KIRKLAND & ELLIS LLP

A BUSINESSPERSON'S GUIDE
TO THE ANTITRUST IMPLICATIONS OF
MERGERS, ACQUISITIONS,
JOINT VENTURES, AND
STRATEGIC ALLIANCES

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THE PURPOSE OF THIS GUIDE

This Guide is intended to assist you in understanding the antitrust implications of potential acquisitions, mergers, joint ventures, and strategic alliances between the Company and other companies or their assets. It is designed to acquaint you with the general nature and overall scope of the antitrust laws and how they apply to such transactions.

This Guide is ***not*** a substitute for consultation with the Legal Department. It is intended to emphasize the importance of involving the Legal Department *whenever* you believe that antitrust issues may be raised. Consultation with the Legal Department is essential to maximize the likelihood of expeditious, cost-efficient consummation of deals and to make sure that the Company's policy of full compliance with the letter and spirit of the antitrust laws is implemented at *all* levels, and in *all* circumstances.

After briefly reviewing the applicable antitrust laws, this Guide explains the various antitrust issues raised at each stage of a potential transaction with another company – from the identification of a candidate, through due diligence, and ending in consummation and integration.

The guidelines discussed apply to all kinds of potential transactions, including: (a) ***mergers***; (b) ***acquisitions*** of the stock or assets of another company; (c) ***sales*** of the stock or assets of the Company or sales of stock or assets of a subsidiary to another company; and (d) ***joint ventures or strategic alliances*** between the Company and other companies. For convenience, all of these types of transactions will be referred to in this Guide as "acquisitions" or "transactions."

The most sensitive acquisitions from an antitrust perspective are ***horizontal*** transactions, *i.e.*, those involving assets or businesses that compete directly with the Company in a given product or service category.

THE APPLICABLE ANTITRUST AND COMPETITION LAWS

The antitrust laws of the United States, the European Union and its member states, and now most other nations (including Canada, Mexico, Brazil, Japan, and even China) are broad and far-reaching. These laws affect nearly all of the Company's business activities and transactions, including acquisitions, mergers and other transactions.

The fundamental purpose of these antitrust laws is to promote free enterprise by prohibiting business activities that unreasonably restrain or suppress competition. The antitrust laws are seen as promoting "consumer welfare" because competition is believed to – and experience teaches it does – provide consumers with a greater supply of higher quality, more innovative products and services, at lower prices. Companies benefit from the antitrust laws as well, due to the stimulus to excellence provided by competition, and by protecting the Company from the actions of others, that unreasonably would hinder the Company's ability to compete freely in the marketplace.

One portion of the U.S. antitrust laws, Section 7 of the Clayton Act, specifically prohibits acquisitions that "***may***" lessen competition substantially. The principal concern is with transactions that will allow the acquiring company (or the joint venture entity) to control a sufficient portion of the industry's output of the goods or services (including research and development) involved, to be able to increase prices to consumers, by restricting its own output of those goods or services. This is called "unilateral" market power.

Another concern is prohibiting the development of "concentrated markets" (particularly those with 5 or fewer "effective" competitors). It is believed that in such markets, it is easy for the competitors to recognized that it would be in the mutual best interests of all them to follow the merged company's decision to restrict its output, so as to increase overall market prices. This is called "tacit" collusion or "mutual interdependence."

A *presumption* has been established that any transaction that would reduce the number of competitors from 3 to 2 should be prohibited. However, some such transactions have been permitted, based on a persuasive showing of the pro-competitive purposes of – and the consumer benefiting effects likely to result from – the transaction, as discussed later herein.

Antitrust authorities carefully examine *any* transaction between the Number 1 and 2 companies in any "market." The government antitrust and competition authorities tend to define "markets" for goods or services *very* narrowly (e.g. "office products superstores" rather than just "office products," "premium" rather than all "ice cream," etc.), in order to minimize the arguable number of effective competitors in the market being analyzed for likely competitive effects.

The European Union (and now most other nations) have "merger control" laws prohibiting transactions that create a "monopolist" or "dominant" firm (*i.e.*, one capable of unilaterally affecting price by restricting its own output) or increase the likelihood of "shared dominance" or "mutual interdependence."

A specific additional concern as to *joint ventures* is that they may facilitate agreements between the companies involved relating to products or services marketed by them which are *not* part of the joint venture (e.g. an oil and gas drilling joint venture yielding coordination on gasoline pricing).

This Guide obviously cannot recap all the antitrust laws from every nation in which the Company does business. There are countless variations in the provisions of such laws and their application.

The simple rule is: ***Employees should exercise the same degree of caution in conducting business in all nations as they exercise in the United States.*** The Legal Department should be asked for specific antitrust counseling about non-U.S. antitrust requirements, particularly in regard to any communications or other relationships with competitors.

The watchword for antitrust compliance is "independence."

