

A Competition “Tune-Up”: Antitrust in the New Administration

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Antitrust Compliance for Crude Oil Pipelines

- ❖ Much of the business of crude oil pipelines is regulated.
- ❖ **Antitrust rules still apply, however.**
- ❖ **Trade associations** have historically been subject to close scrutiny by antitrust enforcers.
- ❖ The **oil industry** has historically been subject to close scrutiny by antitrust enforcers, as well as Congress.

Time for an “Antitrust Tune-Up”

GOALS:

- ❖ Why you should be aware of antitrust issues – including new antitrust enforcers.
- ❖ How the Federal Trade Commission views competition among crude oil pipelines.
- ❖ Basic antitrust laws.
- ❖ Potential application of antitrust laws in setting of trade association for oil pipelines.

New, Aggressive Antitrust Enforcers

❖ **Federal Trade Commission**

- Reviews virtually all mergers or acquisitions involving oil pipelines.
- **New Chairman: Jon Leibowitz**
 - Spent many years in high-level antitrust staff positions in the U.S. Senate.
 - Has expressed skepticism that oil and gasoline markets operate competitively.

❖ **DOJ Antitrust Division: Christine Varney**

How FTC Views Competition Involving Oil Pipelines

❖ Who Are Competitors?

- To what alternatives could crude producers or refiners turn if oil pipelines acted anticompetitively?
- Answer will depend on:
 - Location of other pipelines that can carry the same type of crude.
 - Whether refinery can switch its crude slate.
 - Whether marine transportation is feasible.

How FTC Views Trade Associations: Opportunities to Reach Agreement

❖ Recent FTC Order

- National Association of Music Merchants
- 9,000 members compete in selling musical instruments
- FTC alleged that NAMM organized meetings where members were encouraged to communicate, and did in fact share, competitively sensitive information about *prices* and *business strategy*
- **Trade associations should avoid circumstances that might lead to, or be construed as, anticompetitive agreements.**

Basic Antitrust Law

❖ **SHERMAN ACT OUTLAWS:**

- **Agreements that unreasonably restrain trade** – usually, **agreements between competitors**
- Monopolization or attempted monopolization (exclusionary conduct)

❖ **CLAYTON ACT OUTLAWS:**

- Certain mergers or acquisitions.

What Qualifies as an “Agreement”?

❖ **NOT LIMITED TO A FORMAL CONTRACT**

- May be **VERBAL**; Need not be in writing
- Includes **INFORMAL UNDERSTANDINGS** or arrangements

❖ **CAN BE PROVEN BY:**

- Course of conduct
- Direct or **CIRCUMSTANTIAL EVIDENCE**

Agreements That May Violate Antitrust Law

❖ “PER SE” ILLEGAL:

- Price fixing between competitors
- Agreements between competitors to restrict pipeline availability
- Division or allocation of customers or territories
- Group boycotts (e.g., oil pipelines agree among themselves not to serve a refinery that sometimes uses marine transportation)

❖ “RULE OF REASON” for Other Agreements

- Weigh anticompetitive and procompetitive effects

Examples of Anticompetitive Agreements

- ❖ **Price Fixing:** Owners of competing pipelines agree on the discounts they will offer to a refiner.
 - **Note:** Agreement between competitors on *any aspect of price* is illegal (e.g., credit terms, etc.)
- ❖ **Output Restrictions:** Owners of undivided interests in a pipeline decide to take turns making their space available to crude producers.

Other Possible Antitrust Violations

- ❖ **Customer Allocation:** Competing pipelines agree from which producer each will purchase (e.g., I'll buy from A, you buy from B). This would enable each to pay a lower price to the crude producer.
- ❖ **Non-price Agreements Among Competitors Also May be Challenged. Examples Would be Agreements on:**
 - Batch sizes
 - Delivery frequency
 - Expansions
 - New connections

How to Avoid Antitrust Scrutiny

- ❖ **DO NOT TALK ABOUT PRICES OR ANY OTHER ELEMENT OF COMPETITION WITH A COMPETITOR.**
- ❖ Any discussion of competitive subjects may lead to an agreement in restraint of trade, or may *look like* an agreement in restraint of trade, even if no actual agreement is reached.
- ❖ Remember that an agreement can be proved by circumstantial evidence – e.g., information exchange followed by action at the same time to change competitive terms.

Examples of What NOT to Talk About with a Competitor

❖ DO NOT DISCUSS OR EXCHANGE INFORMATION ABOUT:

- Any aspect of price
- Output, Capacity, Inventory levels, Costs
- Customers
- Territories
- Exclusion of Customers or Suppliers from Sources of Supply
- Plans Concerning Production, Distribution or Marketing
- Other Sensitive Corporate Information

Why Such a “Big Deal”?

- ❖ **OFTEN UNCLEAR WHEN ILLEGAL AGREEMENT EXISTS**
- ❖ **GOOD CHANCE ANYTHING SAID WILL NOT BE REMEMBERED IN THE SAME WAY BY BOTH PARTIES**
- ❖ **RISKS ARE GREAT AND THE COST OF PROVING INNOCENCE CAN BE ENORMOUS**

Trade Association: “Danger Zone”

❖ **TRADE ASSOCIATION MEETINGS**

- DO NOT DISCUSS COMPETITIVELY SENSITIVE SUBJECTS.
- BE ON GUARD AGAINST INDIVIDUAL EXCHANGES OF COMPETITIVE INFORMATION.
- PROTEST AND, IF NECESSARY, LEAVE IF IMPROPER DISCUSSION STARTS.
- BAD DOCUMENTS – TAKE CARE WHAT YOU WRITE!