

Antitrust Compliance Program: Insurance for Small Businesses

By Ronald Ravikoff and Ivonne Barroso

In today's highly scrutinized business environment, antitrust issues can affect any business — from large corporations to small businesses. Federal and state governments are filing price-fixing lawsuits against companies and trade associations, along with private businesses that claim their financial results have been hurt by lack of competition in their market.

Becoming the target of an antitrust lawsuit can result in serious problems. Along with negative publicity that can cripple normal operations, your business may be subject to heavy fines, criminal charges and harsh sentences if convicted. Under the Antitrust Criminal Penalty Enhancement Act of 2004, corporate fines can run up to \$100 million, individual fines up to \$1 million, and prison sentences up to 10 years.

Establishing a Compliance Program

If your small or startup business is involved with a competitor in a joint venture, marketing program, production agreement, territorial division or research and development activities, you should consider establishing an antitrust compliance program. Such a program, if done properly, will help you identify potential problems and develop solutions that reduce the risk of litigation. It is like purchasing an insurance policy to guard against one of the growing risks to your business.

An antitrust compliance program, like an automobile, can come in any shape, form, or price range, and should be tailored to the company. A large corporation will naturally need a more extensive antitrust

program than a small business operating in a relatively trouble-free climate.

The first step toward crafting an effective compliance program is to conduct an antitrust audit, a process that usually involves an outside attorney familiar with this complex field of law. It is essential for the auditor to be familiar with recent antitrust court decisions and enforcement actions, as regulators follow certain business sectors — such as health care and waste management — far more closely than others.

An antitrust expert will identify antitrust problem areas that require immediate correction or longer-term solutions by interviewing a new company's decision-makers and reviewing business practices relating to competitors, customers, suppliers and distributors.

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

Steps in the Process

The federal government publications provide guidelines for the seven suggested steps in creating an effective antitrust compliance and ethics program:

1. Clearly establish compliance standards.
2. Assume the responsibility as owner to oversee compliance.
3. Be careful not to delegate responsibility to employees who have a propensity to engage in illegal conduct.
4. Take reasonable steps to commu-

nicate standards and procedures effectively to employees through training. This typically involves creating a written policy statement or guidebook that should be distributed to all employees, owners and directors.

5. Take steps to achieve compliance with standards through monitoring and auditing.

6. Be consistent in enforcing compliance through appropriate standards and discipline.

7. Respond in a reasonable manner when an offense occurs, to prevent future violations.

Throughout this process, the new business should be able to document and demonstrate its commitment to a competitive process in its defined marketplace. This should include ongoing monitoring to detect criminal conduct and a "whistleblower" system that allows employees or outside business associates to report illegal activities without fear of retribution.

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

Ravikoff is partner-in-charge of the Miami law office of Zuckerman Spaeder LLP. Barroso is an associate whose practice focuses on commercial litigation matters. Founded in 1975, Zuckerman Spaeder LLP has more than 90 lawyers in offices in Baltimore, Miami, New York, Tampa, Washington, D.C., and Wilmington, Delaware.