

# Table of Contents

---

|                                     |      |
|-------------------------------------|------|
| <b>About the Editors</b> .....      | v    |
| <b>Introduction</b> .....           | vii  |
| <b>Acknowledgments</b> .....        | xi   |
| <b>Table of Chapters</b> .....      | xiii |
| <b>Table of Contents</b> .....      | xv   |
| <b>Table of Abbreviations</b> ..... | lxxi |

## Chapter 1 Overview of the U.S. Antitrust Laws

|  |      |
|--|------|
| <b>Enforcement of the Antitrust Laws</b> .....   | 1-3  |
| Q 1.1 What federal and state agencies are responsible for enforcing the antitrust laws? .....              | 1-3  |
| <i>Department of Justice's Antitrust Division</i> .....  | 1-4  |
| Q 1.1.1 How is the DOJ's Antitrust Division organized? .....   | 1-4  |
| <i>Federal Trade Commission</i> .....  | 1-6  |
| Q 1.1.2 How is the FTC organized? .....  | 1-6  |
| <i>State Attorneys General</i> .....   | 1-7  |
| Q 1.1.3 How are state attorneys general offices organized? .....   | 1-7  |
| <i>Agency Jurisdiction</i> .....   | 1-7  |
| Q 1.2 How do the federal antitrust agencies decide which will investigate a particular matter? .....       | 1-7  |
| Q 1.2.1 Do U.S. antitrust agencies ever coordinate investigations with foreign competition agencies? ..... | 1-9  |
| Q 1.3 How are different types of U.S. antitrust investigations initiated? .....                            | 1-10 |
| Q 1.3.1 Under what circumstances will state enforcers initiate an investigation? .....                     | 1-11 |
| Q 1.3.2 Can state investigations overlap with federal investigations? .....                                | 1-11 |
| Q 1.3.3 May a company cause the government to initiate an investigation of another company? .....          | 1-11 |
| Q 1.3.4 To what extent might members of Congress influence an antitrust investigation? .....               | 1-12 |

|  |             |
|--|-------------|
| <i>Criminal/Civil Determination</i> .....  | 1-12        |
| Q 1.4 How does the government differentiate between potential criminal and civil violations? .....                       | 1-12        |
| Q 1.4.1 Can a civil investigation be converted into a criminal investigation?.....                                       | 1-13        |
| Q 1.4.2 Are criminal and civil violations of the antitrust laws mutually exclusive?.....                                 | 1-14        |
| <b>Criminal Enforcement</b> .....  | <b>1-15</b> |
| <i>Statute of Limitations</i> .....  | 1-15        |
| Q 1.5 What is the statute of limitations for a criminal violation of the antitrust laws? .....                           | 1-15        |
| <i>The Criminal Investigation</i> .....  | 1-15        |
| Q 1.6 How is a criminal investigation conducted? .....   | 1-15        |
| Q 1.7 Do corporations and their employees need separate counsel during the course of a criminal investigation? .....     | 1-16        |
| Q 1.8 How long does a criminal investigation typically last? .....   | 1-17        |
| Q 1.9 How does the government decide whether to prosecute a company or an individual?.....                               | 1-17        |
| <i>Criminal Indictment</i> .....   | 1-17        |
| Q 1.10 What are the procedures for issuing a criminal indictment against a company or individual? .....                  | 1-17        |
| Q 1.11 Can a foreign company be prosecuted criminally?.....  | 1-18        |
| Q 1.12 Are non-U.S. executives under indictment subject to extradition? .....  | 1-18        |
| Q 1.13 Are non-U.S. executives from foreign companies placed on border watches by DOJ?.....                              | 1-19        |
| Q 1.14 Is there an opportunity to negotiate a plea before an indictment is returned? .....                               | 1-20        |
| Q 1.15 Is DOJ willing to enter into plea agreements with corporate or individual defendants post-indictment?.....        | 1-20        |
| <i>Penalties</i> .....   | 1-21        |
| Q 1.16 What types of penalties do companies and individuals face in connection with a criminal enforcement action? ..... | 1-21        |
| Q 1.16.1 Is there any way for corporations involved in unlawful activities to obtain favorable treatment? .....          | 1-22        |
| <i>Leniency Policies</i> .....   | 1-23        |
| Q 1.17 How does a corporation obtain leniency? .....   | 1-23        |
| Q 1.17.1 May a company qualify for leniency if it is not the first informant? .....                                      | 1-23        |

## Table of Contents

---

|   |      |
|---|------|
| <b>Civil Enforcement</b> .....  | 1-24 |
| <i>Statute of Limitations</i> .....   | 1-24 |
| Q 1.18    Is there a statute of limitations for government enforcement<br>of a civil violation of the antitrust laws? .....   | 1-24 |
| <i>Civil Enforcement Investigation</i> .....  | 1-24 |
| Q 1.19    How is a civil enforcement investigation conducted? .....   | 1-24 |
| Q 1.19.1    Does a company under investigation have access to<br>information collected by the government?.....  | 1-25 |
| <i>Resolution/Remedies</i> .....  | 1-26 |
| Q 1.20    What remedies may the government pursue in a civil<br>enforcement action? .....   | 1-26 |
| Q 1.20.1    If an investigation is closed without action, is that<br>a final resolution of the matter? .....  | 1-26 |
| Q 1.21    How and when does an investigation turn into an<br>enforcement action? .....  | 1-27 |
| Q 1.21.1    When a formal complaint is issued against a<br>company, who hears the case?.....  | 1-27 |
| Q 1.21.2    Can a party appeal an administrative law judge’s<br>decision if it loses an FTC trial?.....   | 1-29 |
| <i>Settlements</i> .....  | 1-29 |
| Q 1.22    How does a company settle a civil matter with the<br>government? .....  | 1-29 |
| Q 1.22.1    How are DOJ antitrust consent decrees issued?.....  | 1-30 |
| Q 1.22.2    How are FTC antitrust consent orders issued? .....  | 1-31 |
| Q 1.23    Do settlements operate as a finding of liability in lawsuits<br>brought by third parties? .....   | 1-31 |
| Q 1.24    What is the typical duration of a case from the time a<br>complaint is issued until a final decision? .....   | 1-32 |
| Q 1.25    Can a company obtain an advance ruling from the<br>government about the legality of a particular course<br>of conduct?.....                                     | 1-32 |
| <b>Private Enforcement</b> .....  | 1-33 |
| <i>Standing</i> .....   | 1-33 |
| Q 1.26    Who can bring private lawsuits for violations of the<br>federal antitrust laws? .....   | 1-33 |
| Q 1.26.1    Can a foreign plaintiff sue in U.S. district courts for<br>violations of U.S. antitrust laws concerning trade or<br>commerce outside the United States? ..... | 1-34 |