The Company acts ***independently*** in all its business activities: when it selects its acquisition, merger, joint venture or strategic partner candidates as well as when it selects its customers and suppliers; when it decides what products to make or services to offer, and what quantities to produce; when it sets the prices at which it buys or sells and decides on the other terms and conditions of its sales and purchases.

When the Company enters into legitimate business transactions with an actual or potential competitor (*e.g.*, a supplier or customer who is also (or *could* become) a competitor), the Company will do so *only* for its own independent business reasons and *only* with ***prior*** Legal Department approval.

When the Company enters into joint ventures, it will make ***no*** agreements with its joint venture partner(s) that limit the Company's freedom of action on any matters outside the necessary scope of the joint venture, such as limiting the Company's ability to compete with the joint venture, *without the* ***prior*** *approval of the Legal Department*.

COMMUNICATIONS WITH COMPETITORS

The antitrust laws ***prohibit any discussions*** with a competitor relating to:

- prices, price levels or trends, or terms of sale;
- output or production planning or capacity utilization;
- customer relationships or sales volumes;
- discounts, allowances for promotions, advertising, or sales and marketing programs; or
- costs, cost structures or profit levels.

Caution should be taken as to *any* communication with a competitor. ***Beware*** of any topics which would suggest anything inconsistent with the Company's freedom to act independently in the conduct of its business. There are ***no*** **"**safe" communications with competitors.

There is ***NO EXCEPTION*** in the antitrust laws for discussions with a competitor in the context of a potential acquisition or other transaction. A company remains a competitor until the closing has taken place, ***even if*** there is a signed, definitive agreement to purchase the company and the closing is scheduled for a date certain in the near term.

No "Price Fixing" or "Bid Rigging"

"Price fixing" is the most frequently and vigorously prosecuted type of antitrust violation – worldwide. Persons guilty of price-fixing affecting the United States can go to ***jail*** for up to ***10 years***.

The prohibition against "price fixing" applies broadly to any understanding or "agreement" with respect to prices, price levels or trends (up or down), credit terms, promotional programs (*e.g.*, whether to advertise), or other terms and conditions of sale (*e.g.*, F.O.B. or freight terms).

"Price fixing" can occur even if there is ***no*** agreement on specific prices. To be found guilty of price-fixing only requires an understanding, by two or more competitors, to raise, lower, peg, or even just stabilize (or stop lowering) the prices at which they sell products or services or the prices that they will pay for inputs.

An employee and the Company can be found guilty of "price fixing" even if the understanding does ***not*** work. Long experience teaches that price fixing efforts ***never*** work for any sustained period of time (absent government participation and enforcement, like exists for OPEC).

> **EXAMPLE**: Representatives of two competitors are in a discussion about a possible joint venture when someone says, "These falling prices are killing us. I don't know about anyone else, but we are going to hold the line." Within a month, prices of both competitors begin to firm. That would be "evidence" of an agreement to fix prices.

An executive can be prosecuted – ***criminally*** (i.e. go to jail) – even if he or she is only aware of "price-fixing" by a subordinate and the executive fails to take action to stop it.

No "Invitations to Collude" or "Price Signaling"

Even an *attempt* at fixing prices will be aggressively prosecuted by the antitrust authorities. Thus, if the competitor in the foregoing example does *not* also "hold the line," the company making that statement can be prosecuted for an "invitation to collude."

Indeed, the competitor can turn the person making the "hold the line" statement in to the antitrust authorities for prosecution. That happened to the chairman of American Airlines when he made a statement to the Chairman of Braniff suggesting that both of them raise prices. ***The Braniff CEO tape recorded the conversation, and then gave the tape to the Department of Justice's Antitrust Division.***

The U.S., the E.U. and most other countries have policies ("leniency programs") encouraging companies and individuals to report even potential price-fixing by competitors, by promising not to prosecute the "whistleblower." Companies have increasingly blown the whistle, both to save themselves *and* to burden their competitors with the expense of a government investigation and the potential for huge fines. In the U.S. and E.U., many criminal fines in excess of ***$100 million*** have been imposed – including one ***$500 million*** fine.

Beware of announcements of planned price increases. Future prices should only be communicated to those people with a *legitimate* business need to know. Any such announcement should be issued no further in advance of the effective date than is reasonably necessary for the customers' *legitimate* business planning purposes. The antitrust authorities carefully monitor advance price announcements to see if companies are engaged in "***price signaling"*** as a way of achieving an agreement to raise or stabilize prices.

With the exception of mass, direct-to-consumer goods, it is unlikely there will ever be legitimate business reasons for a press release about future price increases. However, announcements ***may*** be necessary to financial analysts of a publicly held company, where a planned price increase may be material to future earnings projections.

Future prices are the most antitrust sensitive topic. Therefore, any discussion about future prices with competitors, the press, or the public should only occur *after* consultation with the Legal Department and in a manner and at a time *approved* by the Legal Department.

