NATIONAL COUNCIL FOR PROBLEM GAMBLING
ANTITRUST COMPLIANCE PROGRAM
HOW TO RECOGNIZE AND AVOID ANTITRUST PROBLEMS
I. WHAT IS THIS FOR?

The purpose of this outline is to acquaint you generally with the kinds of conduct that can raise antitrust concerns so that we can avoid them. National Council for Problem Gambling (“NCPG”) is committed to a policy of complying with the antitrust laws and any members or affiliates who violate these laws will be subject to disciplinary action which may include termination of membership. You should also keep in mind that violations of the antitrust laws may subject you and NCPG to lawsuits for millions of dollars and even criminal prosecution. If you have any suspicion that your actions as a NCPG member or affiliate may violate the antitrust laws, you should contact your own attorneys, explain the facts to them, and follow their advice completely. In addition, you should alert NCPG antitrust compliance officer so that NCPG may also consult with counsel.

II. WHAT CONDUCT IS PROHIBITED?

A. Fixing Prices With Competitors

One of the most common and serious antitrust problems is price fixing between competitors, a matter of particular concern because it is frequently the basis of criminal prosecution. The law requires us to set our prices independently, without consulting, agreeing with, or even talking to our competitors. One cannot agree with its competitors on a specific price one will charge, or on a range of prices or on a price component such as a service charge. It is even dangerous to discuss prices with our competitors (1) because this may indirectly affect price levels and (2) because if our prices end up being the same as or similar to our competitors after we have had discussions this could be used as circumstantial evidence that there was an implied agreement on prices.

This is something we as a group of independent providers have to guard against. We are use to thinking of “agreements” as written contracts -- formal documents with specific terms. There are no required formalities to make a price fixing agreement. In fact, most of the price-fixing cases deal with situations where the “agreement” is oral, often expressed in “code” and sometimes only expressed by a “knowing wink.” So it doesn’t take much for a jury to find there has been an agreement to fix prices.

One situation that can be very dangerous occurs when you find yourself in the company of your competitors, such as at a trade association meeting. The thing you have in common with your competitors is that you’re all in the same business, deal with the same suppliers and customers and you all know the same people. It’s just natural that you will want to talk business with them. Bear in mind, though, that our prices and our competitors’ prices are strictly “off-limits” as topics of conversation. Even good-natured “joking” about who is a price-cutter or how low prices have gotten must be avoided.

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1 This is prepared in compliance with the final order entered in United States of America v. National Council on Problem Gambling, Inc., Case No. 1:03-cv-1278
B. Dividing Up Customers And Territories

Another type of agreement that causes antitrust problems is the agreement between competitors to “carve up” territories or customers between or among themselves. In other words, it is wrong for a company to agree with a competitor that neither will “raid” the other’s customers or the other’s territory. Like the price fixing agreements described above, these agreements don’t require any formalities and may be proved by circumstantial evidence. Also, like the price-fixing agreements, agreements to divide customers or territories are generally considered by the enforcement agencies to be criminal actions and so can lead to jail terms.

C. Group Boycotts

A group boycott occurs when two or more persons or companies agree not to deal with someone. Although boycotts are frequently referred to as “hard core” violations, not all group refusals to deal are illegal. Their legality depends on a number of factors, including the reasons for the refusal, whether there are other alternative sources available to the customers, etc. Group refusals to deal, however, are complicated and no one should engage in such behavior without clearance from your attorneys.

D. Price-Fixing By Buyers

Although it does not come up as frequently, price-fixing by two or more buyers is as illegal as price-fixing by sellers.

E. Joint Bidding And Teaming Agreements

Bidding in conjunction with another company or teaming together to perform a single project often raises significant antitrust issues, particularly where each bidder or team member could perform the contract or project alone. Consequently, your attorneys should be consulted with respect to any joint bid or teaming agreement.

F. Other Agreements Among Competitors

Other types of agreements or understandings among competitors which have the purpose or effect of restraining competition may violate the antitrust laws. For example, competitors may not agree on restriction of production, or on terms and conditions of sale, or on the manner in which they will distribute their products or services. As in the case of price-fixing, you must be sure that you avoid even discussing such topics with our competitors.