|                                      |  |      |
|--------------------------------------|--|------|
| Q 1.26.2                             | Can private plaintiffs sue in the United States for violations of foreign antitrust laws, or in foreign jurisdictions for violations of U.S. antitrust laws? .....               | 1-35 |
| Q 1.27                               | Generally, what must a plaintiff demonstrate to bring a private action for a violation of state antitrust laws? .....  | 1-36 |
| Q 1.28                               | What must a private antitrust plaintiff allege to establish standing to assert a claim for damages under section 4 of the Clayton Act? .....                                     | 1-37 |
| Q 1.28.1                             | What qualifies as “injury to business or property”? .....  | 1-39 |
| Q 1.28.2                             | How does a plaintiff show that the injury was “by reason of” an antitrust violation? .....   | 1-39 |
| Q 1.28.3                             | How does a plaintiff prove a causal connection between the defendant’s antitrust violation and the plaintiff’s injury? .....   | 1-40 |
| Q 1.28.4                             | How does a plaintiff show “antitrust injury”? .....  | 1-40 |
| Q 1.29                               | What is the indirect purchaser doctrine? .....   | 1-42 |
| Q 1.29.1                             | Can indirect purchasers obtain relief for antitrust violations after <i>Illinois Brick</i> ? .....   | 1-42 |
| Q 1.29.2                             | What are <i>Illinois Brick</i> repealer statutes? .....  | 1-43 |
| Q 1.29.3                             | How does the Supreme Court’s decision in <i>Apple v. Pepper</i> alter the indirect purchaser doctrine? .....   | 1-44 |
| Q 1.29.4                             | What changes can a company make to its distribution practices to mitigate risk from antitrust lawsuits as a result of the Supreme Court’s <i>Apple v. Pepper</i> decision? ..... | 1-45 |
| Q 1.30                               | What must a private antitrust plaintiff allege to establish standing to assert a claim for injunctive relief under section 16 of the Clayton Act? .....                          | 1-46 |
| <i>Antitrust Class Actions</i> ..... |  | 1-47 |
| Q 1.31                               | Can any federal antitrust claim be brought as a class action? .....  | 1-47 |
| Q 1.31.1                             | What are the prerequisites for class certification in an antitrust case? .....   | 1-47 |
| <i>Risk and Remedies</i> .....       |  | 1-49 |
| Q 1.32                               | What is the probability that a government investigation or enforcement action will lead to a private suit? .....   | 1-49 |
| Q 1.32.1                             | How can a party mitigate the risk of a private suit? .....   | 1-49 |
| Q 1.33                               | What remedies are available to a private plaintiff for a defendant’s violation of the antitrust laws? .....  | 1-50 |
| Q 1.34                               | With what level of specificity must damages be proven? .....   | 1-50 |
| Q 1.34.1                             | What categories of damages are typically available in antitrust suits? .....   | 1-51 |
| Q 1.34.2                             | How are damages calculated? .....  | 1-52 |

## Table of Contents

---

|  |   |      |
|--|---|------|
| Q 1.34.3                                   | Are antitrust defendants jointly and severally liable for plaintiff's injuries? .....   | 1-53 |
| Q 1.34.4                                   | Is an antitrust plaintiff entitled to prejudgment interest? .....   | 1-53 |
| Q 1.34.5                                   | Is an antitrust plaintiff entitled to post-judgment interest? .....   | 1-54 |
| Q 1.34.6                                   | Is a successful antitrust plaintiff entitled to recover attorney fees? .....  | 1-54 |
| Q 1.35                                     | What kinds of injunctive relief are available to a private antitrust plaintiff? .....   | 1-55 |
| Q 1.35.1                                   | Can a private plaintiff sue to enjoin a merger from being consummated? .....  | 1-55 |
| Q 1.35.2                                   | What must an antitrust plaintiff prove to demonstrate entitlement to injunctive relief? .....   | 1-56 |
| <i>Defenses</i> .....                      |   | 1-56 |
| Q 1.36                                     | What are some common defenses available to an antitrust defendant in a private antitrust suit? .....  | 1-56 |
| Q 1.36.1                                   | Does the doctrine of unclean hands apply to antitrust claims? .....   | 1-57 |
| Q 1.36.2                                   | Does the doctrine of <i>in pari delicto</i> apply to antitrust claims? .....  | 1-58 |
| <i>Statute of Limitations</i> .....        |   | 1-58 |
| Q 1.37                                     | What is the statute of limitations for private actions under the Clayton Act? .....   | 1-58 |
| Q 1.37.1                                   | Can the statute of limitations be tolled? .....   | 1-59 |
| Q 1.38                                     | What is the doctrine of fraudulent concealment? .....   | 1-60 |
| Q 1.38.1                                   | Must fraudulent concealment be pled by an antitrust plaintiff that seeks to toll a statute of limitations and, if so, with what level of specificity? .....                                       | 1-60 |
| Q 1.39                                     | Are state statutes of limitations for private actions under state antitrust statutes different from the federal statute of limitations for private antitrust actions under the Clayton Act? ..... | 1-61 |
| <b>Antitrust Exemptions/Immunity</b> ..... |   | 1-62 |
| <i>Noerr-Pennington Doctrine</i> .....     |   | 1-62 |
| Q 1.40                                     | Is it an antitrust violation to ask the government to take anticompetitive action? .....  | 1-62 |

