Antitrust Fundamentals for
__[company name]__ Employees

I. __[company name]__ Policy.

At [company name], we accept the fact that compliance with laws is part of our business practices. This behavior is not only the right thing to do, but it pays off in the long run. As a market leader, we understand we may be a target of certain competitors or even disgruntled business partners seeking to undermine our competitive advantages in the marketplace by filing complaints with government agencies or lawsuits aimed at disrupting our business operations. Because volumes of our business documents must be produced in response to any investigation or lawsuit, it is always very important to be careful about what you write, and how you write it. Any document you sign can bind the company, whether or not it is called a "contract", so make certain to obtain legal review and senior management concurrence before you sign any document which legally binds the company.

In order to manage the business successfully, it is important that there be no surprises to top management. To avoid making dumb mistakes, remember that you should never hesitate to ask questions.

II. Antitrust Laws.

There are four key rules to remember, which we can shorten to four words: collusion, domination, discrimination, and unfairness. These principles are derived from the statutes and court cases interpreting them.

The key antitrust law is §1 of the Sherman Act of 1890. It prohibits conspiracies that unreasonably restrain trade. Some practices are considered always bad, and they are referred to as unreasonable per se. Other practices may be unreasonable depending on a bunch of factors, and they are evaluated under the Rule of Reason.

The per se violations require a conspiracy (more than one party). Certain horizontal activities (i.e., among competitors) fall into this area, including price fixing, group boycotts, and market or customer allocation. The prohibited vertical activity is resale price maintenance.

As a practical matter, our employees should never talk to competitors about subjects such as pricing, costs, or production. Care should be exercised when attending trade association or credit meetings.

The Rule of Reason violations are hard to precisely define. However, a restraint is more likely to be considered unreasonable when the firm imposing it has a large market share and the restraint deals with price. While care should be taken when you talk to dealers, and you should consult with the Law Department frequently before undertaking anything in this area, you can

guide the marketing and distribution activities of your dealers to a great extent, and terminate them if they do not perform.

Section 2 of the Sherman Act deals with monopolies. The risk factors here are a large market share, evidence of an intent to eliminate competition and some sort of behavior that seems to be aimed at implementing the anticompetitive plan.

The Clayton Act of 1914 deals with other practices that may violate the law, such as tying arrangements, exclusive dealing and reciprocity.

Remember, the most serious risks are those practices that are considered unreasonable per se; other practices may create legal problems, but do not always violate the law.

The Robinson-Patman Act of 1936 makes it unlawful to discriminate in price. There are cases where you can charge customers different prices, such as when they are not actually competing, when time has passed between sales, when you are meeting competition, when goods are deteriorating, when dealing with charities, or when you have cost justification. However, you should always consider the possible adverse trade relations impact of any deviation from our price list (even if completely legal), which may be extremely severe. Promotional allowances and services must be offered to competing customers on a proportionate basis.

The Federal Trade Commission Act prohibits unfair methods of competition, and unfair or deceptive acts or practices. In general, the key rule here is what we call the "nose" test: Does your proposal smell bad? All advertising and label copy must be approved by the law department, to make certain that claims are substantiated, trademarks are used properly, and other requirements (such as nutritional labeling) are met. Specific regulations govern certain promotional activities we may employ, like sweepstakes and mail order, so obtain legal review before your program is finalized.

States also have antitrust laws that may parallel the federal laws, or be more restrictive. Watch for special laws dealing with specific industries (like dairy products) or classes of people (like brokers) that have lobbied for protection.

III. Penalties.

Penalties are severe. Sherman Act violations are criminal, with jail terms of up to 3 years possible. Treble damages may also be awarded in civil suits. Always be sensitive to antitrust risks, but don't be snowed. ❄

IV. Four Easy Rules.

Don't collude.

Don't abuse market power, or talk as if you are.

Don't illegally discriminate among customers.

Don't engage in or unreasonable or deceptive practices.

V. One Even Easier Rule.

If you ever have a question, contact your division counsel. Use the phone or send an e-mail.

There is no such thing as a dumb question.