



Antitrust Considerations for Participants in the Commodity Markets

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What is Antitrust?

- System of laws designed to protect and promote competition as a means of increasing consumer welfare
- Antitrust laws seek to prevent:
 - Agreements that restrict competition and do not have offsetting benefits
 - Behavior by a single firm (other than competition on the merits) that:
 - Creates or strengthens monopoly power
 - Abuses market power
- Key Principles are COLLUSION and EXCLUSION

Why Worry About Antitrust?

- Company policy of ensuring compliance with laws
- Costs of public and private enforcement actions can impose significant burdens:
 - Damages
 - Criminal sanctions
 - Diversion of corporate resources from core business
 - Costs and disruption of investigation/litigation
 - Negative impact on corporate image
- Large companies will be in the antitrust spotlight



Penalties for Antitrust Violations

- Corporate Criminal Liability (Sherman Act)
 - Up to \$100 million fine or twice the gain caused by each violation
- Individual Criminal Liability (Sherman Act)
 - Criminal antitrust violations are felonies and may carry a prison term up to ten years and up to \$1 million fine
- Civil Injunctions
- Private Damage Awards
 - Award for treble damages sustained plus attorneys' fees
 - Healthy class-action plaintiffs bar

Summary of Conduct Prohibited by Federal Antitrust Laws

- **Sherman Act Section 1:** Prohibits agreements that unduly restrain competition

Horizontal Agreements

- Price Fixing
- Market Allocation
- Bid Rigging
- Group Boycotts

Vertical Agreements

- Tying Arrangements
- Exclusive Dealing
- Resale Price Agreement
- Refusals to Deal

- Most agreements lawful because procompetitive benefits outweigh anticompetitive potential
- For some, however, the reverse is true
- Key is to understand justification and likely effects

Sherman Act § 1 – What is an Agreement?

- “Agreement” is a term of art in antitrust law and does not require a formal or express agreement
 - Encompasses informal “understandings” - *American Tobacco Co. v. U.S.*, 328 U.S. 781 (1946).
 - “A knowing wink can mean more than words” – *Esco Corp. v. U.S.*, 340 F.2d 1000,1007 (9th Cir. 1965).
- An agreement may be inferred from conduct or circumstantial evidence
 - Exchange of price lists, followed by price increases
 - Trade association meeting comment: “The industry needs to get margins up,” followed by price increases - *American Column & Lumber Co. v. U.S.*, 257 U.S. 377 (1921).
- A single entity cannot have an agreement with itself, so wholly-owned subsidiaries cannot conspire with the parent company or each other in violation of Sherman Act § 1

Sherman Act § 1: *Per Se* v. Rule of Reason

- Courts determine the legality of agreements under the Sherman Act based on one of two possible rules:

The Per Se Rule	The Rule of Reason
The agreement, if proven, is illegal per se, and the law recognizes no defenses	The procompetitive benefits of the agreement are weighed against any anticompetitive effects, and the law recognizes certain defenses
Applies to “naked” restraints of trade, such as price fixing and bid rigging, that unambiguously harm competition	Applies to activities like information exchanges, exclusive contracts, and joint ventures, which the law recognizes may enhance competition
<i>United States v. Trenton Potteries Co.</i> , 273 U.S. 392 (1927).	<i>Chicago Board of Trade v. United States</i> , 246 U.S. 231 (1918).

Monopoly — Sherman Act § 2

MONOPOLY POWER + BAD ACT = SECTION 2 VIOLATION

- Section 2 of the Sherman Act prohibits monopolization and attempted monopolization without requiring an element of concerted action or agreement
- Possessing Monopoly Power by itself not a violation, It also requires a bad act - *United States v. United States Steel Corp.*, 251 U.S. 417 (1920).
 - Monopoly Power is the power to suppress prices below competitive levels or to exclude competition
 - Generally presumed with significant ($\approx 70\%$) market share; but also can be proven by facts
 - Bad Act is acquisition/maintenance of monopoly power by exclusionary conduct that injures competitors and does not further competition on the merits

Unilateral Conduct / Monopolization

- Potential abuses include (not exhaustive) certain forms of:

Activity	Cases
Long Term Exclusivity	<i>Standard Oil Co. of California v. U.S.</i> , 337 U.S. 293 (1949).
Refusals to Deal (in very limited cases)	<i>Northwest Stationers, Inc. v. Pacific Stationary & Printing</i> , 472 U.S. 284 (1985).
Below-cost pricing	<i>Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.</i> , 509 U.S. 209 (1993).
Tying and Bundling	<i>International Salt Co. v. U.S.</i> , 332 U.S. 392 (1947).
Loyalty Rebates	<i>Concord Boat Corp. v. Brunswick Corp.</i> , 207 F.3d 1039 (8th Cir. 2000).
Product innovation	