|          |   |      |
|----------|---|------|
| Q 1.41   | What types of government petitioning typically have antitrust immunity? .....   | 1-62 |
| Q 1.41.1 | Does petitioning immunity apply to lobbying the government for anticompetitive legislation or regulatory action? .....                              | 1-63 |
| Q 1.41.2 | Does petitioning immunity apply to participation in litigation or administrative proceedings? .....   | 1-63 |
| Q 1.41.3 | Does petitioning immunity apply to requests for unlawful government action? .....   | 1-63 |
| Q 1.41.4 | Does petitioning immunity apply when the government is acting in a commercial capacity? .....   | 1-63 |
| Q 1.41.5 | Does petitioning immunity apply to compulsory filings with government bodies? .....   | 1-64 |
| Q 1.41.6 | Does petitioning immunity apply to settlement agreements? .....   | 1-64 |
| Q 1.42   | What types of government petitioning typically are excluded from antitrust immunity? .....  | 1-64 |
|          | <i>Sham Litigation</i> .....  | 1-65 |
| Q 1.42.1 | What is sham litigation? .....  | 1-65 |
| Q 1.42.2 | What must be proved to show litigation was a sham? .....  | 1-65 |
| Q 1.42.3 | Can immunity ever apply to petitioning that involves deliberate misrepresentations? .....   | 1-66 |
| Q 1.42.4 | Why does immunity not apply to petitioning of nongovernmental organizations? .....  | 1-67 |
| Q 1.43   | If the conduct in question is determined not to have antitrust immunity, what must be proved to show the conduct violated the antitrust laws? ..... | 1-67 |
|          | <i>Industry-Specific Exemptions</i> .....   | 1-67 |
| Q 1.44   | Are any industries or business activities outside the reach of the antitrust laws?.....   | 1-67 |
| Q 1.44.1 | What industries or business activities are expressly exempt from the antitrust laws? .....  | 1-68 |
|          | <i>State Action (Parker Immunity) Doctrine</i> .....  | 1-68 |
| Q 1.45   | What is the state action doctrine? .....  | 1-68 |
| Q 1.45.1 | How is the active-supervision requirement satisfied? .....  | 1-69 |
|          | <i>Filed-Rate (Keogh) Doctrine</i> .....  | 1-71 |
| Q 1.46   | What is the filed-rate doctrine? .....  | 1-71 |

## Table of Contents

---

|  |      |
|--|------|
| <i>Implied Immunity</i> .....  | 1-71 |
| Q 1.47 What is implied immunity? .....   | 1-71 |
| Q 1.47.1 How does a court determine that there is a need<br>for implied immunity?..... | 1-71 |
| Q 1.48 Are the antitrust laws relaxed during periods of national<br>emergency? .....   | 1-73 |

## **Chapter 2 Antitrust Investigations and Litigation in the United States**

|   |      |
|---|------|
| <b>Initial Considerations</b> .....   | 2-4  |
| Q 2.1 What should a company faced with an investigation or<br>litigation do first? .....  | 2-4  |
| <i>Assembling a Team</i> .....  | 2-5  |
| Q 2.2 What type of team should the company assemble to<br>respond to an antitrust investigation/litigation? .....                                     | 2-5  |
| Q 2.2.1 What factors should a company consider in selecting<br>counsel to manage the investigation? .....   | 2-5  |
| Q 2.2.2 What factors should a company consider in selecting<br>economists and other experts? .....  | 2-7  |
| Q 2.2.3 What factors should a company consider in selecting<br>an e-discovery vendor? .....   | 2-7  |
| <i>Managing Communications, Exposure, Confidentiality</i> .....   | 2-8  |
| Q 2.3 How should the company manage inquiries from employees<br>and the public? .....   | 2-8  |
| Q 2.4 What should the company say to management about the<br>potential risks and outcome of an investigation/litigation? .....                        | 2-8  |
| Q 2.4.1 Should the company be concerned about disclosure<br>of trade secrets/confidential information? .....  | 2-9  |
| Q 2.4.2 Should the company be concerned about<br>confidentiality of documents submitted to the<br>government during an antitrust investigation? ..... | 2-10 |
| Q 2.4.3 Should the company be concerned about<br>confidentiality of discussions with government<br>officials during an antitrust investigation? ..... | 2-11 |
| <i>Defining the Scope of the Investigation</i> .....  | 2-12 |
| Q 2.5 What important considerations should the company<br>take into account with respect to the scope of the<br>investigation? .....                  | 2-12 |

|  |             |
|--|-------------|
| <i>Budgeting</i> .....   | 2-12        |
| Q 2.6     How should a company budget for an investigation/litigation? .....   | 2-12        |
| <b>Internal Investigations</b> .....   | <b>2-13</b> |
| <i>Overview</i> .....  | 2-13        |
| Q 2.7     What should a company do if it receives word that a whistleblower has reported potential anticompetitive conduct by the company? ..... | 2-13        |
| Q 2.7.1     What are the ramifications of not properly investigating whistleblower information? .....  | 2-14        |
| Q 2.7.2     What, if anything, should the company tell the whistleblower in response to his/her report? .....                                    | 2-15        |
| <i>Initial Response</i> .....  | 2-16        |
| Q 2.8     What should the plan of action be for a company contemplating an internal investigation? .....   | 2-16        |
| Q 2.8.1     Who will conduct the investigation? .....  | 2-16        |
| Q 2.8.2     Who is the investigating team's client? .....  | 2-18        |
| Q 2.8.3     How will the attorney-client privilege be maintained? .....  | 2-18        |
| Q 2.8.4     How will the company deal with employees whose interests may be in conflict with the company's? .....                                | 2-19        |
| Q 2.8.5     What is the scope of the investigation? .....  | 2-20        |
| Q 2.8.6     How and to whom will the results of the investigation be reported? .....   | 2-20        |
| <i>Interviews, Collecting Information/Documents</i> .....  | 2-20        |
| Q 2.9     How should interviews be conducted? .....  | 2-20        |
| Q 2.9.1     What warnings or advice should the company or its outside counsel give to the employees it interviews? .....                         | 2-21        |
| Q 2.9.2     Should the interviews be summarized in writing? .....  | 2-24        |
| Q 2.9.3     Is there any risk that a company might end up having to produce its interview summaries? .....                                       | 2-24        |
| Q 2.10    What documents should be collected and reviewed? .....   | 2-25        |
| Q 2.10.1    How should the company conduct document collection? .....  | 2-26        |
| <i>Managing the Costs and Outcomes of an Internal Investigation</i> .....  | 2-26        |
| Q 2.11    Where an investigation concludes that employees have violated the antitrust laws, what can be done to mitigate liability? .....        | 2-26        |
| Q 2.11.1    Should employees who were involved in wrongdoing be terminated? .....  | 2-27        |



