



**Federal Trade
Commission**
Protecting America's

Consumers

Appendix H
APPLICATION OF ANTITRUST PRINCIPLES
TO VOLUNTARY INDUSTRY EFFORTS TO
RESTRICT MARKETING TO UNDERAGE PERSONS

Restrictions in industry self-regulatory codes that are reasonably designed to prevent the targeting of alcohol advertising to underage persons are unlikely to violate the antitrust laws.⁽¹⁾ First, the conduct targeted by the restrictions -- advertising of alcohol to underage persons -- is not the kind of activity the antitrust laws were intended to protect. While advertising is an important part of the competitive process,⁽²⁾ selling alcohol to underage persons is not; it is unlawful and thus not a legitimate form of competitive activity. Second, there are many means by which advertising messages can reach persons who are of legal drinking age. So long as the means available for marketing to adults are not unduly restricted, legal-age consumers will continue to have access to product information, and sellers can continue to compete for their patronage.⁽³⁾ Consequently, self-regulation reasonably tailored to prevent the targeting of alcohol marketing and advertising to underage persons should not impose a significant restraint on legitimate competitive activity. In fact, reasonable self-regulation should further the competitive process by focusing competitive efforts on legitimate marketing activities and by lessening the need for government regulation.⁽⁴⁾

For similar reasons, appropriately designed code mechanisms to enforce reasonably designed restrictions also are likely to avoid antitrust problems. The use of clear and fair procedures in the design, implementation and enforcement of such restrictions should further lessen any antitrust concerns.⁽⁵⁾ Such procedural safeguards help ensure that the self-regulatory group's actions are impartial and not calculated to gain an economic or competitive advantage. Moreover, the enforcement of such codes by conditioning association membership on compliance with the standards of conduct will rarely exclude competitors from the market. This is because firms often can compete in the market without association membership. In any event, there may be a sufficient number of other firms to keep the market competitive even if one firm were expelled from membership for violating the codes.

Applying these standards, the antitrust laws are unlikely to prohibit the alcohol industry's adoption of the "best practices" and other recommendations set forth in this Report.

ENDNOTES

1. The antitrust laws are concerned about conduct that unreasonably restricts competition and harms consumers. Self-regulation reasonably designed to prevent alcohol advertising from being targeted to underage persons is unlikely to have those effects. Under the antitrust laws, the legal test applicable to most kinds of self-regulation is called the "rule of reason." This test has two components: (1) whether the conduct significantly restricts competition; and (2) whether there are legitimate justifications for the conduct that further, rather than restrict, the competitive process. See, e.g., *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918). The rule of reason test requires a balancing of these two elements. The exceptions to the application of the rule of reason test involve agreements that are not truly efforts at self-regulation, but rather are attempts to fix prices, restrict price competition, reduce output, or exclude competitors, without any legitimate justification. Such agreements are per se unlawful.
2. See, e.g., *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977) (by apprising consumers of the "availability, nature, and prices of products and services," advertising "performs an indispensable role in the allocation of resources in a free enterprise system").
3. Even if a prohibited advertising venue has a substantial adult audience, as well as a significant underage audience, competition will not be significantly affected if firms have adequate access to other, permissible advertising venues that reach that adult audience. For example, a restriction that bars advertising of alcoholic beverages on college campuses, which have a large population of underage persons, would not be anticompetitive insofar as it affects sales to underage persons, and it is unlikely to affect significantly sales to the adult college population because there are numerous other advertising venues available to reach that group. Only if the various advertising or marketing restrictions, taken together, significantly restrict the flow of information to legal-age consumers might there be an antitrust concern. As described in note 50 of this Report, there are numerous TV programs with adult audience shares above 70 percent.
4. Reasonable self-regulation to prevent marketing of alcoholic beverages to underage persons therefore is consistent with the ruling of the Supreme Court in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), where the Court held that the rule of reason analysis is limited to competitive considerations and does not accommodate non-economic goals such as health and safety considerations. Reasonable self-regulation to prevent marketing of alcoholic beverages to underage persons can assist the functioning of the market as well as serve broader societal interests. The situation in *Professional Engineers* was different. There, an association attempted to justify a ban on competitive bidding by claiming that such competition would lead to "deceptively low bids, and would thereby tempt individual engineers to do inferior work with consequent risk to public safety and health." *Id.* at 693. The Supreme Court rejected the asserted justification. Even if one could establish a link between low bids and a risk to public safety, as well as demonstrate that the elimination of such risks could enhance the competitive process, it is clear that there are far more direct ways to ensure public safety.
5. See, e.g., *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988).