



# ANTITRUST COMPLIANCE MANUAL

PREPARED FOR




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# INTRODUCTION

The manual has been prepared for distribution to members of AICC –The Independent Packaging Association.

The manual is not intended as a substitute for company counsel or independent legal advice. The antitrust laws, while reflected in only a few short statutory enactments, are complex and important. Compliance with them requires a thorough analysis of each company's product line, structure, and business operations. A general manual such as this cannot foresee all problems.

This manual is brief, in view of the areas with which it is concerned. It is intended as a general introduction to the field, and consists of several parts. The first is an antitrust compliance guide which, it is hoped, individual companies will find useful for the purpose of adapting and distributing to their employees. The second is a proposed, short compliance program offered as a suggestion, with the realization that it will require shaping and modeling in accordance with company needs. Finally, two related subjects are briefly considered: Joint selling and AICC's FirstPak program; and joint purchasing.

The antitrust laws do not impact only on big business. They apply with equal force to businesses of all sizes. Of course, some laws deal specifically with monopolization or an attempt to monopolize and thus are of greater concern to companies with larger market share. However, the bulk of antitrust concepts are applicable to all, particularly as companies structure the sales and distribution of their products and relationships with competitors.

## ANTITRUST POLICY AND GUIDELINES FOR YOUR COMPANY

# Letter From the President

Dear Fellow Employee:

From its inception, it has been the policy of the Company to conduct its business in full compliance with all applicable laws. An important element of this policy is respect for the purpose, goals and objectives of the antitrust laws of the United States. In a nutshell, the antitrust laws seek to deter or eliminate anticompetitive restraints that impede free market competition.

Many people seem to look upon the antitrust laws as an obstacle to the growth of business, or as further evidence of the encroachment of government on business freedom. While reasonable people may differ on the proper extent and reach of these laws, there are many reasons for the commitment of your Company to fulfillment of these legal requirements.

The first reason is a view about the kind of economy and society in which we are privileged to live. We believe that antitrust laws reflect an underlying belief and respect for a free, open and competitive society. We think this kind of society is essential to the welfare of the Company, its employees, and, indeed, the entire country. We are committed to a free market which is governed by the law of supply and demand. We want free trade to determine price, production, sources of supply, and the ability of our Company to compete. We are confident that we can compete effectively and prosper. We want to do so in an environment which is free of unfair trade practices.

It is not the existence, but rather the violation, of antitrust laws that stimulates excessive government interference into business affairs. We believe that we contribute best to the kind of society in which we want to live by expressing our

unlimited respect for law and order through the way in which the business of your Company is conducted.

Aside from our underlying policy and commitment, there are many practical reasons for antitrust compliance. Violation of the antitrust laws can involve you and the Company in a great deal of unnecessary expenditure of time and money. Defending an antitrust suit is extremely expensive and diverts the attention of all of us from our proper goal of making the Company profitable for the benefit of its shareholders, employees, and their families. Violations of the law also expose the Company to adverse publicity, thus causing a great deal of harm to our reputation. Finally, a violation of the antitrust laws can expose violators - both the Company and the individuals involved - to substantial fines and even jail sentences. The consequent loss of respect and reputation in one's community should serve as no little deterrent.

You have probably read and heard a great deal in recent years about corporate behavior which has led to criminal and other consequences. Your Company is pledged to respect all laws and to follow ethical business practices.

We urge that you read this guideline carefully and respect the principles which it sets forth. You are also urged to seek the advice and counsel of your supervisors and Company counsel whenever there is even a suspicion of unlawful conduct, or whenever a business associate (in or out of the Company) suggests what you think may be improper conduct.

It is the policy of your Company to permit no exception to the rule that the antitrust laws must be complied with. Violations of this policy will result in appropriate disciplinary or other measures, including discharge, when justified. Please assist us in fulfilling our commitment to Company profitability within a conscientious and lawful environment.

Sincerely yours,

President



# 1 THE ANTITRUST STATUTES

As an overall observation, antitrust laws act as a kind of charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. Free-market competition is, and has long been, the fundamental economic policy of the United States. By doing things such as stopping cartels, preventing mergers that would create or enhance market power, and forbidding significant restraints of trade and exclusionary practices, the antitrust laws provide for an interaction of competitive forces that yield the best allocation of economic resources, the highest quality, and the greatest material progress.

Violations of the antitrust laws generally fall into two categories: (a) *per se*, and (b) rule of reason.

“*Per se*” violations are those activities which are considered so reprehensible that they are automatically illegal, without any inquiry into their effect on the market. Price fixing among competitors is the prime example. Most conduct under the antitrust laws is analyzed under the so-called “rule of reason,” which means that a court will weigh any anti-competitive impact against pro-competitive attributes.

## A. The Sherman Act

The basic antitrust law of the United States is the Sherman Act. Its first section contains a simple statement of antitrust principles. It prohibits every contract, combination or conspiracy which unreasonably restrains competition. This law generally reaches consensual arrangements among competing companies. Price-fixing, bid rigging, and dividing markets are common examples. This does not mean that only a formal written agreement or contract in restraint of

trade is prohibited. Any kind of combination or conspiracy, and any kind of understanding, can fall within the prohibition of the Sherman Act. The agreement can be verbal, tacit, or informal. This is why it is our Company's policy to conduct our business independently of any competitors. Our product development, design, pricing, and sales efforts are determined independently.

Of course, we consider what we know about the marketplace and the conduct of our competitors, but we arrive at both the knowledge and our conclusions based upon independent study.