## Table of Contents

---

|   |  |      |
|---|--|------|
| Q 2.11.2  | Do employees who appear to have engaged in misconduct need separate representation? .....  | 2-28 |
| Q 2.11.3  | Should the company pay the attorney fees of an employee needing separate counsel? .....  | 2-29 |
| Q 2.12  | If the investigation finds no clear wrongdoing, what should the company do? .....  | 2-29 |
| <b>Federal Government Civil Conduct Investigations</b> .....  |  | 2-30 |
| <i>Overview</i> .....   |  | 2-30 |
| Q 2.13  | Which agency conducts civil investigations? .....  | 2-30 |
| <i>Subpoenas/Requests for Information</i> .....               |  | 2-31 |
| Q 2.14  | How do the agencies collect information during civil investigations? .....   | 2-31 |
| Q 2.14.1  | What is a voluntary request for information? .....   | 2-31 |
| Q 2.14.2  | How do agencies use compulsory process to obtain evidence? .....   | 2-31 |
| Q 2.15  | How should a company respond to a voluntary letter request for information from the DOJ or FTC? .....                                | 2-33 |
| Q 2.16  | How should a company respond to a subpoena or CID? .....   | 2-33 |
| Q 2.16.1  | When is the appropriate response to comply? .....  | 2-34 |
| Q 2.16.2  | When is the appropriate response to negotiate the scope of the subpoena/CID? .....   | 2-34 |
| Q 2.16.3  | When is the appropriate response to initiate an action to quash or limit the subpoena/CID? .....                                     | 2-35 |
| Q 2.16.4  | When is the appropriate response to let the agency seek enforcement? .....   | 2-36 |
| Q 2.17  | What is the burden of responding to a government request? .....  | 2-36 |
| Q 2.17.1  | Should outside counsel be retained to deal with responding to information requests? .....  | 2-37 |
| Q 2.18  | Can the DOJ or FTC share information provided by an investigated company with other antitrust agencies in other jurisdictions? ..... | 2-38 |
| <i>Document Preservation and Production Obligations</i> ..... |  | 2-39 |
| Q 2.19  | What first steps should a company take with regard to its document preservation and production obligations? .....                    | 2-39 |
| Q 2.19.1  | What does a legal hold notice entail? .....  | 2-39 |
| Q 2.19.2  | How should a company establish procedures for retention of electronic information? .....   | 2-40 |
| Q 2.19.3  | How should a company handle collecting information from an employee no longer at the company? .....                                  | 2-40 |

|  |      |
|--|------|
| <i>Managing the Costs and Outcomes of a Government Investigation</i> .....   | 2-41 |
| Q 2.20 How long does a government investigation take?.....   | 2-41 |
| Q 2.21 What is the cost of a government investigation? .....   | 2-41 |
| Q 2.21.1 Is there any way to limit the expenses and burden<br>of a government investigation? .....   | 2-42 |
| Q 2.22 Can the subject of an investigation find out who else is<br>under investigation? .....  | 2-42 |
| Q 2.23 What can a company under investigation do to develop<br>its defense?.....   | 2-43 |
| Q 2.23.1 What is a joint defense agreement? .....  | 2-44 |
| Q 2.24 What are the possible outcomes of the investigation? .....  | 2-45 |
| Q 2.25 When should a “settlement offer” be made in a<br>government civil conduct investigation? .....  | 2-46 |
| <b>Federal Government Civil Conduct Litigation</b> .....   | 2-49 |
| <i>Overview</i> .....  | 2-49 |
| Q 2.26 What are the stages of federal government civil conduct<br>litigation?.....   | 2-49 |
| Q 2.26.1 Is the filing of a complaint in an agency litigation the<br>same as in private litigation? .....  | 2-50 |
| Q 2.26.2 How does post-complaint discovery differ from<br>pre-complaint discovery?.....  | 2-50 |
| Q 2.26.3 When is preliminary relief appropriate? .....   | 2-51 |
| Q 2.26.4 Is the settlement process in agency litigation the<br>same as it is in private litigation?.....   | 2-51 |
| <i>Collection and Use of Evidence in Federal Civil Litigation</i> .....  | 2-53 |
| Q 2.27 How can evidence collected in the investigation be used<br>in litigation?.....  | 2-53 |
| Q 2.27.1 Will the defendant company have access to the<br>government’s investigative file, including<br>information collected from third parties?..... | 2-53 |
| Q 2.28 Can the defendant company conduct discovery of<br>customers and competitors? .....  | 2-54 |
| Q 2.28.1 How will confidential information be handled?.....  | 2-54 |
| Q 2.28.2 How will a defendant company preserve<br>customer relations? .....  | 2-54 |
| Q 2.29 Who is likely to be deposed? .....  | 2-54 |
| <i>Managing the Costs and Outcomes of Civil Litigation</i> .....   | 2-55 |
| Q 2.30 How long does government litigation take?.....  | 2-55 |
| Q 2.31 How much does government litigation cost? .....   | 2-56 |

