

Information Surveys And Exchanges Among Competitors: A Few Simple Rules

In a series of recent business review letters, the Antitrust Division has staked out its position that, as long as the right restrictions are placed on the process, competitors can exchange price, cost and other sensitive information without risk of being charged with violating the antitrust laws.

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This is good news for businesses and even better news for certain antitrust practitioners who undoubtedly will take advantage of the situation to convince clients that thousands of dollars in attorney's fees need to be expended on the development, initiation and monitoring of intricate information exchange programs.

While insuring all of us antitrust lawyers continue to make a good living is a noble goal, we take issue with the premise that any of this is terribly complicated or requires any significant outlay of attorney's fees. Below are a few simple rules to follow when participating in a survey or exchange of sensitive information with your competitors.

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Have a Legitimate Reason for the Exchange

The main concern of antitrust regulators regarding information exchanges is that they will facilitate price-fixing by competitors. Thus, if you agree to participate in a survey or exchange of competitively sensitive information, you should first confirm it has a legitimate, pro-competitive purpose. Helping you and your competitors coordinate price increases, identify price-cutters in your industry, or organize a group boycott of high-priced suppliers, of course, are not legitimate purposes. Using information exchanges to cure information asymmetries that prevent you and your competitors from being more competitive is a legitimate purpose.

This is why the Antitrust Division has approved surveys of prevailing prices in certain industries on the ground that more accurate information regarding prices will spur competitors to independently set more competitive rates for their products or services. It also has blessed surveys of

industry costs on the ground that they help manufacturers identify those areas in which there are opportunities to reduce costs, improve efficiencies and bring greater value to customers. The key is to identify a reason for the information exchange that will ultimately benefit consumers, not just the survey participants.

Make Participation in the Exchange Truly Voluntary

Nothing reeks of illicit activity more than a survey or exchange where participants are forced to share their sensitive information with their competitors. This can happen in a number of scenarios, from a trade association that requires its members to participate in information exchanges to an industry where threats are made against companies that refuse to participate in the exchange. You can be assured that, if you or your competitors participate in an involuntary exchange, it will be highly suspect in the eyes of antitrust regulators.

Trade associations promoting participation in an industry survey must clearly indicate that participation is completely voluntary and that a member's trade association privileges will not be adversely affected if it elects not to provide data for the survey. Participants should not discuss with their competitors other companies' refusals to provide information for the survey and must refrain from taking any action against those companies because of their non-participation.

Hire a Third Party to Administer the Process

In a series of industry-specific statements on antitrust policy, the Antitrust Division and the Federal Trade Commission have stated that it is highly advisable to retain a third party to collect sensitive price, cost and other sensitive information from competitors. The purpose of this third-party survey administrator is to serve as independent gatekeeper for the information collection and assimilation process. Regulators are concerned that, if participants use their own staff to administer the survey, those employees will be tempted to share raw survey information with their employers before the data is appropriately aggregated and use the data for anti-com-

petitive purposes (e.g., calling up a competitor and urging it to increase its prices for particular customers or territories or giving up a bid on a piece of business).

While hiring a third party to run the survey will add expense to the venture, it is well worth incurring in light of the presumptions antitrust regulators are likely to draw if you use your own employees or your competitors' employees to conduct the survey. Moreover, many consulting firms have experience serving as third-party administrators of information exchanges and can conduct the survey more efficiently than participants' employees who have never worked together before.

Use Survey Data That Is At Least Three Months Old

Competitors interested in collusion are most apt to share current or future prices. Thus, for an information exchange to be lawful, participants should only share competitive information that is historical in nature. As a rule of thumb, antitrust regulators have said that data collected from competitors needs to be at least three months old. The older the price or cost data exchanged, the more unlikely it is that competitors will be able to use the information for improper purposes (e.g., coordinating future prices).

It should also be made crystal clear upfront by the third-party administrator that any participant in the survey who provides current data or forecasted data will be dropped from the survey and their data returned to them. In industries where prices or costs customarily change only quarterly or annually, it is advisable to ask survey participants for data that precedes the current quarter or year to avoid antitrust scrutiny.

Insure Data Cannot Be Linked to Specific Participants

Another requirement of an information exchange among competitors is that the information collected must only be disseminated in a form that does not permit the identification of individual participants' data. The Antitrust Division has said that no single participant's data should constitute more than 25% of any given statistic on a weighted basis. This means that there must be at least five sources for each data point collected in the survey.

Practically speaking, the more participants in the survey, the better -- both in terms of the accuracy of the statistical results and the survey's ability to pass scrutiny by

antitrust regulators. This also means that, once data is collected, survey results must be published in a format that prevents participants from determining which competitor provided which data. Preventing the identification of data sources can be accomplished in two ways:

- The most common way is to aggregate the data, namely to publish survey results in terms of average industry or territory cost or price.
- Another method is to publish the results by survey participant but using codes that are not linkable to specific survey participant (e.g. Company A). This method presents more risk to survey participants in the event the code used by the third-party administrator is cracked and places a premium on having a large number of survey participants provide data on each statistic published in the survey.

Exchanging competitive information with your competitors can be done under the proper circumstances. Make sure you follow these few simple rules and bring any questions or concerns to the attention of your company's antitrust counsel. For some industries with a history of anti-competitive activity or diligent antitrust enforcement, it may not be advisable to conduct a survey of price or cost information among competitors even if you scrupulously adhere to the rules. This is because regulators simply may not believe your reasons for the survey are anything other than cover for illicit activity. If your industry fits this description and you are still interested in exchanging data with your competitors, you would be well served to contact the Antitrust Division via its Business Review Procedures and obtain the agency's advance guidance on how it is likely to view the survey you have in mind. For most industries, however, a few simple rules and a brief conversation with your antitrust counsel should suffice.

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