The second section of the Sherman Act makes unlawful any monopolization or attempt to monopolize or combination or conspiracy to monopolize. Most violations of Section Two require only one actor, possessed of the ability and the intent to monopolize a defined product market in a prescribed geographic area. The law can be violated by relatively small companies, if they possess the requisite power in a properly defined market.

## **B. Clayton Act**

The Clayton Act is another major antitrust law. This is a civil statute (carrying no criminal penalties) that prohibits corporate mergers or acquisitions that are likely to lessen competition. In fact firms considering a merger or acquisition above a certain size must notify the federal government and receive advance approval. The Clayton Act also it declares it unlawful to sell one's products on condition that the purchaser will not buy the products of a competitor, where the effect is to substantially lessen competition or create a monopoly. The well known Robinson-Patman Act, prohibiting price discrimination, is also a part of the Clayton Act.

Other parts of the Clayton Act deal with interlocking directorates of competing companies, mergers and other business acquisitions. Another important part of the Clayton Act is that which impacts on exclusive dealing arrangements with customers, an area which will be discussed further in this guide.

## **C. Federal Trade Commission Act**

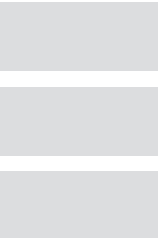
The reach of this statute is quite broad, as it prohibits “unfair methods of competition” which can include traditional antitrust conduct also addressed by the Sherman Act, but also reaches corporate behavior beyond the scope of the Sherman, such as mere invitations to collude. Unlike the other laws, it does not provide for a private right of action but contemplates only enforcement by the Federal Trade Commission. It is an important tool in government antitrust enforcement.

## **D. State Law**

Most States have some kind of trade regulation law - whether called antitrust law, consumer protection law or unfair competition law — analogous to the federal antitrust laws and that regulates the same business activity with the same purported objectives as the federal antitrust laws.

## **E. Foreign Law**

These guidelines focus only on U.S. law. However, it is important to remember that the laws of many other countries are similar, and sometimes more restrictive, than U.S. law. Where products are sold abroad, or other international business is concerned, applicable foreign law must also be considered. It is also important to know that the U.S. antitrust laws can reach overseas conduct by US firms.



# 2 WHAT HAPPENS IF YOU VIOLATE THE LAW?

The consequences of violation are very serious. Under the Sherman Act, there may be both criminal and civil consequences. Very heavy fines for corporations and individuals are provided. In addition, significant jail sentences can be imposed for violations, and the government has an announced policy of seeking jail sentences as the primary punishment for price fixing and other per se violations of antitrust laws. The consequences to personal reputations and families should be obvious.

Antitrust violations can also be enjoined by court action in civil proceedings. In addition, anyone injured by an antitrust violation can sue for damages and recover treble (i.e., three times) damages in addition to attorneys' fees. In fact, often one consequence of governmental action is that such private lawsuits soon follow. Defending these kinds of actions can cost hundreds of millions of dollars. In many cases, violations give rise to class action suits brought by persons on behalf of themselves and all others who are similarly injured. The amounts involved in such suits are staggering.



# 3 THE DON'T'S OF ANTITRUST... IN BRIEF

Please be sure that in all of your actions you conform to the following summary guidelines:

1. Don't ever discuss pricing with competitors. In fact, don't attend meetings with competitors at which pricing is discussed. If you are ever present at such a meeting, protest and leave immediately.
2. Don't agree with competitors in any way, shape or form, to divide or allocate customers, markets or territories.
3. Don't talk to customers about the prices charged by the Company to others.
4. Don't talk to customers about other customers or about whether or how you will sell to other customers.
5. Don't insist that a customer buy exclusively from the Company (some such agreements may be lawful under limited circumstances, but this, too, is done only as a policy matter with the advice of counsel).
6. Don't ever require a customer to buy one product in order to obtain another. Don't make sales or purchases conditional upon reciprocal sales or purchases. Don't even suggest that a purchaser should buy from the Company because we purchase from his Company.
7. Don't charge different prices to customers who may compete with each other. This also means that bidding

must be handled with great care and in consultation with the Company's counsel.

8. Don't disparage the product of a competitor unless you are absolutely certain you can prove your statement to be true.

These don'ts are necessarily broad and brief. Some of them will now be discussed more fully. However, this guide is not a complete statement of the antitrust laws. If ever in doubt, please speak to your supervisor and feel free also to contact the Company's counsel. They will assist you in every possible way.

# 4 UNDERSTANDINGS OR OTHER ARRANGEMENTS WITH COMPETITORS

It is natural that in the course of your business career, you will deal with the employees of a competitor. Many of them are your friends, and have been for years. You will see each other at trade association meetings, trade shows, and other industry events. The law does not interfere with these fine relationships. Many times, competitors act in common as when they come together under the auspices of a trade association to enhance the industry, promote its welfare, or oppose or support certain government policies or legislation. This is all part of the legitimate democratic process.

At the same time, dealing with competitors probably presents the area of greatest danger under the antitrust laws. The simple rule is that, other than a formal joint venture or similar relationship, any kind of understanding with competitors, no matter how informal and regardless of whether in writing or not, which relates in any way to prices, production, territories of sale, customers, or markets, is likely to be illegal under the law and could very likely lead to criminal prosecution.

## **A. Price Fixing**

Very simply, there is no justification whatsoever for any kind of price fixing arrangement with one or more competitors. It is one of those violations considered illegal “per se.” This means that the courts do not even have to look into the effect on the marketplace or competition to find it unlawful. It is also often found to be criminal conduct. Another form of

illegal price fixing or customer allocation, discussed in the next section, is bid rigging such as reaching an agreement with a competitor not to bid so that others can do so successfully.

