The Legal Corner

Have You Thought About Price Fixing Lately?

Your company has just been served with a subpoena from a federal grand jury demanding the company's sales records for a specific product as well as phone records, appointment books, expense reports, and more from your top executives and sales managers. Or perhaps a sales manager has received a personal visit from federal agents. More likely than not, this means your company is the target of a criminal price fixing investigation. And, more likely than not, one of your competitors is already cooperating with the government, telling the prosecutors about your company's involvement.

Price fixing? If you can't remember the last time you thought about price fixing, it's been too long. Criminal antitrust fines last year in the United States totaled nearly $500 million, the second highest annual total in history. The statutory fine was recently raised to $100 million and, in many cases, fines have gone even higher. Executives and managers routinely are being sent to prison. In one investigation alone, eighteen executives and managers have done time, some serving nearly two years. Civil liability can add considerably to the consequences of a criminal price fixing conviction. Class actions on behalf of consumers and individual lawsuits by larger customers, as well as actions by state attorneys general and even foreign governments, are often not far behind that grand jury subpoena, whether or not your company is convicted.

Right now there are several grand juries across the country investigating price fixing. No industry is immune. Many of the current investigations involve electronic components where fierce international competition drives prices down year after year. And large fines for price fixing are no longer unique to the United States. The European Community imposed antitrust fines last year totaling nearly 2 billion euros.

Fines. Civil liability. Jail time. It doesn't have to end this way. An effective compliance program can minimize the chances of a price fixing problem. Simply having a written policy that your lawyers drafted which sits in a drawer somewhere is not enough. Implementation and follow-up are essential. An effective program includes:

- limit the people in the company who deal with competitors;
- educate the people who deal with competitors that they cannot talk about prices with competitors. Tell them price fixing rarely works and is not worth the risk of going to jail and ruining a career;
- if you have to buy or sell to a competitor, divide responsibilities so the people involved in pricing of competitor trades are not involved in setting prices to your customers;
- review performance criteria for people setting your prices so they are rewarded for beating market prices rather than earning bonuses from increases in general market prices; and
- most importantly, send a clear message from the top that fixing prices with competitors will not be tolerated.

There is one form of "price fixing" you should be considering right now. Until last month, vertical price fixing -- an agreement between a manufacturer and its reseller on the prices that the reseller charges -- were strictly prohibited by the antitrust laws. No matter what justifications you could present, such agreements were illegal.. But in the *Leegin* decision, the Supreme Court ruled that manufacturers could justify setting resale prices for their products under the "rule of reason." Under this new decision, manufacturers are now allowed to agree with distributors or retailers on minimum resale prices if these agreements will increase competition with other manufacturers.

How can you implement a resale price maintenance program that passes legal muster? If you rely on resellers to promote the sale of your products over that of your competitors, or offer retail support for consumers, you may be able to justify setting minimum resale prices to protect reseller margins and encourage them to provide the right level of promotion or service. These agreements may also be acceptable if you need to build a distributor or dealer network for a new brand. Also, if you have brands that rely upon prestige to sell -- e.g., for clothes or cosmetics or accessories -- resale price maintenance may help protect the brand image.

If you think setting resale prices could help your company, you may need to act sooner rather than later. The Supreme Court explained that courts should be more skeptical of a resale price program implemented after resellers request one. So if it makes sense to you as a manufacturer to set resale prices, you should do it before your resellers come to you. The Supreme Court also said that a resale price program is more likely to help competition when some companies are not doing it. In defending resale price programs, "everyone else is doing it" is not a good excuse; it may actually make your situation worse.

A resale price maintenance program may not be right for your company. First, the Supreme Court decision changed federal law, but the states have their own antitrust laws. Many states follow federal law, so the change in federal law is more likely to make resale price programs possible in those states. But other states, including California, do not always follow federal law. In those states, it may be best to wait until the law in this area has been clarified.

You also need to review your existing agreements with resellers. There's a good chance those agreements recite that the manufacturer's suggested prices are not binding on the reseller, who has discretion to set its own prices. These agreements will need to be revised before you can adopt a resale price maintenance program.

Whether your interest is in keeping your company out of hot water, keeping your folks out of jail, building a stronger dealer network, or supporting the prestige of your brands, it's time to start thinking about price fixing.

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