No Allocations of Supply or Markets

Agreements among competitors (or potential competitors) concerning the quantities of goods to be produced, marketed or purchased, the geographic areas into which they will be sold, or the customers to whom they will be sold, are considered by the antitrust laws to be just as serious as "price fixing."

> **EXAMPLE**: Because of a concern that supply and demand might be out of balance in a particular market area, in the course of acquisition negotiations, one competitor discusses with another competitor how much they intend to supply to that market area. That can be used as evidence of an agreement to allocate markets.

(Agreements relating to product quality also may be illegal, but *some* joint actions – such as those involving public standard setting, joint research and development or production – may be permitted. However, ***no*** such joint actions should be discussed with a competitor without ***prior*** Legal Department approval.)

No Supplier Restrictions

Agreements with suppliers who are actual or potential competitors concerning the quantities or prices of their sales to other purchasers or competitors, or their sales areas or customers, also could have the effect of illegally allocating supply or markets.

> **<u>EXAMPLE</u>**: In the course of possible joint venture discussions with a supplier believed to be considering a move into a new sales area as a direct competitor, the customer/competitor discusses with the supplier a desire to prevent the supplier from competing against it. When the supplier begins to compete, the customer/competitor threatens to stop purchasing from him as a condition for entering the joint venture. If the supplier stops competing, that could be found to be an agreement with the supplier to allocate markets between them. If more than one customer/competitor is involved, such conduct could be used as evidence of an illegal group boycott agreement.

(Some *exclusive* supply arrangements may be legal. ***No*** such arrangements should be made *without* ***prior*** *approval by the Legal Department*.)

<u>In short</u>, no discussion with any representative of a competitor or a potential competitor about a potential acquisition or joint venture should take place *without* ***prior*** Legal Department approval.

<u>What Is An "Agreement" Among Competitors?</u>

In antitrust law, many terms are used to refer to an "agreement" among competitors, including "contract," "combination," "conspiracy," "understanding," "meeting of the minds," and "common scheme." An "agreement" need ***not*** be expressly stated or in writing: it may be found to exist with ***no*** actual offer or acceptance.

An "agreement" may be proven entirely by indirect or "circumstantial" evidence. Communications among competitors that do not themselves involve any agreement often are used as "circumstantial" evidence of the existence of an "agreement" that goes well beyond the scope of the communication itself.

Meetings to discuss potential acquisitions or joint ventures, as well as trade association meetings, social contacts, telephone calls, casual remarks — indeed any communication with a competitor's employees — can be used as "circumstantial" evidence of an "agreement."

> **<u>REMEMBER</u>**: There are no such things as "*off the record"* conversations or "*gentleman's agreements"* with competitors.
>
> Anything an employee says to (or writes about) a competitor can be used as evidence of an agreement in violation of the antitrust laws.
>
> ***All*** emails will be searched. Today's computer forensic technology means that almost anything "deleted"

> can be recovered and, in investigations, deleted emails are routinely recovered – and often are "damaging," meaning they can prompt an investigation of – or even kill – a deal.
>
> **<u>WARNING</u>**: If a competitor, in connection with an acquisition or joint venture discussion, or at a trade association meeting or elsewhere, initiates a discussion (or sends an email) on any of these subjects (*i.e.*, *future, rather than past* prices, output, customers or suppliers), immediately discontinue the discussion, and firmly announce your objection and unwillingness to participate in such discussions or communication by stating "it is legally improper to discuss such matters." If the person persists, leave the meeting.

Report any such discussion (or provide any email received from a competitor) *immediately* to the Legal Department.

<u>ANTITRUST PENALTIES</u>

U.S., E.U. and most other nations "merger control" laws are civil, *not* criminal statutes (*i.e.*, the government will seek to enjoin or unwind transactions, *not* seek criminal penalties or jail time).

However, the penalties for price fixing and the other antitrust prohibitions discussed above are *severe*. They can result in court orders that restrict the Company's ability to make future acquisitions, or restrict the way the Company does business.

Price-fixing violations will result in substantial fines. In the U.S., the government seeks prison sentences (up to ***<u>10 years</u>*** for each offense) in *every* criminal prosecution for "price fixing." The Company can be fined up to ***<u>$100 million</u>*** for each violation or ***<u>double</u>*** the amount of any overcharge, whichever is ***<u>greater</u>***. As noted, a fine of ***<u>$500 million</u>*** was imposed on one company.

It is a certainty that time-consuming and costly private litigation on behalf of direct and indirect purchasers will follow *any* allegation of price-fixing, with claims for three times the amount of actual damages ("***<u>treble damages"</u>***), plus what typically prove to be substantial attorneys' fees.

Additionally, there are typically "***securities fraud"*** claims brought for the failure to disclose the existence of the price fixing or the failure of management to properly manage the Company, on the theory that the value of the Company's stock was artificially inflated by the increased revenues and profits achieved through the price-fixing.

