

ANTITRUST "DOS" AND "DON'T'S" FOR MOH HOME HEATING OIL DEALERS

Today's home heating market is extremely challenging. Oil hovers close to \$140 per barrel; retail prices are at an all time high. There is increased need for working capital and hedging products. Regulators are continuing to closely monitor and regulate the home heating oil industry.

MOH dealers are committed to conducting business activities legally and honestly. No dealer wants to be investigated for possible antitrust or trade practice violations. Even isolated consumer complaints can result in time consuming investigations. Investigations that divert human and financial resources.

This article discusses general principles of appropriate business conduct and some specific "dos" and "don'ts" for MOH dealers to help them avoid . This article does not cover consumer contracts and consumer trade practices; both of which will be covered in a future article.

Do Have a Compliance Program.

Every company should have an effective antitrust compliance program. A compliance program formalizes and demonstrates the company's commitment to compliance by outlining procedures and standards for the employees to follow. A compliance program should include a written antitrust compliance policy, training, communication, monitoring and enforcement. The written compliance policy should be developed by company officers and senior management, together with counsel. The policy should be presented to the company's board of directors for approval. The approved policy should then be communicated to employees, then implemented by training the employees. Counsel can assist with the policy development and the training. The policy should also be enforced by the company, and employees disciplined for violations.

Educating employees about antitrust law through training helps a company to avoid violations. The training explains the antitrust rules and requirements and further underscores the company's commitment to comply with law and to operate the business according to ethical standards.

Even with training, employees will have ongoing questions about the requirements of the compliance policy given particular factual situations. Having a senior employee appointed as an officer or manager in charge of the compliance program provides a point person to respond to questions. The identity of this compliance program-manager should be communicated to employees. This person should take responsibility for day-to-day implementation and monitoring of the Program. In addition to responding to questions, the manager can provide ongoing training, conduct investigations and provide direction on handling issues. The company should communicate to employees that all concerns should be reported to, and handled by, the compliance manager.

Having an effective compliance program is also very important as it provides a potential defense in the event the company is accused or convicted of violating antitrust law. A company accused of violating antitrust law may raise the program as a defense to such charges, arguing that any actions were by a rogue employee acting in violation of company policy and practice. Also, if a company is convicted of violating such laws, under the Federal Sentencing Guidelines, having an effective compliance program may result in a mitigation of any fine imposed by the federal judge.

Do Take Individual Responsibility.

Having a compliance program is not a substitute for each employee taking personal responsibility for complying with the company's antitrust policy. Employees are responsible for asking questions to make sure they understand their compliance obligations. Company management is responsible for educating and supervising employees to be sure the policy is being followed.

A good rule to live by is do not write, email, text message, make note of or say anything you wouldn't want to disclose in open court.

Don't Fix Prices.

It is generally illegal under federal and state law to enter into agreements or understandings with competitors on price, pricing policies, margins, inventories, bids, or discounts.

Do not discuss or even mention price or pricing policies with any competitors. This means that competitors attending trade shows, trade association meetings and conventions should not discuss price or pricing policies with each other. If a competitor attempts to raise the subject of price or pricing policy, one should immediately walk away from the conversation. In addition, one should report the incident to his or her company's compliance manager. If later, an investigation is commenced involving this competitor, there is a contemporaneous record of what action was taken to avoid the discussion and violation of law.

Don't Allocate Customers or Markets Among Competitors.

Do not discuss or even mention allocating customer or geographic territories with any competitors. If a competitor offers to stay out of a particular area, or away from a particular group of customers, one should immediately walk away from the discussion and report it to his or her company's compliance manager.

Don't Boycott Customers or Geographic Areas.

Do not discuss or even mention to competitors possibly boycotting or ceasing deliveries to any group of customers. Group boycotts are illegal. Do not refuse to serve a particular group of customers for any reason other than credit or the failure to reach agreement on the terms of delivery. If an MOH dealer plans to exit a particular geographic or customer market for any reason, the MOH dealer should consult with counsel before doing so.

Do Make Independent Decisions.

Each MOH dealer should make independent decisions about pricing, markets, customers and the types of pricing programs they will offer. Do not discuss with competitors whether or not a particular pricing program is effective. To ensure that each MOH dealer is making independent decisions, one should never discuss or even mention any of these subjects while attending trade shows, trade association meetings and conventions. If any of these topics are raised at a trade association or trade show meeting – whether as part of a formal presentation or informally in the hallways – one should immediately walk out. Don't assume the topic is permissible just because it is being discussed as part of a formal panel at a tradeshow.

Penalties

Penalties for violating antitrust laws can be significant. In government enforcement actions, companies and individuals face criminal penalties and/or substantial criminal or civil fines. In addition, convicted individuals potentially face prison time and companies may be subject to criminal violations for the acts of their employees, even if the employee's act violates company policy. In addition to government actions, companies may also face private claims seeking monetary damages, attorney's fees and in some cases, treble damages. Many of the court cases result in some sort of injunction against the offending conduct. Defending an antitrust case is enormously expensive in terms of time and money.

Conclusion

An effective antitrust compliance program should become part of every MOH dealer's operation and culture. Such a program will benefit the dealer as it will avoid antitrust law violations. Don't hesitate to consult with the Company's legal counsel if you have any doubt about the legality of a practice. Antitrust laws are wide-ranging, complex, and subject to changing interpretations.