Price fixing does not only mean agreeing on a higher price. It includes any understanding which stabilizes prices—making them higher, lower, or keeping them the same. You cannot agree on maximum prices or minimum prices.

The only safe course of conduct is to avoid discussion with competitors of any kind on prices. Do not “signal” pricing activities to competitors. And be sure to avoid jokes on the subject. They are generally not funny, and can haunt you in a future investigation.

Remember also that many terms of a sale bear on prices. You cannot agree on discount terms, premiums, extras, standard warranties, after-sale service or the like. All of these may have the effect of price fixing.

Illegal conduct is complete when you reach the agreement, even if it is never carried out. Even the suggestion of an illegal agreement or an invitation to engage in price fixing can itself be illegal, with serious penalties and other consequences. If you are ever in a situation where illegal price fixing (or, in fact, any other illegal conduct) is proposed or even hinted at, bring the matter to the attention of your supervisor and Company counsel. Remember also that it is Company policy not to distribute price lists to competitors and not to ask them of competitors. This policy must be strictly adhered to.

It is important to note, however, that we are not precluded from basing pricing decisions in part on the behavior of our competitors. So-called “conscious parallelism - when competitors observe and match each other’s conduct, including pricing - does not violate the antitrust laws.

## **B. Market, Customer and Territory Allocations**

Another kind of activity which is illegal “per se” is an arrangement by which competitors divide up markets (geographic or product) or customers. It is illegal to agree, for example, that one company will sell in one area of the country or to one group of customers, while the competitor sells in another area or to a different group of customers. It is also illegal to agree that one competitor will make one product or line of products while another makes a different product or line of products.

Although different, an agreement among competitors to limit new technology or product introduction, or product quality, is also clearly illegal and must be avoided.

## **C. Refusals to Deal and Boycotts**

It is a general principle of law that a company has the right to select its customers. Our Company, for example, can refuse to deal with somebody except under unusual circumstances (such as with an intent to drive that person out of business or to establish or maintain a monopoly). This freedom is restricted and cannot go beyond a unilateral refusal to deal. It is Company policy, to prevent clear illegality, that no employee may discuss dealing with a customer with another customer, competitor, or any third party. If you are asked to participate in such a discussion, decline and report the incident to your superior or to Company counsel.

Another kind of “per se” violation of the law is a concerted refusal to deal or a group boycott. Sometimes, one or more companies do not like another, because of the latter’s method of competition, pricing, or general business dealing. It is unlawful to get together and decide to “punish” that person by refusing to deal in any way. Even if the third person is someone who has committed conduct you think is reprehensible, or is a poor credit risk, a refusal to deal must be decided upon and carried out independently, unilaterally and without discussions among or with other companies.

# 5 PRICE DISCRIMINATION

The Robinson-Patman Act, part of the Clayton Act, is a law that prohibits price discrimination. The rules are complex, and it is for this reason that employees must follow all announced pricing policies and price lists of the Company. Variations will be permitted only after consultation with a superior, and on the advice of Company counsel.

Basically, the law prohibits a supplier from selling a product at different prices to two or more different competitors. One cannot discriminate in price between purchasers of commodities of like grade and quality where the effect may be to injure competition or substantially lessen competition. The competition thus protected is not only among our customers, but may extend to our customers'. Protected competition may also include the Company's own competitors in some circumstances. This law does not apply to the sale of services, but only to the sale of goods or services performed in connection with the sale of goods.

The law prohibits direct and indirect price discrimination, and employees are urged therefore to be exceedingly cautious in varying any terms or conditions between competitors in any way. Not only actual sales prices are involved. The prohibition extends to such matters as rebates, allowances, credits, advertising allowances, and services. There are some circumstances when price discrimination is allowed. For example, it may be allowed if a company can prove that a lower price simply reflects the passing on to the purchaser of cost savings in manufacture, sale or delivery of the product. But if there is a charge of discrimination, the company has the burden of proving the cost justification and this is often very difficult.

In addition, a company can lower its price to meet the competition of competitors. Generally, the lower price must be to meet—not beat—the competitive price. Meeting competition, while a defense, can also be difficult to prove.

Other situations may also suggest pricing differentiation, which is justifiable, such as different, or custom products, or absence of competition among our customers. However, such distinctions are generally complex and must not be made without executive and legal approval.

It is the Company's policy not to permit the lowering of prices under these defenses unless the circumstances have been thoroughly reviewed with Company counsel, who makes a complete record of the transaction and its justification.

# 6 DEALING WITH AGENTS, BROKERS AND DISTRIBUTORS

Products in our industry often reach the ultimate user through the efforts of intermediaries of various kinds — such as those who buy and resell in their own name or those who solicit orders for a commission. Some of these transactions are ad hoc; others reflect an ongoing supplier - dealer relationship. They can be non-exclusive or exclusive arrangements. For convenience we will refer to those who buy for resale as “dealers” or “brokers” and those who solicit orders for a commission as “agents”.

Relationships with dealers or brokers can often give rise to problems under the antitrust laws. In general, it is the policy of the Company to conduct its business with dealers or brokers on the basis of equality, permitting them to determine their own resale prices and terms of sale, and permitting them to deal in competitive goods and within territories of their choice. Where these policies are departed from, concurrence of the Company’s counsel must be secured.

## **A. Resale Price Maintenance**

Resale price maintenance, i.e., requiring dealers or brokers to follow resale prices set by the Company, is permitted under federal and many State antitrust laws, if there are pro-competitive benefits. For example, such price restraints can restrict or even eliminate price competition among distributors, which then may encourage distributors to invest in tangible or intangible services or promotional efforts, as well as even investment in capital and labor, all of which help the manufacturer and the dealers and brokers compete against rival firms.