You, your Company, and your fellow employees all are put at grave risk by violations of the antitrust laws. The mere allegation of individual or Company criminal wrongdoing can seriously damage your and the Company's reputation with customers. Acquittals rarely receive as much publicity as indictments.

The Company is determined not to let its employees or itself be exposed to such grave risks. The Company's belief in the free enterprise system and the rule of law are buttressed by the certainty that ***no imagined gain is worth the risk of violating the antitrust laws***.

IDENTIFICATION OF CANDIDATES

Potential candidates for acquisitions or joint ventures are brought to the Company's attention from a variety of sources. The Company may be contacted by a potential suitor, an investment banker or identify a candidate internally. Before proceeding to any in-depth analysis of a potential partner, *public* sources should be reviewed to determine whether the target company (or potential suitor) or *any* of its assets are in the same (or a related) line of business as the Company's.

Key *preliminary* questions: Is this a transaction with a competitor? What are the ***pro-competitive*** supply and innovation enhancing benefits likely to result from the transaction? How will consumers be helped by this transaction? Who will not like this transaction?

The law looks at competitive overlaps in "*any* line of commerce," not just the *principal* line of business of the candidate. Therefore, inquiry must be made into *all* of the product lines of the target company or any of its assets proposed to be included in the transaction. If there is an overlap, the Legal Department should be consulted *immediately* to determine the degree of antitrust sensitivity.

Most acquisitions and joint ventures are lawful – indeed, ***pro***-competitive. They result in demonstrable and desirable "synergies" and cost-savings through the greater and more efficient output of goods and services, at lower per unit costs, and through more effective and innovative research and development, production, marketing, distribution, and management.

That said, the more directly the candidate is a competitor of the Company and the more successful the candidate is in an overlapping line of business, the more closely a proposed transaction will be scrutinized for its likely competitive effects, *even if* that line of business represents only a small percentage of the value of the total transaction.

You should ***not*** reject any desired merger or other transaction because of perceived antitrust sensitivity without first consulting the Legal Department.

There are many factors that influence the likely competitive effects of a transaction which should be taken into account; *e.g.*, the identity of the other present or likely competitors; how difficult it would be for them to expand supply if prices increase; the characteristics and practices of the buyers and sellers of the products or services involved; the history of prices and profits in the industry; possible changing market conditions relating to technological innovations and the like; and the possible ability to spin off any potentially offending assets to another buyer.

In short, you should ***not*** do your own antitrust analysis of a proposed acquisition or joint venture. ***Antitrust review is the responsibility of the Legal Department.***

ANALYSIS OF PROPOSED TRANSACTIONS

You should keep in mind that ***all*** documents (including *especially* emails), relating to a proposed acquisition or joint venture – that are not prepared for or by the Company's attorneys – are subject to inspection by government antitrust agencies in connection with the government's review of a transaction.

Written Communications With Or About Competitors

> **NOTE**: The documents subject to production are "business related" documents and not just "company forms" or "corporate files." This requires the production of "personal" files, computer diskettes and backup, "Email" memory files, handwritten notes, calendars, diaries, appointment books, and other written or computerized materials maintained in connection with your due diligence and other work on the transaction.

Therefore, business analyses of a potential acquisition or joint venture should ***not*** contain assessments of the antitrust implications of the transaction. References to "product" or "geographic markets" (*e.g.*, the "West Coast market") should be avoided. Rather, documents should refer to "product categories" or "areas of current operation."

Avoid "market power" characterizations, *e.g.*, "dominant firm," "price leader," "aggressive" or "passive" competitor. Comments about other competitors, or the state of competition in the line of business involved, should be included only to the extent necessary to the business analysis of the desirability of a proposed acquisition or joint venture.

Most lines of business are ***vigorously*** competitive. That is *good* from an antitrust perspective.

It is important to document the ***pro***-competitive reasons for the acquisition or joint venture. Contemporaneous documents that discuss the cost savings, output expansion, or other benefits for customers that will result from the deal are the most persuasive to government regulators.

The following specific guidelines should be kept in mind in preparing documents for any purpose, including those prepared in connection with acquisitions or joint ventures:

- ***Do not*** use words suggestive of illegal or surreptitious behavior, such as "please destroy after reading."

- ***Do not*** overstate the significance of the Company's competitive position or of our production or marketing strategy, *e.g*. "dominant position," "this will cripple the competition," or "price leader."

- ***Do not*** speculate on the ability of the Company to raise prices or have "market leverage" after the acquisition.

  Beware of pro forma financial statements! ***Do not*** forecast non-cost based post-merger price increases!!

- ***Do not*** speculate about the difficulties other firms would face in attempting to enter the industry or expand output.

- ***Do not*** speculate on the inability of other firms to compete in a product category.

- ***Do not*** speculate or comment on the legality or potential illegality of any particular business conduct.

- ***Do not*** describe as undesirable or objectionable the competitive activities of competitors or customers. Customers are "lost," *not* "stolen;" "price cutting" is *not* "unethical;" and persons who charge lower prices than the Company are *not* "irresponsible." The acquisition target is *not* an "aggressive competitor" which is "destroying margins."

