National Association of Credit Management

Antitrust Guide

For NACM Group Members

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Credit Groups

The National Association of Credit Management (NACM) has been active in the formation and servicing of credit groups since 1896. At present, the Association and its affiliates conduct and provide secretarial services for more than 1,000 credit groups. Total membership in these credit groups aggregates more than 15,000 persons and represents almost every industry—from food to electronics, footwear to construction. The purpose of the Association-approved groups is to assist the credit professional in making decisions with respect to the extension of credit based on current and accurate information.

American industries and businesses risk billions of dollars each year on sales on credit rather than for cash. If this practice is to be more than a mere gamble by the credit professional, they must be able to gauge the difference between fact and fraud, hope and charity, faith and foolishness. One of the best sources available to the alert credit professional in helping them form a sound judgment in this delicate and difficult area is the NACM credit group.

Credit groups have proven themselves an effective management tool. They permit credit professionals of different companies servicing the same customer regardless of industry or trade to compare information on collections and provide a forum for the exchange of data as to the most recent payment practices. It matters not whether they are new or continuing customers. The purpose of exchanging such information is to help group members segregate fiction from fact so that each may individually be able to make a competent and realistic credit decision on a customer's account.

Further education in improved day-to-day credit management can also be obtained at NACM's Annual Credit Congress and NACM-approved industry credit group meetings through the discussion of ideas relating to general credit management problems and procedures which are consistent with the NACM credit group antitrust policies outlined in this pamphlet.

The Antitrust Law and the Exchange of Credit Information

Of particular interest and concern to the credit professional is the relationship of the antitrust laws to the activities of credit groups and their applicability to business firms in connection with the extension of credit. Since members of credit groups are generally in competition with one another, meetings of such groups could appear to provide a perceptive opportunity for abuse of antitrust laws. Therefore, it is incumbent upon every group member, assisted by NACM-National or Affiliate professional staff, to be vigilant and alert so that no violation of the law occurs, either intentionally or unintentionally. This pamphlet has been prepared to assist members in this important obligation. It contains a summary of the major antitrust laws, a statement of their applicability to the operations of the NACM credit group programs and a cautionary note as to which activities are legal and which are not.

It is recognized that while credit professionals do not usually establish company prices, they generally control or participate in setting credit terms of sale. Some of the material contained here will not be directly pertinent. However, it has been included for purposes of completeness and information with which every company executive should be familiar.

Judicial precedent has established that the extension of credit and other terms of sale come within the scope of the antitrust laws, as do sales and terms of sale. However, the courts in numerous decisions have recognized the legitimate business interest in the exchange of credit information among business persons. In one of the most important cases on the subject, the U.S. Supreme Court held that:

> "…the gathering and dissemination of information which will enable sellers to prevent a perpetration of fraud upon them, which information they are free to act upon or not, as they choose, cannot be held to be an unlawful restraint upon commerce, even though, in the ordinary course of business, most sellers would act upon the information and refuse to make deliveries for which they were not legally bound."[1]

The general objectives and purposes of NACM credit groups are clearly within the scope of lawful conduct. However, each member must make affirmatively certain that the specific discussions, programs and agenda of any group actively serve only legitimate and legal purposes for which the group is organized.

Adherence to these principles is not only a matter of good citizenship and concern for the group, but also of self-protection. Although membership by itself in an association found guilty of violating the antitrust statutes is usually not sufficient to establish the liability of any one member, the courts have held that if a member knows, or should have known, that his associates in the group engage in unlawful activities and he continues his membership without protesting, he and the company he represents may become liable, and the consequences of an antitrust violation can be serious.[2]

Summary of the Federal Antitrust Laws

It is often commented that the success of American capitalism is due in some measure to the antitrust laws and their enforcement. The laws are not intended to disrupt business but rather to ensure that business exists in open competition, not subject to restraints imposed by predatory competitors. The basic sources of these laws are four federal statutes summarized below, and the judicial decisions and regulations that interpret them.[3]

The power of Congress to enact antitrust laws is derived from its constitutional power to regulate interstate and foreign trade and commerce; therefore, all acts that are in violation of the antitrust laws must involve, relate to, or affect such commerce.

The Sherman-Antitrust Act

The Sherman Act, enacted in 1890, was the first Congressional effort to regulate business practices. The Act prohibits contracts, combinations and conspiracies in restraint of trade and is enforced by the Antitrust Division of the Department of Justice. To constitute an offense under the Act, there must be a contract, combination, or conspiracy based upon acts between two or more persons or companies, which has the effect of restraining or monopolizing trade or commerce.

Since trade association activities are collective, the Sherman Act is one of the primary statutes available to the Government in enforcing antitrust policy.

Over the years, the courts have developed two important doctrines in the application of the Act. One doctrine, designated the “rule of reason”, is to the effect that not every restraint of trade is a violation of the Act, but only those that are deemed to be unreasonable. The second doctrine holds that the “rule of reason” does not apply to certain acts such as price fixing, boycotting of competitors or division of markets that are regarded as such obvious violations of the Act as to be deemed *per se* violations.

