Credit Management and Anti-Trust Laws

Smyyth LLC
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A Manager's Primer To Understanding Antitrust Issues

Credit Managers, because they are frequently active in industry groups and communicate with competitors for customer credit references, need to have an understanding of antitrust issues, so that they do not inadvertently step over the regulatory line in the sand.

Certainly, big antitrust cases come to mind: the break ups of Standard Oil and AT&T, the disentangling of Internet Explorer and Media Player from Microsoft Windows, and the recent investigation into Google search processes, for example. But other, less headline-grabbing cases exist. The Justice Department has prosecuted antitrust cases involving bid-rigging cartels affecting hundreds of millions of dollars in contracts to supply food to schools, hospitals, and other public institutions; disaster relief projects; real estate foreclosure auctions; and contracts for the construction of water treatment plants. In addition, the Department has gone after price-fixing conspiracies involving metal building insulation, numerous anti-competitive schemes in the graphics display industry, vitamins and food preservatives, and a variety of services including fine art auctions, marine transportation, and construction.

The point is that opportunities exist in any industry to step over that line, with possible large fines, even jail time, and product overhaul expenses among other penalties. History aside, antitrust issues remain a modern concern to managers.

Five Most-Investigated Antitrust Activities

The first two, Price Fixing and Boycotts, are most important to credit management in its dealings with other industry companies.

Price Fixing. A pricing agreement between business competitors selling the same product or service. T**his includes conditions of sale including trade credit terms, discounts, rebates, and warranties.**

Boycotts. Agreements among competitors not to do business with targeted individuals or businesses, especially if the group of competitors working together holds certain amount of market clout. This also extends to trade associations operating against a business or individual.

Bid Rigging. A form of price fixing and market allocation that involves an agreement in which one party of a group of bidders will be designated to win the bid, even if multiple bids are received.

Geographic Market Allocation: An agreement between competitors not to compete within each other's geographic territories.

Patent Fraud. Illegal monopolization through the maintenance and enforcement of a patent obtained via fraud on the Patent Office. Also called "Walker Process fraud" from Supreme Court case Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.

To protect against such abuses, Congress passed various laws over the last century and a quarter: Sherman Act of 1890, Clayton Act of 1914, Federal Trade Commission Act of 1914, Robinson-Patman Act of 1936, and Celler-Kefauver Act of 1950. These and other laws aim to prevent practices deemed to hurt businesses and consumers.

Written in broad terms, the laws offer considerable room for interpretation, but a credit manager should be able to raise a red flag over particular issues -- although this is not a substitute for review by legal professionals. Law libraries are filled with antitrust cases and decisions, so the following offers only an overview of potentially antitrust issues. Rule number one remains: get competent legal counsel when unsure about a particular action.

Avoiding Antitrust Appearances

As a rule of thumb, the closer managers work with competitors, the closer they get to the appearance of antitrust violations. The more financial information they exchange, the closer they get to he appearance of antitrust violations. Avoid these red flags:

* Indicating whether the company will bid or not on a contract
* Exchanging price lists, procedures, and sales terms, including credit terms, discounts, profit margins, rebates, and shipping costs with competitors.
* Discussing selection, rejection, and termination of suppliers and customers.
* Swapping production schedules and levels of production

Customer Relations

Pressuring customers can be another action leading to an antitrust investigation. Tricky these, especially with franchise agreements, as alleged violations are determined on a case-by-case basis. Some possible red flags:

Non-Price Resale Restrictions. Terms that force customers to resell products only to approved or designated persons or businesses, from designated stores, or in designated geographic territories.

Resale Price Maintenance. Forcing customers to charge set price for reselling company products, albeit modified by "rule of reason" test.

Price Discrimination. Creating differences in price between customers, including delivery terms, rebates, service charges, and so on, and creating different credit terms not related to credit worthiness. Exceptions abound here, including "meeting competition" price changes to react to other sellers' pricing and "cost justification" involving variety of accounting impacts.

Exclusive Deals:.Imposing a "requirements contract" that forcess a customer to buy most or all items from a particular seller. Unlawful if the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce by foreclosing other sellers from doing business with the contracting buyer.

Tied Sales. Forcing a customer to buy a different product in addition to the one contracted, although exceptions exist. A variation is also forcing a customer to buy products from another company.

Preferential Services. All customers must have access to services, facilities, and promotional allowances on proportionally equal terms.

Customer Selection. Generally, companies can choose their customers, but may run afoul of antitrust laws if terminating customers who don't stick to suggested resale pricing or refuse to do business because the customer buys from competitors.

Intent To Create A Monopoly. Holding exclusive rights to a product is not illegal, but controlling prices and excluding competitors can be; for example, selling below cost to eliminate a competitor or taking action to interrupt competitor's supply or distribution chain. State laws blur with Federal laws here.

Marketing Claims. Make sure company advertising claims are true and do not attempt to deceive purchasers -- either with false statements or omissions of true statements. And ignorance of the product is no defense in a Federal Trade Commission investigation.

Bottom Line

Paying attention is a manager's best defense -- that and competent legal counsel -- to avoid potential antitrust problems. Certainly, the Justice Department and various agencies stand ready to investigate and possibly prosecute any alleged violations. You can also add state attorney generals and civil lawsuits to the mix. Generally,

Rule #1: Get competent legal counsel for all contracts.

Rule #2 : Substantiate your process. Here's an area where credit scoring services come into play, since it lends objectivity to the credit decision.

Rule #3 : Maintain vigilance and help create the sort of environment that stays above antitrust troubles.

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