## Table of Contents

---

|  |      |
|--|------|
| <b>Criminal Investigations</b> .....   | 2-57 |
| <b>Overview</b> .....  | 2-57 |
| Q 2.32    How does the DOJ decide to initiate a criminal investigation? .....  | 2-57 |
| Q 2.33    What are the stages of a criminal investigation?.....  | 2-58 |
| <b>Grand Jury Subpoenas</b> .....  | 2-59 |
| Q 2.34    What is the significance of receiving a grand jury subpoena from DOJ? .....  | 2-59 |
| Q 2.34.1    What information does a grand jury subpoena typically seek? .....  | 2-60 |
| Q 2.34.2    Who is likely to be subpoenaed to testify before a grand jury? .....   | 2-60 |
| Q 2.34.3    Can a subpoenaed witness refuse to testify?.....   | 2-60 |
| Q 2.34.4    What kind of immunity can a grand jury witness receive?.....   | 2-61 |
| Q 2.35    What should a company faced with a grand jury subpoena do first?.....  | 2-61 |
| Q 2.35.1    What should document preservation in response to a grand jury subpoena entail?.....  | 2-62 |
| Q 2.35.2    How can a company identify which employees are potential witnesses?.....   | 2-62 |
| Q 2.35.3    What should potential employee witnesses be told? .....  | 2-62 |
| Q 2.35.4    What should the company consider when contacting former employees?.....  | 2-63 |
| Q 2.35.5    What factors should a company consider in deciding how to deal with disclosures to others about the investigation?.....        | 2-64 |
| Q 2.35.6    What is the purpose of conducting an internal investigation in response to a grand jury subpoena? .....                        | 2-65 |
| Q 2.36    What is the burden of responding to a grand jury subpoena? .....   | 2-66 |
| Q 2.36.1    Can the recipient of a grand jury subpoena limit the scope of compliance with the subpoena?.....                               | 2-67 |
| Q 2.37    Should outside counsel be retained?.....   | 2-68 |
| Q 2.38    Who should take responsibility for coordinating the company's compliance with the subpoena?.....                                 | 2-68 |
| Q 2.39    How far does the company need to go when responding to subpoena specifications that call for information? .....                  | 2-69 |
| Q 2.40    What should a company under investigation do if it learns that others in its industry have received a grand jury subpoena? ..... | 2-70 |
| Q 2.41    If others are under investigation, should a joint defense agreement be created?.....   | 2-70 |

|  |      |
|--|------|
| <i>Criminal Indictment/Target Letter</i> .....   | 2-71 |
| Q 2.42 How and when does DOJ decide to hand down an indictment? .....  | 2-71 |
| Q 2.43 Does the indicted individual or company have the opportunity to respond to the merits of the indictment? .....                              | 2-72 |
| Q 2.44 Is a company informed when an investigation has concluded? .....  | 2-73 |
| <i>Managing the Costs and Outcomes of Criminal Investigation</i> .....   | 2-73 |
| Q 2.45 How long does a criminal investigation take? .....  | 2-73 |
| Q 2.46 What is the cost of a criminal investigation? .....   | 2-74 |
| Q 2.47 How likely is a criminal investigation to result in conviction? .....   | 2-74 |
| Q 2.48 What are the potential consequences if the criminal case goes to trial? .....   | 2-76 |
| Q 2.48.1 What are the potential consequences to employees from a criminal conviction? .....  | 2-76 |
| Q 2.48.2 How are criminal fines and sentences determined? .....  | 2-76 |
| Q 2.49 Can cooperation reduce the exposure of the company and its employees? .....   | 2-77 |
| Q 2.49.1 Under what circumstances should a company consider applying for leniency? .....   | 2-78 |
| Q 2.49.2 What are DOJ's criteria for granting leniency? .....  | 2-79 |
| Q 2.49.3 What is the extent of the leniency applicant's ongoing obligation to cooperate with DOJ? .....  | 2-80 |
| Q 2.49.4 Does leniency shield a company from potential civil lawsuits that might follow the criminal investigation? .....                          | 2-81 |
| <b>Private Civil Litigation</b> .....  | 2-82 |
| <i>Overview</i> .....  | 2-82 |
| Q 2.50 Typically, who are the parties in private civil litigation? .....   | 2-82 |
| Q 2.50.1 How does litigation proceed when the case involves one plaintiff against one defendant? .....   | 2-82 |
| Q 2.50.2 How does litigation proceed when the case involves a single plaintiff against multiple defendants? .....                                  | 2-82 |
| Q 2.50.3 How does litigation proceed when the case involves one plaintiff bringing a class action against one or more defendants? .....            | 2-83 |
| Q 2.50.4 How does litigation proceed when the case involves multiple plaintiffs bringing putative class actions against multiple defendants? ..... | 2-83 |

## Table of Contents

---

|   |      |
|---|------|
| <i>Initial Response</i> .....   | 2-84 |
| Q 2.51 What is the road map for dealing with such complaints?.....  | 2-84 |
| Q 2.51.1 What does a defendant need to consider in<br>answering or responding to the complaint? .....                         | 2-84 |
| Q 2.51.2 What does a defendant need to consider planning<br>the proceedings? .....  | 2-85 |
| Q 2.51.3 What does a defendant need to consider hiring an<br>economic expert? .....   | 2-86 |
| Q 2.51.4 What does a defendant need to consider gathering<br>the facts? .....   | 2-86 |
| <i>Disposing of the Case</i> .....  | 2-86 |
| Q 2.52 What opportunities will a party have to put an end to the<br>case before going to trial? .....                         | 2-86 |
| <i>Discovery, Disclosures, and Depositions</i> .....  | 2-89 |
| Q 2.53 What is the road map for discovery?.....   | 2-89 |
| Q 2.53.1 Who will be involved in discovery? .....   | 2-90 |
| Q 2.53.2 Is there any way to limit the burden of discovery? .....   | 2-91 |
| Q 2.54 What disclosures are parties obliged to comply with? .....   | 2-91 |
| Q 2.55 Who is likely to be deposed, when, and about what? .....   | 2-92 |
| <i>Special Considerations</i> .....   | 2-93 |
| Q 2.56 If the private complaint is based on a government<br>investigation, how will that affect the litigation road map?..... | 2-93 |
| Q 2.57 How does the filing of “me-too” cases affect how private<br>litigation proceeds?.....                                  | 2-94 |
| Q 2.58 How is the process of private litigation affected by who the<br>plaintiffs and their lawyers are? .....                | 2-96 |
| <i>Managing the Costs and Outcomes of Private Litigation</i> .....  | 2-96 |
| Q 2.59 How can a defendant company end meritless litigation<br>quickly and cheaply? .....                                     | 2-96 |