- ***Do not*** use language that suggests "collusive" conduct, *e.g.*, "industry agreement," "industry price" or "industry policy."

- ***Do not*** use "code" names for projects that suggest market power, *e.g.*, "Project Overlord" or "Bold Stroke."

Email and other documents often are written about competitive matters. Sometimes, ambiguity in these materials may convey the erroneous impression that there has been contact with competitors regarding prices or other matters of antitrust sensitivity. Every written communication with or about a competitor should have a clear, lawful purpose and must be drafted carefully to so reflect. The purpose should be apparent on the face of the document. Ambiguous language *must* be avoided.

Re-read emails – *before* pressing send – with these guidelines in mind!

There should be absolutely ***no*** mention of discussions with a competitor regarding prices, supply, or competitive bids, except where the Company is a supplier or a customer of the competitor. In those cases, any exchange of prices, supply information, or bids must be limited to the specific transaction at issue, and to only the information necessary to complete the transaction.

Even internal communications about a competitor's pricing, supply, or marketing decisions may present antitrust risks *unless* the document states a *proper* source of information, such as a customer or government report. A poorly worded document could be misconstrued and used as evidence by a government official seeking to stop a transaction or prove price-fixing.

Documents that contain careless and inappropriate language may make conduct that is perfectly legal look suspicious or collusive. "Facetious" or "ironic" comments may seem funny and be understood by other "insiders" – *at the time* – but invariably can be misinterpreted – *after the fact* – by a government agency or court.

In short, don't joke around! Write only what you are willing to hear read in Court!

> **CAUTION**: Handwritten notes and "marginalia" *must* be produced along with the underlying documents. "Email" systems keep memory copies of materials that you may believe you have deleted. These "marginalia" and "Email" comments can be ***fatal*** to a transaction. As noted, today's technology makes "deletion" almost impossible.

In sum, the time spent in writing clearly and following these instructions is an important part of your job and the Company's antitrust compliance efforts. The Legal Department is prepared to assist you in this regard.

Documents and emails can be (and where important, *e.g.* Board presentations, *should* be) submitted – marked "**DRAFT**" – to the Legal Department for review ***prior*** to finalization.

Discussion Of Proposed Transactions With Candidates

Where competitors are involved, it should be clear from the outset that the sole purpose of any discussion is to negotiate a possible acquisition or joint venture. Participation should be *limited* to those persons *necessary* to that stage of the discussion.

The subject matter should ***not*** include discussion of competitors, customers, current or future pricing plans or terms of sale, costs or profits *unless* (and only to the extent) absolutely necessary to the finalization of a proposed transaction.

Whenever practicable, a representative of the Legal Department should be present.

> **REMINDER:** All documents (not prepared by a lawyer or for the Legal Department's review) relating to any discussions with a competitor are subject to inspection by

government antitrust agencies in connection with any review of the transaction. (Just copying the Legal Department on a document does ***not*** make it "privileged.")

Distribution of documents relating to discussions with candidates should be *limited*, to the same extent as that for any non-public information obtained from others.

"Due Diligence" And Other Requests For Information

Non-public information and documents should ***not*** be requested from (or provided to) a competitor, as part of "*due diligence*" or otherwise, without ***prior*** clearance from the Legal Department.

Non-public information and documents relating to *future* plans, current and projected prices, costs, and profits only should be sought to the extent directly necessary to a business analysis of a proposed acquisition or joint venture, and only ***after*** the Company's management and the Legal Department have determined that there is serious interest in the proposed transaction.

Seller Beware! Non-public Company materials of this type should only be provided to a competitor upon a *convincing demonstration of need* and with the recognition that, if a transaction is *not* consummated, the materials will be of significant competitive advantage to the recipient.

To mitigate the risk of improper use by a competitor of non-public information and documents, such materials should ***only*** be provided pursuant to a written undertaking restricting their use and disclosure. Such letters are available for your use from the Legal Department.

When the Company is the buyer, there should be a presumption *against* agreeing to a request from the seller for such sensitive non-public information.

Use of non-public material obtained from others should be *limited* to those analyses necessary to assess the wisdom of the proposed transaction. Disclosure should be *limited* to those persons directly participating in the analysis of whether to pursue the transaction (and only to the extent necessary for the individual's participation). Non-public information obtained from others should be kept in *separate* files. Records should be kept of those persons to whom the materials are distributed.

If a decision is made *not* to pursue a transaction, *all* copies of any non-public materials, and other documents relating to the analysis of the non-public information, should be collected and either returned to the providing party or destroyed. The Company should secure the return or destruction of all copies of any non-public materials it has provided to others, as well as other documents relating to the analysis of the non-public information.