However, this is also an area where federal and State antitrust laws can differ. Under several State antitrust laws, resale price maintenance is per se unlawful. It may still be possible under those laws for a manufacturer to furnish its dealers or brokers with suggested resale prices, but suggestion must mean only suggestion. Regardless, it is vital that there be a full understanding of the impact of all applicable laws before imposing price restraints in the distribution chain.

## **B. Exclusive Dealing and Requirements Arrangements**

Manufacturers sometimes enter into arrangements with dealers providing that the dealer will not handle competing products, or that the manufacturer will not sell to anyone else within a certain territory. In general, these agreements are not “per se” illegal, but are subject to the rule of reason, meaning their pro-competitive benefits must outweigh any likely anti-competitive impact. While exclusive dealers may generally be appointed, it is more likely to be of questionable legality where the dealer undertakes in the agreement not to deal in a competing line of products. Consequently, it is Company policy not to impose such a restriction on a dealer, unless approval has been obtained from Company counsel on a case by case basis. Agreements with agents, however, may permit more restrictions. However, approval for these restrictions must be obtained from Company counsel in such cases as well.

Distribution agreements sometimes restrict the rights of the dealer or broker in other respects. For example, they may require the dealer to purchase minimum requirements from the Company. They may prohibit the dealer from reselling the products outside of certain territory or to certain customers. These provisions are also subject to the rule of reason. Because their justification, if any, can only be made after a thorough inquiry into all of the facts and circumstances, they will likewise be considered on a case by case basis with the advice of counsel. Although such restraints may be more

justified where an agent is concerned, they are also subject to approval by the Company's advisors.

As you can see, agreements with agents and dealers are complex instruments requiring the careful cooperation of management and the Company's legal advisors. Consequently, such agreements may be negotiated and concluded only pursuant to authority granted specifically by the President of the Company, who will do so in cooperation with Company counsel.

# 7 TIE-INS

When a manufacturer or supplier is prepared to sell a product only on condition that the buyer will also purchase a different product, the transaction constitutes a tying transaction. The product, which the purchaser may not want, but is required to purchase, is the tied product. The other is the tying product.

Tying arrangements typically are not illegal unless there is a certain amount of market power represented in the tying product. In other words, the tying product must be so strong or desirable that the purchaser is compelled to buy the tied product. Unlawful tying is considered objectionable because it harms competition for the tied product or service, including from companies that may be able to provide a better or less expensive alternative.

This does not mean that the Company cannot offer a package of products. However, it will then be necessary for the Company to attach different prices to each of the products and to permit the products to be purchased separately.

There are some occasions when a package of products may lawfully be sold and when what would otherwise be a tying agreement is lawful. For example, the two products may upon closer examination be only one single product, or strong quality control elements may be involved in products where a high degree of technology is involved.

Because this area, also, is complex and because the penalties for mistake are severe, it is Company policy to attach a separate price to each product and to agree at all times that each product may be purchased separately. Any variation from this policy will be permitted only if it is a published Company statement, approved by the appropriate Company officials and Company counsel.



# 8 TERMINATIONS

There is a great deal of litigation arising out of the termination of dealers and agents.

A termination is, of course, not necessarily unlawful. In general, U.S. courts will uphold reasonable provisions of a contract, even when they permit a manufacturer or supplier to terminate on short notice. There are some exceptions, however, in a number of states and under laws dealing with franchises and commission agents. Furthermore, foreign laws frequently extend protection to agents and dealers in a manner unknown in United States practice. Consequently, distribution and agency arrangements are entered into only pursuant to a general Company policy that has been constructed in consultation with Company counsel.

In all of its dealings with agents and dealers, it is the Company's intention to adhere to a policy of fairness, affording to intermediaries a reasonable notice of termination, explaining reasons for termination in a firm but honest manner, affording to the dealer or agent a reasonable chance to minimize financial losses and affording to the intermediary an opportunity to complete sales which may then be in process or in progress and to retain the profit from these sales.

The Company considers termination to be a serious event. It is not undertaken lightly, but only when considered to be in the best interests of the Company. Termination is undertaken only when the Company has concluded that there is no other alternative, the dealer has been doing an improper or poor job or violating the contract or that termination is otherwise in the best interests of the Company.

No termination of a dealer or agent is permitted except upon the approval of the President of the Company.



# 9 TRADE ASSOCIATIONS

It is probably true that in no country are there as many people involved in voluntary attempts to improve their lot and that of others as in the United States. This is reflected in the myriad charitable, educational and business associations that exist throughout the country. Trade associations play a prominent role in American industry.

Businesses come together in trade associations for a variety of reasons. They do so to enhance the conduct of their business, the state of the industry and the economy, and to express to the public and government their legitimate business needs. Frequently, they are called upon by governmental agencies for advice in arriving at government policy at home and abroad. Their representatives testify before Congressional committees, and assist government agencies in economic and other studies.

Association sponsored expositions, trade shows, and seminars educate the public as to products and educate both suppliers and customers as to the state of the art. They are also intended to increase the skills of association members and their employees. Unfortunately, the privilege of association has sometimes been abused by illegal conduct under the antitrust laws. Because trade associations almost always bring competitors together, their meetings can be suspect. They can provide a forum for the kinds of illegal conduct that have been discussed in this guide.