- Objective justifications may provide a defense

Summary of Conduct Prohibited by Federal Antitrust Laws

- **Clayton Act Section 7**

- Mergers/Acquisitions or Joint Ventures that may tend substantially to lessen competition
- Hart-Scott-Rodino Act requires companies to file premerger notifications with the FTC and the Antitrust Division of the Justice Department.

- **Federal Trade Commission Act Section 5**

- Unfair methods of competition
- No private right of action
- Generally a “me too” statute but some independent wiggle room

- **The Robinson-Patman Act (part of Clayton Act)**

- Prohibits granting or receiving certain discriminatory prices or promotional allowances
- Applies only to goods, not services

The Enforcers



- Antitrust Division, U.S. Department of Justice
 - Sherman Act §§1 and 2, and Clayton Act § 7
 - Civil and criminal prosecution in federal court
 - Business Review Letters



- Federal Trade Commission
 - FTC Act § 5, Clayton Act § 7, and Robinson-Patman Act
 - Civil prosecution only before FTC administrative law judges
 - Cease and desist orders
 - Advisory Opinions

The Enforcers (cont'd.)

- State Attorneys General
 - Civil and criminal prosecution under state antitrust laws in state court
 - *Parens patriae* actions under federal law in federal court for damages to state's consumers
 - Civil damages actions under state or federal law for damages suffered by the state
- Private Parties
 - Civil damages actions in federal court under federal antitrust laws, or in federal or state court for violation of state antitrust laws
 - Treble damages and attorneys' fees

CFTC Antitrust Authority

17 CFR § 23.607 Antitrust considerations

- (a) No swap dealer or major swap participant shall adopt any process or take any action that results in any unreasonable restraint of trade, or impose any material anticompetitive burden on trading or clearing, unless necessary or appropriate to achieve the purposes of the Commodity Exchange Act.
- (b) Consistent with its obligations under paragraph (a) of this section, each swap dealer and major swap participant shall adopt policies and procedures to prevent actions that result in unreasonable restraint of trade, or impose any material anticompetitive burden on trading or clearing.

Antitrust in the Financial Services Industry

- Primary focus in recent times: legality of alleged rate manipulation under section one of the Sherman Act
- LIBOR, FX, ISDAfix cases – all involve alleged conspiracies to fix or manipulate rates.
- Other cases involve alleged manipulations of metals markets, market for U.S. Treasuries
- Cases have resulted in substantial fines and criminal convictions for companies and individuals across the globe.



LIBOR, FX, ISDAfix

- Multiple government investigations and follow on private litigation
 - Hundreds of millions in fines; criminal convictions; civil liability
- All involved alleged horizontal conspiracies among banks to fix/manipulate rates (LIBOR, foreign exchange rates, and fixed interest swap rates)
 - Methods alleged differ, but all go to artificial rate fixing
- Initially, District Court in LIBOR case dismissed antitrust counts, theorizing that LIBOR rate setting was a collaborative, rather than a competitive, process. District Courts in other cases disagreed.
- In May 2016 – the Second Circuit overturned, re-instating the antitrust counts.
 - Court reasoned that: “Generally, when consumers, because of a conspiracy, must pay prices that no longer reflect ordinary market conditions, they suffer ‘injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants’ acts unlawful.’”

Other Issues

- Where CFTC stops and USDOJ picks up
 - Market Manipulation vs Antitrust
 - Market manipulation generally actionable under antitrust law
 - But requirement of fraud and specific intent to manipulate not necessarily required under antitrust laws
 - CFTC : Antitrust considerations re swap dealers
- Interagency Cooperation

5 Rules For Competitor Interactions

- 1. HAVE A CLEAR AGENDA FOR ALL COMPETITOR DISCUSSIONS**
- 2. DON'T SHARE COMPETITIVELY SENSITIVE INFORMATION**
- 3. BEWARE DISCUSSING VIEWS/STRATEGIES ON COMPETITIVE TERMS**
- 4. DON'T AGREE ON COMPETITIVE VARIABLES**
- 5. REMEMBER AT ALL TIMES THAT YOU ARE INDEPENDENT COMPETITORS**



QUESTIONS





APPENDIX I



Sherman Act, Section 1 (15 U.S.C. § 1)

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”



Sherman Act, Section 2 (15 U.S.C. § 2)

“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.”



Clayton Act, Section 7 (15 U.S.C. § 18)

“No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.”



Clayton Act, Section 7 (15 U.S.C. § 18) (cont.)

“This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce or in any activity affecting commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.”

Clayton Act, Section 7 (15 U.S.C. § 18) (cont.)

“Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: Provided, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Secretary of Transportation, Federal Power Commission, Surface Transportation Board, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Board, or Secretary.”

Hart-Scott-Rodino Act (15 U.S.C. § 18a)

(a) Filing. Except as exempted pursuant to subsection (c), no person shall acquire, directly or indirectly, any voting securities or assets of any other person, unless both persons (or in the case of a tender offer, the acquiring person) file notification pursuant to rules under subsection (d)(1) and the waiting period described in subsection (b)(1) has expired, if—

(1) the acquiring person, or the person whose voting securities or assets are being acquired, is engaged in commerce or in any activity affecting commerce; and

(2) as a result of such acquisition, the acquiring person would hold an aggregate total amount of the voting securities and assets of the acquired person—

(A) in excess of \$200,000,000 (as adjusted and published for each fiscal year beginning after September 30, 2004, in the same manner as provided in section 19(a)(5) of this title to reflect the percentage change in the gross national product for such fiscal year compared to the gross national product for the year ending September 30, 2003); or

Hart-Scott-Rodino Act (15 U.S.C. § 18a) (cont.)

(B)

(i) in excess of \$50,000,000 (as so adjusted and published) but not in excess of \$200,000,000 (as so adjusted and published); and

(ii)

(I) any voting securities or assets of a person engaged in manufacturing which has annual net sales or total assets of \$10,000,000 (as so adjusted and published) or more are being acquired by any person which has total assets or annual net sales of \$100,000,000 (as so adjusted and published) or more;

(II) any voting securities or assets of a person not engaged in manufacturing which has total assets of \$10,000,000 (as so adjusted and published) or more are being acquired by any person which has total assets or annual net sales of \$100,000,000 (as so adjusted and published) or more; or

(III) any voting securities or assets of a person with annual net sales or total assets of \$100,000,000 (as so adjusted and published) or more are being acquired by any person with total assets or annual net sales of \$10,000,000 (as so adjusted and published) or more.

In the case of a tender offer, the person whose voting securities are sought to be acquired by a person required to file notification under this subsection shall file notification pursuant to rules under subsection (d).

Hart-Scott-Rodino Act (15 U.S.C. § 18a) (cont.)

(b) Waiting period; publication; voting securities

(1) The waiting period required under subsection (a) shall—

(A) begin on the date of the receipt by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (hereinafter referred to in this section as the “Assistant Attorney General”) of—

(i) the completed notification required under subsection (a), or

(ii) if such notification is not completed, the notification to the extent completed and a statement of the reasons for such noncompliance,

from both persons, or, in the case of a tender offer, the acquiring person; and

(B) end on the thirtieth day after the date of such receipt (or in the case of a cash tender offer, the fifteenth day), or on such later date as may be set under subsection (e)(2) or (g)(2).

(2) The Federal Trade Commission and the Assistant Attorney General may, in individual cases, terminate the waiting period specified in paragraph (1) and allow any person to proceed with any acquisition subject to this section, and promptly shall cause to be published in the Federal Register a notice that neither intends to take any action within such period with respect to such acquisition.

(3) As used in this section—

(A) The term “voting securities” means any securities which at present or upon conversion entitle the owner or holder thereof to vote for the election of directors of the issuer or, with respect to unincorporated issuers, persons exercising similar functions.

(B) The amount or percentage of voting securities or assets of a person which are acquired or held by another person shall be determined by aggregating the amount or percentage of such voting securities or assets held or acquired by such other person and each affiliate thereof.

Federal Trade Commission Act, Section 5 (15 U.S.C. § 45)

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

Federal Trade Commission Act, Section 5 (15 U.S.C. § 45) (cont.)

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(4)

(A) For purposes of subsection (a), the term “unfair or deceptive acts or practices” includes such acts or practices involving foreign commerce that—

(i) cause or are likely to cause reasonably foreseeable injury within the United States; or

(ii) involve material conduct occurring within the United States.

(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

Robinson-Pattman Act (15 U.S.C. § 13)

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.



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