Where initial due diligence has proceeded to the stage where the transaction appears desirable – **and likely –** consideration must be given to retaining one or more *independent* consultants to do the more detailed due diligence work on present and future profitability and the potential for future cost-savings that typically is required for the Company to make a "go/no go" decision. Such due diligence inquiries necessarily will require an understanding of current prices, customers, marketing plans, etc., which (as explained above) **can*not*** be exchanged amongst competitors, without special protections.

> **CAUTION:** Such an *independent* consultant must be subject to a confidentiality pledge *not* to disclose any of the information received in the course of its due diligence work to the Company or the acquisition candidate.

Only generalized, qualitative judgments can be provided by the independent consultant which:

- ***Do not*** disclose specific current prices or future pricing plans;
- ***Do not*** disclose non-public customer relationships or future marketing plans;
- ***Do not*** disclose specific current costs or future cost saving plans;
- ***Do not*** disclose current output levels or future capacity utilization, expansion plans, or plans to idle production; and
- ***Do not*** disclose any other information that could be of use to the recipient in planning its own pricing or output decisions.

Any report received from an independent due diligence consultant should be used *solely* for purposes of the "go/no go" analysis. Distribution should be *limited* to those people necessary to that decision. If the transaction is not pursued, any such reports should be destroyed, absent prior approval from the Legal Department for some limited retention.

The hiring of any such independent due diligence consultant should be coordinated through the Legal Department. Whenever practicable, a representative of the Legal Department should be at any meetings where reports are being made by the consultant and should review a draft of any written report, *before* it is distributed.

INTEGRATION OF THE ACQUIRED COMPANY

Once the deal is signed, parties are understandably eager to begin the process of integration planning to insure a smooth transition post-closing. There are antitrust risks in any such effort, which must be carefully managed with the help of the Legal Department to avoid what antitrust authorities object to and call "gun-jumping."

Until all required government antitrust approvals are received and the deal is consummated, the parties must act like independent competitors. The Company can***not*** control the business decisions of the acquisition partner.

There is <u>***NO***</u> exception under the antitrust laws simply because competing companies have agreed to a deal.

> <u>**BOTTOM LINE**</u>**:** Competitors ***cannot*** even appear to be coordinating any ongoing business activities – especially the pricing, marketing, selling or development of any product or service in which they compete – until ***all*** antitrust approvals are received and the deal is closed.

In a recent action, the U.S. antitrust authorities challenged a requirement that the acquisition partner seek the Buyer's prior approval before extending certain customer discounts and standard contract terms. The government sought disgorgement of all the profits from the business! The matter was settled, but at great expense.

This means the Company ***may not*** limit the acquisition candidate's ability to conduct its business in the ordinary course prior to closing. The company ***may not*** dictate the acquisition partner's prices and terms of trade to be offered to its customers; ***may not*** seek to influence the acquisition partner's sales or marketing strategies, its output decisions, geographic expansion, new product introductions, research and development, advertising or limit its participation in business development opportunities.

The Company and the acquisition partner ***may not*** hold themselves out to customers or suppliers as a combined entity, and ***may not*** cooperate with each other on sales efforts. Prices, sales terms, customers, and sales territories ***must not*** be agreed upon prior to closing. Legal counsel should be involved in determining whether the parties should initiate any joint meetings with customers and what the parameters of any such meetings should be.

The Company ***may*** prohibit the acquisition partner from taking actions outside of the ordinary course of business, prior to closing to ensure that the Company obtains the assets it agreed to acquire.

The Company must be careful, however, not to "cross the line" into the day-to-day management and operation of an acquisition partner. The fact that the merger agreement includes such an "ordinary course of business" provision does ***not*** justify the Company's pre-closing involvement in the day-to-day activities of Target, *i.e.*, "gun-jumping."

<u>*Unilateral Post-Closing Planning Activities*</u>

The Company ***can*** make *unilateral* decisions regarding the future of the combined businesses and do what is necessary internally to carry out those decisions. It is permissible to plan how and from whom the merged entity will procure supplies to use in its manufacturing process and how the merged entity will be staffed during the transition period and after closing.

The Company ***can*** request data from the acquisition partner to assist in the integration of the businesses post-closing. The following information can be shared without substantial legal:

- balance sheet and other financial data, including current and projected sales, revenues, costs, and profits by broad product categories, and tax returns;
- lists and descriptions of current products, manufacturing and distribution assets, distribution, and general business activities;
- information regarding IT and data processing systems;
- general information regarding existing joint ventures or similar relationships with third parties (giving due consideration to confidentiality obligations to third parties);
- information regarding operations, management, and personnel;
- information regarding pending legal claims against the company;
- information regarding environmental risks; and
- information in the public domain or of a type that is regularly or usually disclosed to third parties such as stock analysts.

Other, more competitively-sensitive information should *only* be sought and exchanged if there is a self-evident, deal-related reason for doing so, and *only* with ***prior*** Legal Department approval. Even then, as in the case of due diligence efforts, steps should be taken to ensure that the information is only seen by a limited group of people working on the deal and is *not* used in any ongoing (i.e., pre-closing) Company business efforts.

If competitively sensitive information is exchanged, it should flow from the acquisition partner to the Company, and not vice versa.

The following information should be considered "competitively sensitive" and should ***not*** be sought from the acquisition partner, without ***prior*** Legal Department approval and the implementation of appropriate safeguards:

- current or planned prices, non-public price lists, internal pricing strategies, or information on customer-specific rebates, discounts, or other terms of sale;
- detailed information regarding pending bids or customer or supplier contract proposals;

- current or future acquisition partner business plans, marketing plans, or bidding strategies;

- customer lists by name, or detailed sales figures listed by named customer, (although seeking acquisition partner sales data by customer without providing names of the customers (e.g., "customer A, customer B", etc. is permissible if there are more than 15 customers on the list);

- executed and current customer and supplier contracts or terms of trade (form contracts may be obtained and contracts with pricing/deal terms redacted may be permissible on a case-by-case basis);

- detailed cost information on an individual product or SKU basis;

- projected profit margins on an individual product or SKU bases (historical figures are permissible).

There are many activities that are necessary to the successful integration of an acquisition partner. So long as these guidelines are followed, the Parties may plan for the integration – *jointly* as well as independently.

<u>Transition Teams</u>

It is important to recognize that joint activities must be carried out for the *right* purpose, by the *right* people. The only proper purpose is for the integration and efficient operation of the merged entity; ***not*** for immediate use in the Parties' ongoing independent businesses.

To that end, the Parties can establish "Transition Teams." Only members of the respective Transition Teams should meet to discuss the post-closing integration and joint operational issues. The members of the Transition Teams should be from the strategic, not the operating side, of the business.

Transition teams may exchange certain proprietary information, ***but*** only after ***prior*** approval by the Legal Department and only to the extent necessary for the integration and efficient operation of the merged entity after the closing. The Transition Teams must agree to maintain the confidentiality of any competitively sensitive information that they exchange, and not to use that information in the operation of their separate businesses.

Non-public information received by Transition Team members may *not* be disclosed to others within the Company or the acquisition partner who could use it for marketing, procurement, or any other competitive purpose. Those involved in transition planning should remain aware at all times that information used in integration planning cannot be disclosed outside the transition planning group.

Transition teams may develop plans and procedures for the organization and operation of the merged entity and the integration of those operations that will be conducted jointly, *provided* that such plans will not result in actual implementation *prior* to closing.

To advance the process, an *independent* third party (management consulting, accounting, investment bank, economic or other firm – experienced in the industry) can be used to collect, aggregate, and analyze even the most competitively sensitive information from the merging parties for use *after* closing.

In addition to assisting in the post-closing integration effort, it is often desirable to retain an independent third-party consultant in order to make informed estimates of the cost-saving and efficiencies that are likely to result from the integration of the businesses. As discussed herein, such informed estimates of the nature of the "synergies" and "efficiencies" to be realized from a transaction can be useful in helping to persuade government antitrust authorities to clear or approve the deal.

The more detailed the presentation – including the bases for the quantification – the more credible it will be to the antitrust agencies. However, as noted earlier in connection with independent consultant due diligence reports, the Parties' (business persons should only received generalized, qualitative reports, with top-line quantifications of the value of the synergies expected to be realized by the combination of the businesses. (The detailed report can, however, be provided to the Legal Department and any outside lawyers they have retained to assist in obtaining the required government approvals and clearances.)

<u>Integration Do's and Don'ts</u>

The following is a list of conduct that is ***not*** appropriate prior to receipt of the necessary government approvals and clearances and until after closing:

- ***DON'T*** co-mingle the assets of the Parties that will be consolidated

- ***DON'T*** engage in joint purchasing that you would not engage in as independent companies

- ***DON'T*** exchange current or future price lists, customer lists, and marketing plans regarding competing products, **except – with *prior* Legal Department approval – through an independent third party consultant**

- ***DON'T*** bid jointly on projects, or jointly solicit customers, or even discuss each other's bids regarding competing products at any time

- ***DON'T*** sit in on the other Party's corporate meetings or set up a regular exchange of information except as provided for by these guidelines

- ***DON'T*** consolidate or coordinate any activity prior to closing without advance approval of the Legal Department.

Bearing in mind the general principles explained above,

- ***DO*** continue to compete vigorously with all market competitors, including the Company's acquisition partner

- ***DO*** continue to make independent decisions that are in the Company's best interests

- ***DO*** check with the Legal Department *before* you undertake any conduct you consider questionable under the antitrust laws or these guidelines

- ***DO*** use independent third parties (economists, consultants, and accountants) to evaluate competitively sensitive information whenever necessary for integration planning.

Once the deal has been consummated, the Company is free to coordinate *all* business activities, including pricing, even if the companies are operated as separate subsidiaries.