While there are some areas in which you may cooperate with fellow members and affiliates, such as joint ventures, product standardization, dealings with labor unions, and lobbying, you should check with your attorneys before engaging in them.

G. Resale Price Maintenance

Setting suggested resale prices can be a very tricky area of the law. It is not against the law to announce a suggested resale price policy and then, without an agreement or understanding with anyone else, to stop selling to those customers which do not observe that policy. But if there is any agreement or understanding with others, then the resale pricing policy is unlawful. For example, we cannot get our customers to assure us that they will not violate our pricing policy, get others to assist us in implementing or enforcing our pricing policy, or use our power to get customers to follow suggested prices.

This is an area of special concern because when companies stop selling to former customers, the customers often become angry, and sometimes become so angry that they will bring a lawsuit alleging a violation of the antitrust laws. As a result, you must be very careful to avoid any inference that NCPG had an agreement or understanding with others regarding the prices at which our members or affiliates sell their product or services.
No resale price program should be instituted or maintained without the advice of the Company’s attorneys.

H. Tying

A “tie-in” occurs when a seller offers a product or service for, sale or lease on the condition that the buyer also buy or lease other products or services. Certain other conditions must exist before a tie-in is illegal, so your attorneys should be consulted whenever the sale or lease of one product is conditioned on that of another.

I. Reciprocal Dealing

Any situation in which a business utilizes its purchasing power to gain customers (“you buy from me and I’ll buy from you!”) may raise antitrust issues. It is not illegal for you independently to decide to place purchase orders with a present or potential customer in order to persuade that customer to purchase from you, provided that you do not attempt to coerce that customer to make the reciprocal purchase. However, if carried to the point of coercion, so that a supplier is compelled to make purchases in order to acquire or keep a sales account, the practice could be found to violate the antitrust laws.

J. Exclusive Dealing And Requirements Contracts

Grants of exclusive territory to dealers and distributors are usually lawful where they involve no more than a commitment by the supplier not to appoint another distributor, dealer, or service provider in the same geographic area. However, it is more difficult to justify exclusive dealing arrangements which restrict a dealer’s sale of competitive products or services. Any plan to restrict a dealer’s handling of competitive products or services should be reviewed in advance with your attorneys.

Requirements contracts, under which a buyer is committed to purchase all or most of his requirements from the seller, may raise issues similar to exclusive dealing arrangements and also should be reviewed by your attorneys.

K. Price Discrimination

It is often unlawful to discriminate between competing customers with respect to the price of “commodities”. (This prohibition does not apply to “revises”. The law is unclear as to whether electricity is a “commodity”. However, not all price differentials are illegal. For example, a seller can prevail in a lawsuit if it can demonstrate that the price concession was given in good faith to meet, but not beat, a competitor’s price. This “meeting competition” defense requires the corporation to conduct a good faith investigation to verify that the customer has been quoted a lower price. In some circumstances, competitor’s prices can even be met on a territorial basis, but the seller must show that the decision was a genuine response to prevailing competitive circumstances in that particular territory. In all cases, it is very important to remember that you should not contact a competitor to verify the competitor’s lower price offer, since such action may be interpreted as evidence of unlawful price fixing.

In addition to the “meeting competition” defense, other defenses may be available as well. For example, it may be allowable to charge different prices at different times to reflect different market conditions. Moreover, lower prices to certain customers may be justified by a lower cost of manufacture, sale or delivery to that customer. This “cost justification” defense requires that the facts supporting the price differential be developed prior to making the sale.

Thus, although not all price discriminations are unlawful, the defenses available require that we have careful and extensive documentation of certain competitive circumstances. As a result, it is imperative that you consult the Company’s attorneys prior to instituting a pricing program which will result in competing customers paying different prices, or offering a price not available to others.
L. Disproportionate Allowances, Facilities, Or Services

The Company also cannot discriminate in promotional allowances, services, or facilities provided to customers (or customers of customers). Such services, allowances, and facilities include: (i) any kind of advertising; (ii) catalogs; (iii) demonstrations; (iv) display materials; (v) special packaging; and (vi) prizes or merchandise for conducting promotional contests.