## Chapter 3 Managing Document and Data Discovery Process

|  |      |
|--|------|
| <b>Document/Records Retention</b> .....  | 3-2  |
| <i>Duty to Preserve</i> .....  | 3-2  |
| Q 3.1 When does a company’s duty to preserve records begin? .....  | 3-2  |
| Q 3.2 What does a legal hold obligate a party to preserve? .....   | 3-3  |
| Q 3.2.1 Can the scope of a company’s preservation obligation<br>be modified? .....   | 3-3  |
| Q 3.3 Do the rules regarding document preservation vary by<br>country? .....   | 3-4  |
| Q 3.3.1 If a company has operations outside the United<br>States, should it seek to store preserved records<br>separately? .....       | 3-4  |
| <i>Penalties for Noncompliance</i> .....   | 3-5  |
| Q 3.4 What are the penalties and sanctions for failure to<br>preserve relevant records? .....  | 3-5  |
| <i>Legal Hold Notice</i> .....   | 3-5  |
| Q 3.5 What should the distribution of a legal hold notice entail? .....  | 3-5  |
| Q 3.5.1 Is a legal hold notice discoverable? .....   | 3-6  |
| Q 3.6 When can a legal hold be lifted and the retained records<br>destroyed? .....   | 3-6  |
| <b>Document/Records Collection</b> .....   | 3-7  |
| <i>Initial Considerations</i> .....  | 3-7  |
| Q 3.7 Is records collection in private litigation different from the<br>records collection process in government investigations? ..... | 3-7  |
| Q 3.8 Should the records collection process in the United States<br>differ from that in the European Union? .....                      | 3-7  |
| Q 3.9 How can parties reduce the burden of document/records<br>collection? .....   | 3-8  |
| Q 3.9.1 How can a company limit the burdens of responding<br>to third-party discovery in antitrust matters? .....                      | 3-9  |
| Q 3.10 Does a company need permission from employees before<br>collecting their documents? .....                                       | 3-10 |
| Q 3.10.1 Should employees be interviewed before their<br>documents are collected? .....  | 3-11 |

## Table of Contents

---

|   |      |
|---|------|
| <i>Collection Process</i> .....   | 3-11 |
| Q 3.11 Who should perform the document collection? .....  | 3-11 |
| Q 3.11.1 Is it ever appropriate for employees to collect<br>their own documents? .....  | 3-12 |
| Q 3.12 What measures can be taken during records collection<br>to limit the volume of records collected while ensuring<br>that all relevant documents are collected?..... | 3-13 |
| Q 3.12.1 Does the use of search terms or technology-assisted<br>review require permission from the opposing party? .....  | 3-14 |
| <i>Duty to Update Records</i> .....   | 3-15 |
| Q 3.13 When is a party obligated to “refresh” its records collection?.....  | 3-15 |
| <b>Document Review</b> .....  | 3-16 |
| <i>Initial Considerations</i> .....   | 3-16 |
| Q 3.14 What factors most affect document review cost?.....  | 3-16 |
| Q 3.14.1 How is cost affected by the volume of documents? .....   | 3-16 |
| Q 3.14.2 How is cost affected by privileged documents?.....   | 3-17 |
| Q 3.14.3 How is cost affected by personal/sensitive<br>information?.....  | 3-17 |
| Q 3.14.4 How is cost affected by electronic shared drives and<br>storage sites? .....   | 3-17 |
| Q 3.14.5 How is cost affected by method of review? .....  | 3-18 |
| Q 3.14.6 How is cost affected by choice of vendor? .....  | 3-18 |
| Q 3.15 How long will an antitrust document review take? .....   | 3-19 |
| Q 3.16 Should a different review standard be adopted depending<br>on the type of investigation?.....  | 3-19 |
| Q 3.16.1 How should document review be structured where<br>there are concerns about future related government<br>investigations or private litigation? .....              | 3-20 |
| Q 3.17 How will document review in Europe compare to review in<br>the United States?.....   | 3-20 |
| <i>Review Process</i> .....   | 3-20 |
| Q 3.18 Who should look at the documents? .....  | 3-20 |
| Q 3.19 How should reviewed documents be identified and<br>organized? .....  | 3-21 |
| Q 3.20 How should foreign-language documents be handled?.....   | 3-22 |
| Q 3.21 How should privileged documents be handled? .....  | 3-22 |
| Q 3.21.1 How is Rule 502 of the Federal Rules of Evidence<br>relevant to antitrust litigation in federal courts? .....  | 3-23 |

|                            |   |             |
|----------------------------|---|-------------|
| Q 3.21.2                   | Will a clawback agreement protect the inadvertent disclosure of privileged information? .....                       | 3-24        |
| Q 3.21.3                   | If a company waives privilege as to the government, does it waive privilege as to others? .....                     | 3-24        |
| <b>Document Production</b> | .....   | <b>3-25</b> |
| Q 3.22                     | What are the most important considerations in planning a production? .....  | 3-25        |
| Q 3.22.1                   | What factors affect the timing of document production? .....  | 3-25        |
| Q 3.23                     | Are DOJ and FTC instructions for the production of records during merger investigations negotiable? .....           | 3-26        |
| Q 3.24                     | What are the most common points of agreement and contention over the record production in private litigation? ..... | 3-26        |
| Q 3.25                     | Can a U.S. authority require the production of documents from a company or subsidiary in the EU? .....              | 3-26        |
| Q 3.26                     | Are documents produced to a government or a private party in litigation kept confidential? .....                    | 3-27        |