> **NOTE**: if the Company owns ***less than 100%*** of the acquired entity, precautions must be taken and any coordination of the business activities, particularly pricing, **must** be discussed with and approved by the Legal Department because – depending on the level of ownership and the nature of the minority ownership – the "subsidiary" may still be considered a "competitor" for purposes of the antitrust prohibitions on price-fixing.

GOVERNMENT CLEARANCE OF PROPOSED TRANSACTIONS

Various laws in the U.S., the E.U., and in most other countries require that the respective governments be provided with ***advance notice*** of most proposed acquisitions and other transactions.

This is designed to allow the U.S. and other government antitrust and competition authorities to review the likely competitive effects *before* transactions are consummated. In the U.S., the government can seek a court order to stop a proposed transaction before it is consummated. Elsewhere, government approval typically is required before consummation is permissible.

In connection with an antitrust review, the U.S., the E.U., or other governments may ask for additional information and documents (and request to interview Company personnel) about the proposed transaction. They also are likely to seek to interview customers, suppliers, and competitors about their views on the future competitive effects of the proposed transaction, even where the proposed transaction has not been publicly announced. Thus, it is often difficult to keep secret the fact of a proposed acquisition or other transaction prior to obtaining government clearance for consummation.

An acquisition or joint venture cannot be consummated until *after* a government's request for information and documents has been satisfied. As a consequence, the Legal Department may be required to seek your assistance – on an expedited basis – to provide substantial volumes of documents, information and overall assistance, in order to assure that the Company is in the best position to close a proposed transaction as rapidly as practicable.

All documents generated in considering a potential transaction will be called for and must be produced. Failure to produce relevant documentation can result in serious consequences even after a transaction is consummated. The government has sought ***disgorgement of profits*** after discovering that documents were withheld from production during an investigation. At a minimum the government can impose ***multi-million dollar fines*** for failure to comply with reporting requirements.

In light of the considerable expense, risk of delay and, therefore, damage to the business from a prolonged review by the U.S., E.U., or some other government, it may be preferable to mitigate any concerns the government may reasonably express.

For example, governments have cleared a number of substantial transactions between horizontal competitors, operating in the same or related lines of business, after the acquiring company has agreed to certain limitations on the use of the assets involved, the spin-off of certain assets, or the licensing of technology or trade names. Certain joint ventures among competitors have been approved on the basis of agreements to limit the scope or duration of the joint venture, or the agreement to implement certain procedural safeguards relating to communications between the partners about prices, output, customers, etc.

To the extent an antitrust authority expresses concerns that are deemed unwarranted or that cannot feasibly be resolved (and there remains a desire to pursue the transaction), the Legal Department will work with you to try to secure court or other approval for the consummation of the proposed transaction. The recent trend of the law has been favorable to allowing mergers and other transactions to close despite government objections.

That said, government acquisition investigations and litigation can be expensive, require commitment of substantial management time, and result in significant delay to the consummation of the transaction.

Key issues of inquiry in any government investigation or litigation are:

- How do ***customers*** react to the transaction?

- What are the ***likely effects*** of the transaction on prices and output?

- What do customers say (what can you say) as to why – post-merger – the Company will *not* be able to ***increase prices*** (even 5-10%) in any product category, to any class of customers?

- Who are the ***closest competitors***?

- What products are ***substitutes***?

- What producers can rapidly ***expand production*** of the product or enter the market and start selling the product?

- What are the likely ***pro-competitive benefits*** of the transaction in reducing costs, enhancing efficiencies in producing or marketing products or services, research and development?

- What are the plans for ***passing on to consumers*** any cost-savings (*e.g.*, by reducing prices, investing in new capacity or products or services)?

- What does the ***financial community*** expect will be the results of the transaction on prices, supply, innovation?

- ***Why does the Company want to do this deal***?

  – It is *not* to pre-empt a competitor from acquiring the target or any of its assets!

- Who (*e.g.* competitors, suppliers, unions) is likely to ***complain*** to the government about the transaction and why?

  NOTE: If an individual representing any U.S., E.U., or foreign government agency (or any actual or potential private litigant) contacts you, such individual should be treated with courtesy, *but* no information or documents should be disclosed at that time. The Legal Department should be contacted ***immediately***.

CALL THE LEGAL DEPARTMENT

Compliance with the antitrust laws is *your* responsibility.

The Legal Department is dedicated to working with you to protect you and the Company by helping you to achieve your legitimate business objectives while complying with the law. The Legal Department can be helpful only if it is allowed to be involved. Thus, if you have ***any*** questions – especially when contacts with competitors are involved – call the Legal Department and indicate that you have an antitrust compliance question.

It is imperative in seeking advice from the Legal Department that ***all*** facts be disclosed fully, candidly and promptly. The Legal Department then will be able to make recommendations that are designed to maximize the likelihood of consummating a desired transaction and furthering the Company's legitimate business desires, while minimizing potential exposure to the risks of an antitrust attack or liability.

Thank you for taking the time to read these important guidelines.

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