The Clayton Act

The Clayton Act, adopted in 1914, was created to correct defects in the Sherman Act, and to supplement the Sherman Act by conferring upon certain administrative agencies' power to stop violations of the law in their incipiency, before a threatened conspiracy had ripened into an actual offense.

The statute declares it unlawful to enter into the following where the effect is substantially to lessen competition or tends to create a monopoly:

1. Leases and sales made on condition that the lessee or purchaser shall not use or deal in the commodities of a competitor of the lessor or seller

2. Mergers or acquisitions of stock or assets of other corporations

3. Interlocking directorates

A person injured in his business or property as the result of a violation of the Clayton Act may recover treble damages in a civil action and violations of the Act may be enjoined either by various governmental agencies or by private individuals if loss or damage by reason thereof has occurred or is threatened.

In 1955, the Clayton Act was amended to add new subdivisions that give to the United States a right of action for actual damages sustained by reason of any violation of any federal antitrust law, and imposes a four-year statue of limitations on actions by private persons or by the United States to recover damages under the Act.

The Robinson-Patman Act

The Robinson-Patman Act, which was enacted in 1936 as a partial amendment to the Clayton Act, provides in substance that it shall be unlawful for any person engaged in commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality when any of the purchasers involved in such discrimination are engaged in interstate commerce, and where the effect of such discrimination may be substantially to lessen competition or tends to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination. To constitute a violation, the act requires only a reasonable probability of a substantial lessening of competition; proof of actual competitive harm is unnecessary. These provisions have been held by the courts to apply to credit terms as well as price terms.

Unlike the Sherman Act, the Robinson-Patman Act is designed to afford protection against acts of individual competitors, with a view to preventing discriminatory practices adversely affecting free competitive enterprise, to preserving competition generally and to protecting small businesses against larger competitors.

The Act states that it is a defense if price discrimination is made in good faith to meet a legitimate need for discrimination, such as volume quotas, competitive marketing tactics, an equally low price of a competitor, and provides as an additional defense that the actual differences in the cost of manufacturing, selling, or delivering goods may account for the differences in the prices charged. The Act applies only to the sales of goods and not of services.

The Federal Trade Commission Act

The Federal Trade Commission Act, which became law in 1914, is more sweeping in scope than any of the other federal antitrust laws. The Act declares unlawful all "unfair methods of competition, and unfair or deceptive acts or practices in commerce".

Any practice which could constitute a violation of the Sherman Act, the Clayton Act, or the Robinson-Patman Act, or even if such practice falls short of a violation of such laws but is related to the type of conduct which they prohibit, may constitute an unfair method of competition in violation of the Federal Trade Commission Act.

In addition to restraining budding combinations or conspiracies in restraint of trade, the Federal Trade Commission, under its mandate to prevent unfair and deceptive acts or practices in commerce, has authority to inquire into such matters as false advertising, deceptive branding, and other similar matters, and the great majority of the cases coming before the Commission involve practices of this type.

(For more complete information on the antitrust laws, the reader is referred to the *Manual of Credit and Commercial Laws*, published by NACM.)

NACM Credit Group Policy and Procedure

Outlined below are the approved policies and procedures for credit group operations which NACM believes to be in compliance with antitrust laws, and which can serve as a guide to members and their companies participating in NACM group activities.

No guideline, however, is absolute. Any act can become illegal if done for an unlawful purpose or in conspiracy with another. Good intentions are not an adequate excuse for any conduct proven unlawful.

Information discussed at group meetings is confidential. Under no circumstances should such information be divulged to anyone outside the credit department.

What Members May Do

1. Exchange current but historical, factual information relevant to the credit of accounts based on actual experience or present historical knowledge either at group meetings or by written reports.

2. Issue and exchange reports of actual credit experience, past and current (but not future), with an individual debtor or debtors if such reports are accurately compiled and limited to past and completed transactions. All such reports should be carefully reviewed for accuracy before issuance in order to avoid claims for inaccuracy.

3. Issue and exchange reports that list delinquent accounts that identify the name of the delinquent debtor and state the amount owed. Such delinquent list reports should not name the creditors who furnished the information or to whom the indebtedness is owed; however, source references may be coded. Care should be taken to exclude from such lists, names of debtors who are known to have honest and legitimate reasons for not paying their accounts when due, such as a dispute with respect to the amount of the indebtedness. A statement should be added to every delinquent list to the effect that:

   > "The inclusion on this report of the name of any customer should NOT be deemed to be a recommendation or suggestion on the part of the _____ Credit Group, or of the National Association of Credit Management that further credit should be curtailed or denied. The extension of credit is a question to be determined by each individual seller in accordance with his own judgment after appropriate investigation."

4. Discuss general trends or conditions in their industry or the economy if the purpose or effect of such discussion is not to elicit or encourage uniform action or policy with respect to future transactions by members of the group.