## **Chapter 4    Agreements with Competitors**

|                                     |  |            |
|-------------------------------------|--|------------|
| <b>Section 1 of the Sherman Act</b> |  | <b>4-3</b> |
| Q 4.1                               | What are the key issues to analyze in determining whether an agreement between competitors violates the Sherman Act? ..... | 4-4        |
|                                     | <i>“Existence of an Agreement”</i> .....   | 4-4        |
| Q 4.2                               | What constitutes “an agreement”? .....   | 4-4        |
| Q 4.2.1                             | What are examples of “plus factors” that might indicate an agreement? .....  | 4-5        |
| Q 4.2.2                             | What is the difference between vertical and horizontal agreements? .....   | 4-8        |
| Q 4.2.3                             | Are agreements between competitors only challenged under section 1? .....  | 4-8        |
| Q 4.3                               | Who is considered a competitor? .....  | 4-9        |
| Q 4.3.1                             | Are companies with tiny market shares considered competitors? .....  | 4-9        |
| Q 4.3.2                             | Can parent-subsidiary agreements violate section 1 of the Sherman Act? .....   | 4-10       |
| Q 4.3.3                             | Can a company conspire with its affiliated companies? .....  | 4-10       |
| Q 4.3.4                             | Can a company conspire with its officers, employees, or agents? .....  | 4-12       |



## Table of Contents

---

|   |      |
|---|------|
| “Unreasonably Restrains Trade” .....  | 4-12 |
| Q 4.4 How do courts determine whether an agreement restrains trade “unreasonably”? .....  | 4-12 |
| Q 4.5 What is the “per se” analysis? .....  | 4-13 |
| Q 4.5.1 What is a “naked” agreement? .....  | 4-13 |
| Q 4.6 What is the “rule of reason” analysis? .....  | 4-15 |
| Q 4.6.1 How are agreements analyzed under the rule of reason? .....   | 4-15 |
| Q 4.6.2 What kind of evidence of anticompetitive effects is considered under a rule of reason analysis? .....   | 4-18 |
| Q 4.6.3 What kind of evidence of procompetitive effects is considered under a rule of reason analysis? .....  | 4-19 |
| Q 4.7 What are some examples of practices that are per se illegal?.....   | 4-20 |
| Q 4.7.1 Are antitrust laws violated where competitors agree on capacity issues such as output or sales quotas?.....   | 4-21 |
| Q 4.7.2 Are antitrust laws violated where competitors agree with respect to the industries, specific customers, or geographic areas each will serve? .....  | 4-23 |
| Q 4.7.3 Are antitrust laws violated where competitors agree on product attributes or specifications?.....   | 4-23 |
| Q 4.7.4 Are antitrust laws violated where a company announces in advance or otherwise publishes prices it intends to charge for its goods or services?..... | 4-24 |
| Q 4.7.5 Are antitrust laws violated where competitor buyers agree on the prices they will pay for products or services?.....                                | 4-24 |
| <b>Collaborations</b> .....   | 4-25 |
| <i>In General</i> .....   | 4-25 |
| Q 4.8 Do all forms of competitor collaborations raise antitrust risk?.....  | 4-25 |
| Q 4.9 How can parties ensure that a competitor collaboration will not violate the antitrust laws?.....  | 4-25 |
| Q 4.10 What is the difference between a merger and other forms of collaboration?.....   | 4-27 |
| Q 4.10.1 Is the size of the participants a factor in whether a collaboration will be anticompetitive?.....  | 4-28 |
| Q 4.10.2 Does the market structure of the industry involved make any difference in a collaboration?.....  | 4-28 |

|   |      |
|---|------|
| <i>Joint Ventures</i> .....   | 4-30 |
| Q 4.11 What are “joint ventures”? .....   | 4-30 |
| Q 4.11.1 How is potential antitrust risk impacted by the way<br>collaborators structure a joint venture? .....                          | 4-30 |
| Q 4.11.2 How is potential antitrust risk impacted by<br>continued competition of collaborators? .....                                   | 4-31 |
| Q 4.11.3 How is potential antitrust risk impacted by the<br>duration of the joint venture? .....  | 4-33 |
| Q 4.11.4 How is potential antitrust risk impacted by the level<br>of contribution/participation of the joint-venture<br>partners? ..... | 4-33 |
| Q 4.12 Who should control a joint venture? .....  | 4-33 |
| Q 4.12.1 Are antitrust issues raised in joint ventures where<br>there are ownership interests at low levels? .....                      | 4-34 |
| Q 4.12.2 May minority joint-venture partners have veto rights<br>over certain decisions? .....  | 4-34 |
| Q 4.12.3 Can the joint venture receive additional contributions<br>from existing participants after it is formed? .....                 | 4-35 |
| Q 4.12.4 Can “latecomers” to the joint venture be charged<br>more to participate? .....   | 4-35 |
| Q 4.13 Does the formation of the joint venture require a<br>Hart-Scott-Rodino notification filing? .....                                | 4-35 |
| Q 4.14 Can a joint-venture participant work with its joint-venture<br>partners outside the joint venture? .....                         | 4-35 |
| Q 4.14.1 Can joint-venture partners agree not to compete<br>outside the venture? .....  | 4-36 |
| Q 4.14.2 Can joint-venture partners have different<br>responsibilities for different decisions? .....                                   | 4-37 |
| Q 4.15 Are there any restrictions on directors serving on the<br>board of a joint venture and a separate company? .....                 | 4-38 |
| Q 4.16 What should a joint venture and an affiliated entity do<br>when an employee is transferred between them? .....                   | 4-38 |
| Q 4.17 Must a governing committee have representatives from<br>all joint-venture partners? .....  | 4-39 |
| Q 4.18 How do information firewalls work? .....   | 4-40 |
| <i>R&amp;D Collaborations</i> .....   | 4-40 |
| Q 4.19 What is an R&D collaboration?.....   | 4-40 |
| Q 4.19.1 Are there potential antitrust issues where<br>competitors form a research consortium but<br>continue to compete? .....         | 4-40 |