Services, allowances, and facilities must be made equally available to all competing customers on a proportionate basis. Proportionately means that each customer actually receives allowances, facilities, and services in direct relationship to his respective purchases from the supplier (e.g., unit volume or dollar value of purchases). In addition, all competing buyers shall be made aware of the available services, allowances, or facilities.

M. Receiving A Discriminatory Price, Credit Or Service

The prohibition on discrimination also forbids NCPG members and affiliates from knowingly inducing or receiving discriminatory prices, credit or services. If a buyer is aware that his seller is granting him a discriminatory price or service which is not available to other buyers who compete with him, he also will be in violation of the law.

It is not necessary for the seller to be found in violation of the law for the buyer to be found in violation. For example, if a buyer induces a lower price, and it is shown that the seller, in good faith, was attempting to meet an alleged lower price of a competitor, the buyer may still have violated the antitrust laws.

N. Brokerage

NCPG members and affiliates must not pay a brokerage fee or commission directly or indirectly to a customer on purchases for its own account. If brokers are appointed, the contract should prohibit the broker from passing on any part of its commission to a customer.

O. Customer Terminations

The antitrust laws generally permit a person to decide not to do business with another person, and this generally includes the right to terminate an existing customer (including distributors, dealers, and end users). However, terminated customers frequently institute lawsuits against their former supplier seeking damages for alleged antitrust violations. Even when there is little basis for the suit, it can be difficult and expensive to defend. Therefore, prior to terminating a customer, you should work with your attorneys to insure that there is a lawful basis for the termination and to implement a program to minimize the risk of suit, or at least enhance our ability to prevail and avoid derivative liability to NCPG.

Bear in mind that a customer termination resulting from an agreement with a competitor or another customer may constitute an antitrust violation. Because agreements can be inferred from circumstantial evidence, you should avoid communications with other parties concerning your relationships with your customers and respond to any complaints about a customer by indicating that it is you, and to the extent relevant, NCPG’s policy for members and affiliates to decide independently whether and upon what terms to do business with each of its customers. Otherwise, termination of a customer following third party complaints may involve a high antitrust risk despite a valid basis for the termination. Conversations with terminated customers can end up as evidence in a trial, so be careful what you say.

P. Monopolization And Attempts And Conspiracies To Monopolize

The antitrust laws prohibit monopolization, attempts to monopolize, and conspiracies to monopolize. This prohibition may be violated by a combination of companies or by a single company acting alone.
Although merely possessing monopoly power or a high market share is not itself illegal (this may be the result of superior products, patents or know-how), the antitrust laws will condemn a monopoly obtained or maintained by exclusionary, unfair, or predatory conduct.

Examples of such conduct are pricing below cost to drive a competitor out of business, lowering prices only in a specific geographic area in order to harm local competition, attempting to enforce a clearly invalid patent, and using a monopoly in one market to gain monopoly in another.

It is important to note that a company or association may be liable for an attempt to monopolize or a conspiracy to monopolize, even if it does not yet have monopoly power. As a result, when NCPG members or affiliates operations have actual or potential power to dominate a particular market, it is essential that you work closely with your attorneys to minimize monopolization concerns. You must avoid tactics that cannot be justified by sound business considerations. You also must avoid any actions which could be viewed as designed to exclude or injure present or potential competitors.

Q. Mergers, Acquisitions, Joint Ventures

The antitrust laws prohibit mergers and acquisitions, and the formation of joint ventures, where the effect may be substantially to lessen competition or to tend to create a monopoly. Ordinarily any such transaction will be of such a size that your attorneys will be heavily involved and so attention will be given to antitrust concerns.