Consequently, it is Company policy to permit involvement of employees in trade association activities only when those

activities are responsibly and lawfully carried on. Employees involved in trade association activities must be certain that:

1. minutes are kept of all meetings of the association's directors, executive committee, general committees, and general membership;
2. competent counsel is present at each meeting (where such presence is advisable in the opinion of counsel) and available for advice on antitrust and other matters;
3. no discussion whatsoever is held at any such meeting dealing with any subject matter which may be unlawful, particularly those matters described in this guide such as pricing and dealing with third parties; and
4. the trade association is formed and operated in good faith for the benefit of the entire industry and conducted in such a fashion as to afford to all members of the industry a reasonable opportunity to benefit from its activities and participate in its activities.

AICC is a trade association that, we believe, adheres to these principles and we are proud to be counted among its members. Membership in other trade associations may not be undertaken without the approval of the Company President.

If during the course of any association activity any matter comes to your attention that you suspect may involve a violation of the antitrust laws, please bring the matter to the immediate attention of Company management.



# 10 A WORD ON LICENSES

This guide has been concerned with the distribution of the Company's products, and not with technology licenses. However, it is important to know that there are many antitrust considerations involved in the negotiation, drafting, and carrying out of technology license agreements. Illegality may be reflected in tying or other contracts, as in an agreement to grant a license for one kind of technology only on the condition that royalties be paid on another technology; or, an agreement to pay royalties on products which are not patented in order to obtain a patent license. Similarly, restrictions on the right of a licensee to deal in competitive products may be illegal, as are many package licenses which bundle a group of patents together. Licenses are usually (but not always) analyzed on a "rule of reason" basis, but the problem areas indicate the need for careful analysis. For this reason, all such agreements are handled by company counsel or with their advice.

Other examples of potential antitrust problems in licensing are the following:

1. the payment of royalties on total sales rather than on the products covered by the licensed technology;
2. the payment of royalties after the expiration of the licensed rights;
3. restrictions on the resale price of products produced under the license;
4. agreements to assign or exclusively license improvement inventions; and
5. provisions for cross-licenses and the pooling of patents.



# 11 CONCLUSION

Each of you in complying with the Company's policy to adhere strictly to the antitrust laws of the United States.

This guide is only a beginning. There is, as we have noted, a great deal more to the fulfillment of the Company's objectives.

We hope the guide will assist you in recognizing a number of the problem areas that exist. If any of them comes to your attention, please do not hesitate to call them to the attention of your superior and to Company counsel. We want to help you help the Company achieve its goal of maximizing profits in a lawful, constructive way.



# 12 A PROGRAM FOR ANTITRUST COMPLIANCE

There is no statutory obligation imposed on your Company to establish any program for antitrust compliance. But it is a standard business practice and wise to do so for a variety of reasons, including favorable treatment in the event of an investigation and action by federal or State antitrust regulators.

Company management owes a duty to the shareholders and to the Company to conduct business lawfully. If this duty is not carried out, the Company may suffer severe criminal and civil penalties, as well as excessive costs in defending an antitrust action.

A properly constructed compliance program may assist the Company in avoiding antitrust complications and litigation. In developing a program, the following should be key considerations:

First, it starts at the top. A Company's senior executives and board of directors must fully support and engage with the Company's compliance efforts. If senior management does not actively support and cultivate a culture of compliance, a Company will have a paper compliance program, not an effective one.

Second, a Company should ensure that the entire organization is committed to its compliance efforts and can participate in them. This means educating all executives and managers, and most employees – especially those with sales

and pricing responsibilities. When appropriate, it may also mean providing training for subsidiaries, distributors, agents, and contractors. And it means providing all members of the organization the opportunity to report anonymously and seek guidance about potential or actual criminal conduct without fear of retaliation.

Third, a Company should ensure that it has a proactive compliance program. This means that in addition to providing training and a forum for feedback, a Company should make sure that at risk activities are regularly monitored and audited. And the Company should regularly evaluate the compliance program itself to understand what it can improve.

Fourth, a Company should be willing to discipline employees who either commit antitrust crimes or fail to take the reasonable steps necessary to stop the criminal conduct in the first place.

Finally, a Company that discovers criminal antitrust conduct should be prepared to take the steps necessary to stop it from happening again. This likely includes making changes to a compliance program that failed to prevent the criminal conduct initially.

## **A. An Antitrust Audit**

Periodically, a Company is well advised to conduct an audit or investigation of the entire Company from the viewpoint of compliance with antitrust laws.

Minimally, such an audit should consist of the following:

1. Reviewing the Company and its place in the industry to determine in general its market share, the geographical areas it serves and the nature of competition. This will assist the Company in evaluating the lawfulness of its activities, including distribution, licensing and acquisition agreements.

2. A review should be undertaken of trade associations to which the Company belongs. An executive should be assigned the responsibility of maintaining a list of such associations. Reasonable guidelines (such as those published by AICC) for participation in trade association meetings should be prepared. Company counsel should meet periodically with attendees at trade association meetings to discuss the meetings and to maintain an ongoing overview of antitrust compliance.

AICC maintains a strict and inflexible policy of adherence to the antitrust laws. Be certain to consult its pamphlet, *Antitrust Guidelines*, for additional information.

3. Pricing and other customer relations: a review should be undertaken of the Company's pricing policy. Price lists should be examined and sales staff interviewed for determination of compliance with Company policies. All ongoing contracts with customers should be periodically reviewed.
4. All contracts and arrangements with dealers and agents should be reviewed. New contracts must be studied, and a policy arrived at for contract compliance dealing with such matters as dealers or agent relations, pricing, and termination. Of particular importance is a review of any desire to decline to sell to a customer or dealer.
5. All technology licenses to which the Company is a party should be reviewed with a view to antitrust compliance. In addition, personnel in charge of contract administration should be interviewed to determine any breach or other conduct under the agreement which might indicate the necessity for amendment or enforcement of contract provisions.
6. A review should be undertaken of all joint ventures to which the Company is a party. Joint ventures sometimes lead to antitrust involvement at the time they are established, or during their conduct. Particular attention

should be paid to joint ventures with companies that are or may be in any line of business competitive with that of the Company, with a view to avoiding the “spill-over” effects of coming together under the umbrella of a venture.

7. Where appropriate, counsel should be asked to develop checklists and model contracts covering licensing, distribution, and joint ventures. While a model contract or checklist will never be sufficient to cover all possibilities, they may be helpful in instructing Company personnel in appropriate licensing policies within the requirements of the law.
8. All correspondence, meetings and relationships with competitors should be reviewed. Some of this review will, of course, be undertaken in connection with a study of trade association activities. Other meetings with competitors should also be reviewed.
9. Each Director of the Company should be asked to submit a report identifying any other companies in which the Director serves in a similar capacity.
10. A review should be undertaken of the Company’s purchasing procedures. Remember, it is as unlawful to accept any improper price under Robinson-Patman as it is to exact it.

## **B. Education**

The Company should create a program of education involving its employees. The guide to antitrust compliance, if adopted, should be distributed to all appropriate employees. This should cover all officers, directors, sales personnel, and administrative employees. In addition, one or a series of meetings (depending upon the company, its structure and size) should be periodically conducted with key executives

and counsel to educate employees in current issues and developments in the antitrust field.

Antitrust compliance is not simply a legal matter. It involves not only the assistance of Company counsel, but the full cooperation of all personnel.



# 13 FIRSTPAK & JOINT SELLING

To promote the competitiveness of independents and enhance their ability to compete for customers with multiplant locations, AICC has sponsored the FIRST PAK program.

To assist you in conducting business under the FIRST PAK program, AICC has applied for and received letters from the U.S. Department of Justice and the Canadian Bureau of Competition, copies of which are included in this Manual. Cooperating with others to jointly sell your products is a lawful activity when properly planned and carried out.

If joint selling activities in which you engage do not comply fully with the government letters included in this Manual, they may still be lawful. However, you are strongly urged to have such activities reviewed by your counsel.

# 14 JOINT PURCHASING

It is common for companies to group together and jointly purchase supplies or other inputs which they need in their manufacturing processes or other business activities. The purpose is obvious – to achieve important economies in the conduct of their own businesses. Many such agreements do not raise antitrust concerns and indeed may be procompetitive. Purchasing collaborations, for example, may enable participants to centralize ordering, to combine warehousing or distribution functions more efficiently, or to achieve other efficiencies. It is important to bear in mind, however, that certain activities by purchasers may run afoul of the antitrust laws. For example, it is equally illegal for competing purchasers to come together and agree upon the prices they will pay for products. That is, price fixing by purchasers is also a violation.

The AICC has drafted guidelines for group purchasing or joint purchasing. The following is a synopsis of provisions drafted by the author of this Manual. While not complete, these points should prove helpful to those who are participating in or contemplating the formation of joint purchasing groups:

- Board is a substantial portion of the cost of sheets, and of the finished products. It is therefore necessary to be assured that any group purchasing program does not lead participants to price fixing for their products.
- In view of this, it would be wise if participants in a group purchasing program were established in different market areas – i.e. that they not be competitors. This suggests the advisability of having a series of buyer groups.

- No group should engage in a boycott of unwilling sellers – i.e. those who express a lack of willingness to sell to a group.
- Participants in each group should be free to make purchases outside the group. They can, of course, be required to make minimum purchase commitments as a condition for participation in the group.

# APPENDIX A



**DEPARTMENT OF JUSTICE**  
Antitrust Division

**JOEL I. KLEIN**  
*Assistant Attorney General*

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950 Pennsylvania Avenue, N.W.  
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(202) 514-2401 / (202) 616-2645 (f)*

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<http://www.usdoj.gov> (World Wide Web)*

December 23, 1998

Paul H. Vishny, Esq.  
D'Ancona & Pflaum  
Suite 2900  
30 North LaSalle Street  
Chicago, Illinois 60602

Dear Mr. Vishny:

This is in response to your request on behalf of the Association of Independent Corrugated Converters ("AICC") for the issuance of a business review letter pursuant to the Department of Justice's Business Review Procedure, 28 C.F.R. § 50.6. You have requested a statement of the Department of Justice's antitrust enforcement intentions with respect to a proposal by AICC to establish a model pursuant to which its members could enter into joint selling arrangements with other non-rival members.

AICC is a trade association made up of non-publicly-traded manufacturers of corrugated paper packaging material. You assert that AICC's members collectively account for only 15-20 percent of all corrugated paper packaging materials sold in the United States. While some of its members have multiple plants, others do not. You suggest that transportation cost considerations limit sales from any manufacturing plant to customers located within a 150 mile radius from the plant.

According to your application, there are a number of corrugated paper customers who only want to purchase from corrugated suppliers who have a sufficient number of plants to efficiently supply the customer's national or regional needs ("national" or "regional" accounts). AICC believes that its members, as a result of their small size and limited number of plants, have lost a significant amount of national and regional account business to larger multiplant manufacturers.

To remedy its members' competitive disadvantage, AICC proposes to establish a joint selling model that would allow its members to form joint selling entities ("JSE") that could efficiently sell to national and regional accounts. Under the AICC model, one member would organize the JSE and select other members, who were not rivals of the lead members in any market, to help it bid on national or regional accounts. The lead member would negotiate the contract with a national or regional account and subcontract portions of the work to the other participants in the JSE or invite bids from other members. No other member of the JSE would be advised of the prices quoted by any other member or of the price quoted by the lead member to the customer. Only the lead member would negotiate with the potential customers. The JSE would not contain any member that is capable of meeting, by itself, the needs of the national or regional customer. The lead member would not solicit a bid from any other member for a portion of a customer's business that the lead member could itself supply. Participation in any JSE would be voluntary; and could be terminated by any member who had satisfied its contractual obligation to specific customers. Participation in a JSE for one contract would not preclude a member from bidding against the JSE, either singularly or as part of another JSE, for other customers. Various JSE's could compete against each other and no JSE would identify its existence or membership to any other JSE.

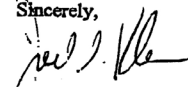
On the basis of the information and assurances that you have provided to us, it does not appear that AICC's proposal to promote joint sales of national and regional account services by nonrival manufacturers would raise risks to competition. In so concluding we express no opinion as to the accuracy of AICC's assertion that transportation costs limit a corrugated paper manufacturer's ability to effectively compete to a radius of 150 miles from the plant. This letter is limited to situations in which the manufacturer members of the joint selling venture do not compete with each other in any area of the United States. That status, the independence retained by AICC's members, and the pledged limitation on price communications should provide adequate assurance that AICC's proposal will not restrain competition.

To the extent that AICC's proposal enables its members to compete more effectively for national or regional account business it could have a procompetitive effect.

For these reasons, the Department is not presently inclined to initiate antitrust enforcement action against AICC's proposal. This letter, however, expresses the Department's current enforcement intention. In accordance with our normal practices, the Department reserves the right to bring any enforcement action in the future if the actual operation of the proposed joint selling program proves to be anticompetitive in any purpose or effect.

This statement is made in accordance with the Department's Business Review Procedure, 28 C.F.R. § 50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately, and any supporting data will be made publicly available within 30 days of the date of this letter, unless you request that part of the material be withheld in accordance with Paragraph 10(c) of the Business Review Procedure.

Sincerely,



JOEL I. KLEIN  
Assistant Attorney General

# APPENDIX B



Industrie Canada      Industry Canada

Commissaire de la  
concurrence

Commissioner  
of Competition

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Bureau de la  
concurrence

Competition  
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MAY 28 1999

Paul H. Vishny  
D'Ancona & Pflaum  
111 E. Wacker Drive, Ste. 2800  
Chicago, Illinois 60601  
U.S.A.

Dear Mr. Vishny:

Thank you for your letter dated May 4, 1999 with attachments, requesting an advisory opinion on the application of the *Competition Act* (the Act) to the proposed establishment of joint selling groups, by the Canadian division of the Association of Independent Corrugated Converters (AICC). The Program of Advisory Opinions seeks to facilitate compliance with the Act by indicating whether a particular practice would provide the Commissioner of Competition with sufficient grounds to commence an inquiry on his own initiative pursuant to paragraph 10(1) (b) of the Act. The Commissioner, under certain circumstances, is obliged to commence an inquiry under paragraphs 10(1)(a)<sup>1</sup> and (c)<sup>2</sup> of the Act. You should understand that the Commissioner has no authority to decide the law.

In the course of discussions with the Competition Bureau, you have confirmed that the proposed transaction raises to your knowledge no issues that are being considered by any other law enforcement agency in Canada or abroad.

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1

Paragraph 10(1)(a) provides that six Canadian residents, under certain conditions, can require that the Commissioner commence an inquiry.

2

Paragraph 10(1)(c) provides that the Minister may direct the Commissioner to commence an inquiry.

Our understanding of the proposal is as follows:

### **The Parties:**

The AICC is an industry trade organization based in Alexandria, Virginia made up of manufacturers of corrugated paper packaging material and associate suppliers. It has 869 members of which 309 are associate suppliers, and the balance are manufacturers.

The Canadian chapter of the AICC is organized as a separate corporation under the laws of the Province of Ontario. There are a total of 51 member companies operating in Canada. Of these, 41 are located in Ontario, 8 in Quebec and 1 in British Columbia. In addition, there is one United States member of the Canadian chapter located in Rochester, New York. AICC's head office is located at 205 Forestwood Drive, Oakville Ontario.

### **Purpose of the Strategic Alliance**

According to your submission, the cost of transporting corrugated paper packaging materials more than 400 kilometres, significantly increases its price to customers. As a consequence, there are a number of national/regional customers in both Canada and the United States, who will only purchase from corrugated suppliers who have a sufficient number of plants to efficiently supply their national or regional needs. The AICC believes that its members, as a result of their small size and limited number of plants, have lost a significant amount of national and regional account business to larger multiplant manufacturers. In particular, smaller manufacturers with only one or two production facilities, are unable to bid on business for these national/regional accounts.

In order to address these concerns, the AICC in the United States requested a Business Review Procedure from the Department of Justice Antitrust Division for approval to establish joint selling groups whereby their members could get together in accordance with set guidelines to jointly bid on contracts from national/regional purchasers. On December 23, 1998, the US DOJ approved a proposed model plan for the formation of joint selling entities. In an attempt to provide the same type of efficiencies to its Canadian members, the AICC has requested the Commissioner of Competition for similar approval.

The proposal would allow the Canadian members of the AICC to form joint selling groups which could supply national/regional accounts and compete with large integrated competitors, who have multi-plant production capacity.