## Table of Contents

---

|  |  |      |
|--|--|------|
| Q 4.19.2   | Can two competitors enter separate R&D collaborations with the same collaborator?.....   | 4-42 |
| Q 4.19.3   | Does the formation of multiple R&D collaborations raise antitrust issues?.....   | 4-43 |
| <i>Production Joint Ventures</i> .....                         |  | 4-44 |
| Q 4.20   | What is a production joint venture? .....  | 4-44 |
| Q 4.21   | Is it lawful for a company to work with a competitor to manufacture a new product? .....   | 4-44 |
| Q 4.22   | How can potential antitrust risk in production joint ventures be reduced?.....   | 4-44 |
| <i>Sales, Marketing, and Distribution Collaborations</i> ..... |  | 4-46 |
| Q 4.23   | What is the antitrust risk where a company agrees with a competitor to sell or market its products?.....   | 4-46 |
| Q 4.23.1   | How can collaborators in sales and marketing joint ventures decrease antitrust risk?.....  | 4-47 |
| Q 4.24   | What is the antitrust risk where a company utilizes a competitor to distribute its products? .....   | 4-48 |
| Q 4.25   | Can a company discuss prices with a competitor who also happens to be a customer, distributor, or supplier? .....  | 4-50 |
| <i>Joint Buying Groups</i> .....                               |  | 4-50 |
| Q 4.26   | What is a joint buying group? .....  | 4-50 |
| Q 4.27   | When does a joint buying group raise antitrust concerns?.....  | 4-50 |
| Q 4.27.1   | Are antitrust concerns raised by joint buying groups where the participants have a large market share?.....  | 4-51 |
| Q 4.27.2   | Are antitrust concerns raised by joint buying groups where competitors centralize their storage and warehousing but otherwise continue to compete? ..... | 4-53 |
| Q 4.28   | Is a participant in a joint buying group obligated to admit a competitor to that group? .....  | 4-54 |
| Q 4.29   | Can a buying group select which vendors to work with and exclude specific vendors? .....   | 4-54 |
| <i>Trade Associations</i> .....                                |  | 4-54 |
| Q 4.30   | What antitrust concerns are raised by participation in a trade association? .....  | 4-54 |
| Q 4.31   | To what extent should a member of a trade association monitor the activities and meetings of the trade association?.....                                 | 4-55 |

|   |  |      |
|---|--|------|
| Q 4.32  | How can an employee avoid raising antitrust issues that might result from attendance at a trade association meeting? ..... | 4-55 |
| Q 4.32.1  | What are the advantages of having a lawyer present at trade association meetings? .....                                    | 4-56 |
| Q 4.32.2  | What should an employee do if a prohibited topic comes up in conversation at a trade association meeting? .....            | 4-58 |
| Q 4.32.3  | What should the company do if the employee participated in discussions about prices? .....                                 | 4-58 |
| Q 4.33  | For companies forming a trade association, do membership rules pose a risk? .....  | 4-59 |
| Q 4.34  | Does the expulsion of a member from a trade association raise antitrust concerns? .....                                    | 4-60 |
| Q 4.35  | What sort of information may be shared among trade association members? .....  | 4-60 |
| Q 4.36  | What procedures should be followed in considering the adoption of industry standards? .....                                | 4-62 |
| Q 4.36.1  | What kinds of industry standards can raise antitrust issues? .....   | 4-62 |
| Q 4.36.2  | Can a trade association set an industry standard that disadvantages or even excludes a competitor? .....                   | 4-64 |
| <b>Other Joint Conduct</b> .....                        |  | 4-64 |
| Q 4.37  | Can competitors jointly seek government action, such as the passage of certain legislation? .....                          | 4-64 |
| <i>Interlocking Directorates</i> .....                  |  | 4-66 |
| Q 4.38  | What are “interlocking directorates”? .....  | 4-66 |
| Q 4.38.1  | May an officer or director of a company serve on the board of a rival? .....   | 4-66 |
| Q 4.38.2  | Are interlocking directorates among competitors permissible? .....   | 4-67 |
| <i>Non-Compete Agreements, No-Hire Provisions</i> ..... |  | 4-68 |
| Q 4.39  | Can a company enter into an agreement not to compete for employees with another company? .....                             | 4-68 |
| Q 4.39.1  | Are the rules relating to agreements on HR issues any different in franchised businesses? .....                            | 4-69 |
| Q 4.39.2  | Can a company have its employees sign non-compete clauses in case they try to work for a competitor? .....                 | 4-70 |
| Q 4.39.3  | What kinds of no-hire provisions are permissible in a joint-venture agreement? .....                                       | 4-70 |

## Table of Contents

---

|   |      |
|---|------|
| <i>Information Sharing</i> .....  | 4-71 |
| Q 4.40 What are the risks associated with information sharing between competitors? .....  | 4-71 |
| Q 4.41 What information should never be shared with competitors? .....  | 4-71 |
| Q 4.42 How can a company that shares competitively sensitive information for a legitimate purpose avoid violating antitrust laws? ..... | 4-72 |
| Q 4.42.1 Can a company contact its competitors and obtain price information? .....  | 4-74 |
| Q 4.42.2 Can a company obtain competitor information through shared customers? .....  | 4-76 |
| Q 4.42.3 Can a company collect information/competitive intelligence about a competitor without creating antitrust risks? .....          | 4-76 |
| Q 4.43 What information can a company considering a merger with a competitor share in due diligence? .....                              | 4-78 |
| <i>Network Industries</i> .....   | 4-78 |
| Q 4.44 What are network industries?.....  | 4-78 |
| Q 4.45 Are there antitrust risks with cooperation in network industries? .....  | 4-78 |
| Q 4.46 Can a competitor be excluded from a network? .....   | 4-79 |
| <b>Outside the United States</b> .....  | 4-80 |
| <i>European Union</i> .....   | 4-80 |
| Q 4.47 How does European Union law address agreements among competitors? .....  | 4-80 |
| Q 4.47.1 Does EU law only apply to activities in the EU? .....  | 4-81 |
| Q 4.47.2 Can agreements be exempted from the article 101 prohibition?.....  | 4-81 |
| Q 4.47.3 Are there any types of agreements that are automatically exempted? .....   | 4-82 |
| Q 4.47.4 Are joint ventures covered by article 101? .....   | 4-83 |
| