

Your Best Foot Forward Under Siege

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In challenging economic times, many businesses, and not a few industries, feel under siege. There may be a sense that joint action is needed to regain more solid footing in the marketplace.

While there is much that may be done jointly by competitors to promote their industry, in any interaction among competitors, the concerns of the antitrust laws must be kept in mind and addressed. The antitrust laws prohibit contracts, combinations, conspiracies, and other agreements in restraint of trade, as well as monopolization and attempted monopolization. Violations of the Sherman Act may be subject to penalties for individuals of up to \$1 million and 10 years' imprisonment and for corporations of up to \$100 million.

Here are some guidelines as to what competitors may do jointly to promote their industry.

Competitors may:

- build awareness and educate regarding the attributes of their industry.
- voice opinions and concerns regarding the industry.
- secure cooperation and better relations among different sectors of the industry and the supply chain.
- with the advice of antitrust counsel, collect and disseminate ideas and historical information relating to the industry, including:
 - share trends and **aggregated historical** data on prices, discounts, allowances, costs, capacity, sales.
 - discuss best practices, methods and concepts that have worked and that haven't worked, and why.
 - exchange analytic tools that have been useful in their businesses.
 - publish aggregate data to customers and/or the public.

Competitors may not:

- share individual data with each other, especially in the areas of pricing, discounts, allowances, payment terms, capacity levels, or costs.
- discuss current or future prices, discounts, allowances, payment terms, capacity levels, costs, salaries, volume or profit levels, or business strategies.
- discuss whom to sell to or buy from, or whether or not to deal with someone.
- have joint negotiations with distributors, wholesalers, retailers or vendors.
- discuss or try to reach any consensus on what the industry collectively, or any individual business, should be doing, especially as to rates, discounts, allowances, or prices, or categories to be active in.

For example:

- Competitors may discuss how buyers of discounted products may be a different demographic than full price buyers.
- Competitors may not discuss what an appropriate discount, if any, off full price should be.

The guiding principle is that each business acts independently in the market, and should seek antitrust and other legal counsel when interacting with competitors. Each company must make its market decisions independently, based on knowledge of market facts and trends, and its individual circumstances.