R. Unfair Methods Of Competition And Deceptive Practices

The antitrust laws also contain general prohibitions on “unfair methods of competition” and “unfair or deceptive acts or practices.” The specific conduct prohibited by these provisions cannot be precisely defined, and has been subject to different interpretations at different times. However, the following are examples of conduct which have been found to violate these broad prohibitions:

1) Commercial bribery, including payments made by a seller to a competitor’s customer in order to induce purchases of the seller’s products;

2) Coercion, intimidation, and scare tactics directed against customers, prospective customers, competitors or suppliers;

3) Offering special benefits to dealers who agree to exclude the products of a competitor;

5) Making false or deceptive comparisons of one’s own product with another company’s product;

6) Making false or deceptive statements about competitors or their products, business practices, financial status or reliability;

7) Misrepresenting the price, composition, effectiveness, quality or other characteristics of a product;

8) Making an affirmative product claim in advertising without a reasonable basis; and

9) Passing off one’s products as those of another manufacturer, such as by simulating a competitor’s advertising labels or trademarks.
S. Patents And Trademarks

Few areas of antitrust law involve as much confusion and uncertainty as antitrust constraints on patents, copyrights, know-how and other trade secrets. Sometimes it is difficult to square the grant of statutory monopoly rights in the form of a patent with the idea of economic freedom that is the focus of the antitrust laws. Accordingly, it is important you’re your attorneys participate in the drafting and review of all agreements involving the acquisition, and disposition of intellectual property rights, in order to assure compliance with the complex U.S. and foreign laws and regulation that apply to this area.

III. PRACTICAL SUGGESTIONS

A. Don’t Talk Prices

In part, this means don’t talk about prices, price multipliers, price leadership, or other terms and conditions of sale, with anyone outside of your organization except your customers. But this isn’t all it means. It also means don’t discuss profits or costs, even in general, or production levels or other competitively sensitive information with a competitor. Nor should you attempt to verify a competitor’s price directly with such competitor.

When at NCPG meetings, if the conversation turns to subjects which you feel may be in violation of the law, you should immediately ask that the subject be changed or quickly and conspicuously leave the meeting. You should make your protest known to persons involved at the meeting. What you’re talking about may sound harmless, but when everyone in an industry knows what everybody else is doing, all may wind up doing the same thing. And where you’ve talked about it in advance, the antitrust enforcement authorities may suspect that you have agreed unlawfully to do the same thing.

Promptly report the incident to a NCPG official in order to preserve proof that you were not a participant in and NCPG was not facilitating or condoning any unlawful activity. One’s mere presence at a meeting in which an illegal conversation has taken place, even if one disagrees with it, is sufficient to include that individual as part of an alleged conspiracy.

B. Don’t Give Our Price Lists To A Competitor; Never Accept A Price List From A Competitor

When a price list from a competitor is in your files, or when your price lists are in a competitor’s files, it looks as if you have talked about prices with a competitor. If you get a price list from a customer (or from another source other than the competitor itself), make a record of how and from whom the price list was obtained. Never exchange prices orally with a competitor, regardless of the reason. There is no justification for talking prices.

C. Don’t Talk To Competitors About Customers

If you violate this rule, you may lose a customer. If you keep the customer, it may look as if you’re agreeing with a competitor to stay away from his accounts if he will stay away from yours, or that both of you have agreed not to sell to the customer. Your accounts are your own business. Do not discuss with a competitor rejection or termination of your customers or the competitor’s termination of his customers.

If you tell someone what price or terms you’re going to bid, or have bid, they may make the same bid. When bids are the same, the antitrust enforcement authorities may suspect that you’ve agreed unlawfully to submit the same bid. On the other hand, if they make a higher bid, or do not bid, the antitrust enforcement authorities may suspect that you have an unlawful agreement to rotate the business. The above does not apply to bona fide joint bids where known and acceptable to the customer.
D. Don’t Talk To Competitors About Bids

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E. Don’t Make Telephone Calls To Competitors

Telephone lists are kept by the telephone company, and frequently diaries and other records reflect such calls. And, by being able to prove the fact of a telephone call, the antitrust enforcement authorities may infer that you talked about conduct under investigation which conduct would violate the antitrust laws if agreed upon. Occasionally, you may need to make or receive telephone calls to or from a competitor in connection with safety matters, bona fide trade association activities, technical problems, professional societies, purchases or sales in the ordinary course of business, emergency situations, etc. Exercise great caution to limit the conversation to these lawful matters. Make and preserve notes as to the contents of any such conversations.

