-fixing may imply acquiescence and make a non-participant criminally responsible and subject to as great a penalty as the active participants in the discussion.

Section 5 of the Federal Trade Commission Act prohibits “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce”. Unlike the Sherman Act, the Federal Trade Commission Act reaches anticompetitive acts committed by individual persons or companies whether or not there is any agreement of “combination”: but like the Sherman Act, it also covers joint actions.

The Sherman Act and Federal Trade Commission Act apply not only to interstate commerce but also to activities “affecting” such commerce, which the government says includes practically every business, and especially those handling products from other states. And in addition to Federal laws, most states have adopted antitrust statutes. Therefore, no local business can expect to avoid the antitrust laws by claiming that they do not apply.

- II **Potential Antitrust Problem Areas for Businesses** -Experience show that the government is most likely to enforce violations of the price-fixing prohibition of the Sherman Act. A price-fixing violation may be inferred from similar price behavior by group of businesses, even in the absence of a written or oral agreement. If price-fixing is established, the businessmen/women involved may not raise the defense that the prices set are reasonable or that the ends sought through the price-fixing behavior are worthy.

An agreement among businessmen/women to divide customers is, in and of itself, a criminal act. Likewise, so is an agreement by a wholesaler to stay out of another’s territory.

- III **Penalties for Violations for the Antitrust Laws** – Federal antitrust laws may be enforced against individuals and corporations both by government officials and by private parties through treble damage actions. In both cases, penalties are severe.

An individual convicted of a criminal violation of the Sherman Act may be fined as much as \$100,000 and imprisoned for up to three years for each violation. A corporation convicted of such a criminal offense may be fined as much as \$ 1 million. Both may be subjected to court injunctions severely restricting their activities, and to further penalties for violating such injunctions.

Violations of the Federal Trade Commission Act can result in issuance of a cease and desist order, which will place extensive governmental restraints on the activities of a corporation. Failure to obey such an order can result in penalties of as much as \$10,000 per day.

In addition to government prosecution, for a criminal or civil violation, the business can face private actions for treble damages by injured competitors, customers or suppliers.

This is a brief summary of the antitrust laws that is meant a general guide only. The CDA cannot and does not render individual legal advice and suggests that specific questions of law be referred to any individual’s or companies legal counsel.

- IV **CDA and the Antitrust Laws** The provisions of the antitrust laws and the penalties for violation can also be applied to associations and their members and staff.

Strict compliance with the antitrust law is and always has been the policy of CDA. Your Association exercises extreme care, with the advice and assistance of its legal counsel, to avoid not only violation but also anything that might justify even a suspicion of possible violation. This policy is essential for the protection of its members and for its continued existence and activities for the improvement and promotion of the candy, tobacco and allied products wholesale industry, and that policy will be continued.