5. Cooperate in assisting a customer to overcome financial difficulties, where desirable, through participation in creditors' committees (as in Chapter 11 proceedings under the United States Bankruptcy Code or in out-of-court adjustment procedures under the supervision of NACM-approved adjustment bureaus or otherwise), or participation in state insolvency proceedings.

6. Engage in collective activities in support of, or in opposition to, legislation that is of direct interest to the group.

7. Engage in educational, research and public relations activities.

What Members May Not Do

1. Engage in or participate in any agreement or understanding, expressed or implied, to (a) fix or determine to whom sales are to be made or credit is to be extended or on what terms, (b) establish joint or uniform prices, terms and conditions under which sales are made or credit is to be extended, (c) create uniform or standardized freight rates, (d) limit production or establish quotas, (e) divide markets, or (f) boycott or blacklist customers or suppliers.

2. Plan with another, either explicitly or implicitly, any future actions or policies which might be taken by themselves individually or in conjunction with a competitor with respect to any of the following: (a) prices; (b) terms of credit or sale, including credit policies such as early payment discounts or interest rates to be charged on past due accounts; (c) profit margins; (d) sales discounts or allowances; (e) production costs and expenses; (f) transportation rates or costs; (g) production or research and development; (h) market areas or sources; or (i) product or packaging standardization.

3. Exchange or collect prospective information concerning prices, credit policies, terms or conditions of sale, or production costs or plans.

4. Participate in or give consideration to any activity, plan, understanding, or arrangement which would restrict or interfere with the exercise of free and independent judgment by the members in the management or operation of their respective companies.

5. Act in concert or agree with respect to any of the foregoing topics, whether at an official meeting or

function of a group or committee, or in private meetings or talks before and after official functions.

6. Receive the benefit of any such illegal activity.

What Members Must Adhere To

1. Defamatory statements in group meetings must be carefully avoided; they may expose all group members and the Association to major damage suits by persons who consider themselves to have been defamed.

2. Any statements declaring persons to be dishonest, fraudulent or immoral, must be avoided since no specific damages need be proven to recover in court for these kinds of statements.

Group Membership

1. A group may establish general membership qualifications, which are reasonable and related to its objectives, such as number of members, territorial jurisdiction of the group, financial status of an applicant and a minimum business experience.

2. Membership, however, must be open to all qualified applicants upon non-discriminatory terms and conditions, and no member of an industry can be arbitrarily excluded.

3. The group must adopt bylaws or be covered by Association bylaws consistent with the principles set forth in this guide.

4. A member who refuses to abide by the bylaws of the group or the Association and its antitrust policies should be expelled.

5. All business and business-related activities shall be transacted or discussed only at formal meetings and not in private conversations before or after the meeting.

Association Responsibilities

1. It is the responsibility of the Association to compile the written credit information reports to be discussed at group meetings and to insure that the information contained in those reports fulfill the guidelines detailed above and comply with the antitrust statutes.

2. It is the responsibility of the Association to maintain an updated list of all members of a group, to pro-

vide access to each group member of the group roster and to safeguard the group roster to prevent access by anyone not a member of a specific group.

Association Staff Representative Responsibilities

1. Local associations affiliated with the National Association of Credit Management shall have a qualified professional staff representative present at all meetings of all authorized credit groups.

2. This representative is to assist a group in the rendering of only such services to its members which are approved by the National Association of Credit Management and are consistent with the policies set forth herein.

3. It is the duty of this representative to limit discussions among those present at group meetings to the permissible topics of discussion as outlined in this guide and which are not in violation of the antitrust laws and could thereby jeopardize the individual participants, the companies they represent, or the group.

4. It is the duty of this representative to safeguard all copies of the credit reports and any group rosters that may be present at a meeting.

5. The representative is responsible for preparation of and maintaining the records of the meetings. Such records shall include an agenda of items to be discussed; the date, time and place of each meeting; the names of those in attendance and firms they represent; a summary of discussions, if any; actions taken or a notation to the effect that no actions were taken if such is the case; and the time the meeting adjourned. A verbatim transcript of proceedings is not required.

6. The staff representative must leave and withdraw any further support of the group by the Association if one or more of the individual members, separately or jointly, persist in not following the representative's warning to discontinue discussion on any matters which are prohibited under the policies set forth herein; any member who violates these principles may be subject to expulsion.

7. The staff representative should periodically review records and files of the group, and all material there in which is not deemed of any present value should be discarded. Records that are more than four years

old should be discarded unless they serve a particular purpose.

Conclusion

It is hoped that this pamphlet will help you to realize the valuable objectives of your NACM group membership, consistent with the requirements of the antitrust laws. In the event of any doubt with respect to an activity or discussion, members are urged to seek the advice of their company counsel as to whether or not such activity is lawful.

Notes:

[1]*Cement Manufactures' Protective Association v. United States*, 268 U.S. 588, 603-604.

[2]*Chain Institute v. Federal Trade Commission*, 246 F.2d 231.

[3]No consideration has been given in this pamphlet to the antitrust laws enacted by the various state legislatures.