F. Pay Attention To The Language You Use When Drafting Letters And Memoranda

Careful language will not avoid an antitrust violation when the conduct is in fact illegal, but you and NCPG can be severely handicapped in a lawsuit or a government investigation when lawful conduct is mischaracterized by the misleading or thoughtless use of words that do not fairly express NCPG’s position or accurately describe the facts. It is important to note that a private plaintiff in a lawsuit or the government in an investigation can obtain anything written or recorded by an officer or employee of the company, including handwritten notes and drafts of documents, whether kept at the office or in a private home. An important exception is that communications to and from your attorneys seeking or giving legal advice need not be disclosed. WHEN YOU WRITE SOMETHING, THINK ABOUT HOW IT WILL LOOK AND SOUND IF IT IS EVER READ IN A COURTROOM.

Keep in mind the following list of suggestions on how to avoid a false implication of wrongdoing.

• Avoid using words which indicate a guilty conscience (“Please destroy after reading”)

• Be careful of exaggeration (“This program will destroy the competition”)

• Don’t speculate about the legal propriety or consequences of conduct.

• Don’t misdescribe competition as something unexpected or improper, such as referring to price cutting as “unethical” or “chiseling” or to a lost customer as one “stolen” by a competitor.

• When discussing competition and prices, avoid giving a false impression that you are not competing vigorously or that its prices are based on anything other than its own business judgment because of NCPG policies or rules.

• When discussing the prices or plans of competitors, clearly identify the source of your information so that there will be no suggestion that the information was obtained by a collusive arrangement with a competitor.

• Avoid suggesting that special treatment is being accorded to a customer or class of customers (“For you alone”)
• Do not disparage the products of your competitors.

• Avoid using words that may falsely imply that you are pursuing a course of action as a matter of “NCPG agreement” or “NCPG policy” rather than as a matter of your own self-interest.

• Avoid using “canned” wording in memoranda which may sound as though you are writing for the sake of appearance rather than to create an accurate record.

G. Don’t Enter Into Joint Ventures Or Engage In Joint Lobbying Or Trade Enforcement Activities With Competitors Without Clearance

In our rapidly changing and complex world, it occasionally is necessary or advantageous to enter into joint research or manufacturing agreements with one or more competitors, make industry-wide appeals to legislators or regulators, or joint industry-wide efforts to obtain general relief against unfair foreign competition. While these activities normally do not violate the antitrust laws, they could spill over into unlawful conduct. Any such activities must be reviewed in advance with your attorneys.

H. Don’t Discriminate In Dealings With Different Customers

Customers competing with one another should be charged the same price for goods of like grade and quality sold under the same market conditions unless one of the specific defenses mentioned above can be met. Any differences in price should be discussed with your attorneys. Don’t disparage a competitor’s product, unless you have specific proof that your statements are correct. Such action could result in a charge of unfair competition.

IV. INVESTIGATIONS

Government antitrust actions may begin with a subpoena or Civil Investigative Demand requiring production of company records and other information. A government investigation also may start in a more informal manner. For instance, it may start with just a letter or telephone call by a Department of Justice or Federal Trade Commission attorney or investigator from a state attorney general’s office seeking to interview employees. Sometimes these requests concern the activities of companies that are customers, suppliers, or competitors of NCPG.

NCPG’s policy is to cooperate with reasonable requests of government investigators seeking information for antitrust enforcement and other purposes. Once the Government begins a criminal investigation, it would be a felony to destroy relevant evidence to impede the investigation. At the same time, NCPG and its officers and employees are entitled to all the safeguards provided by the law. It is therefore imperative that all investigatory inquiries be referred immediately to NCPG’s attorneys.

The antitrust laws are complex. Many of the general principles in the antitrust field are subject to intricate qualifications. If you follow this booklet, you and the Company should avoid the most serious antitrust violations. But, at the same time, this outline is not an exhaustive statement of the antitrust laws governing day-to-day business operations. It cannot be a substitute for consulting counsel.

Whenever you have any doubt as to the application of the antitrust laws to a particular problem, you should immediately seek the advice and help of your attorneys and, if it concerns a matter of NCPG policy or rules with NCPG’s antitrust compliance representation.