In addition, the strategic alliance will allow members of the AICC, in Canada and the United States, to form joint selling groups to bid on contracts for either Canadian or US

multinational firms who require product in various locations within both countries. This will effectively allow Canadian AICC members to participate in bids to supply product to multinational purchasers who operate in both markets.

Currently, Macmillan Bathurst/Stone Smurfit, one of the largest Canadian manufacturers of corrugated paper packaging materials, is part of a multinational group located in the United States, which has a large share of that market.

### **Operation of the Strategic Alliance**

It is intended that the formation of joint selling groups (**JSG**) will be coordinated from AICC's head office in Alexandria, Virginia. It is proposed that each joint selling group be modeled along the following lines:

1. One general member or a third party would constitute the lead member of a group of companies who will jointly sell to one or more national accounts. The lead member of each group within a joint selling group will select the members of such group.
2. As stated above, the lead member of each group may establish the group but:
  - (a) each member of the group shall remain free at all times to compete with the group for the business of any national or regional account (proposed customer) except as respects a specific bid or order for which the member participates in the group;
  - (b) the proposed customer will be advised of each group member and the customer shall have the right to decline to deal with any member of the group;
  - (c) only the lead member will negotiate pricing with the proposed customer.
3. The lead member may (i) negotiate a contract with the proposed customer and subcontract out portions of the work to the members of the group or (ii) invite bids from proposed members of the group, which the lead member can accept or reject.
4. No member of the group will be advised of the prices quoted by any other member of the group nor of the price at which the lead member proposes or agrees to sell products to the proposed customer.
5. Participation in the program or in any group will be voluntary and can be terminated at anytime by any member, subject to the rights and obligations of parties to a contractual obligation.
6. No member of the group may be a company that has the capability to meet the national (or regional, as the case may be) requirements of the proposed customer in a satisfactory manner.

7. The lead member will not submit a bid or seek a quote from any member of the group for delivery to any proposed customer location where the lead member is capable of meeting the requirements of the customer in a satisfactory manner.

8. The various joint selling groups will be free to compete with each other.

9. Each joint selling group will be independent of every other joint selling group. The makeup of joint selling groups will not be identified to the AICC nor will any one joint selling group identify its existence or its membership to any other joint selling group.

### **Application of the Competition Act**

As a strategic alliance, your proposal has been considered under the conspiracy provisions of the Act. It is the Competition Bureau's intention to encourage those strategic alliances which increase companies' competitiveness provided they do not infringe the Act.

Section 45 has two material elements-(1) agreement, and (2) an undue lessening of competition flowing from that agreement. With respect to the agreement element, the intent of the parties in entering into the JSG is to satisfy demand from those customers who only want to purchase from national or regional suppliers. We also believe that on an objective basis, a reasonable business person would not draw the inference that the likely effect of the proposal would be to unduly lessen competition.

The appropriate legal framework for the assessment of the undueness standard is articulated by the unanimous decision of the Supreme Court of Canada in *R. v. Pharmaceutical Association of Nova Scotia et al.*, [1992] 2 S.C.R. 606. In that case the Supreme Court held that the inquiry into whether an agreement has prevented or lessened competition unduly involves three steps:

1. Defining the relevant market;
2. Analysing the structure of the market to determine if there is market power; and
3. Analysing the behaviour of the parties to the agreement.

It is the combination of market power and some behaviour likely to injure competition that makes a lessening of competition undue and thus unlawful.

## **Relevant Market and Structure**

The relevant market is Canada and is expanding to points in the United States. Canadian members of the AICC have approximately 17% of the total Canadian market, and about 22% of the Ontario market. The percentages for other parts of Canada are significantly lower.

The top five integrated firms in Canada account for between 78% and 83% of total Canadian supply of corrugated paper packaging materials. It is estimated that the two largest Canadian firms, Norampac and Macmillan Bathurst/Stone Smurfit, supply over 55% of the entire Canadian market. Crown, in British Columbia, has over 50% of that regional market. No members of the AICC are included in the top five ranking of corrugated suppliers in Canada. Given the relatively low market shares that AICC members will have as a group either regionally or nationally, it does not appear that any joint selling group would have market power. If at a later date the market shares change significantly, the Commissioner may be required to review the matter again.

## **Behaviour of the Parties**

The object of the agreement is to allow small manufacturers of corrugated paper packaging materials to compete with large multi-plant manufacturers. This would appear to increase competition for the larger manufacturers who are supplying the national and regional accounts.

## **Assessment**

Overall, I am of the opinion that the proposed establishment of joint selling groups by the AICC, is not likely to lessen competition unduly in any market in Canada. I would like to stress however, that this analysis is based upon the current market share information. In addition, it is important that the lead members of the JSG adhere to the principle of price confidentiality expressed in the submission to the US DOJ which you have indicated makes up the submission to the Bureau.

## **Conclusion**

In our opinion, based on the information which you have provided as set out above, the Commissioner does not have grounds for causing an inquiry to be made pursuant to paragraph 10(1)(b) of the *Competition Act*. This opinion is predicated on the assumption that no material facts have been omitted or misrepresented in your submission. It is also based on the interpretation of the existing jurisprudence. Finally, this opinion will continue to be valid unless there is an amendment of the provision of legislation upon which it was based. Should you be uncertain as to the impact of any amendment on the opinion you have received, you should seek legal advice or re-contact the Competition Bureau.

If you have any further questions or require clarification of this letter, please do not hesitate to contact Eugene Besruky (819) 953-8538.

Yours sincerely,

A handwritten signature in cursive script, appearing to read "Jim Walker".

**Jim Walker**  
Assistant Deputy Commissioner  
(Criminal Matters)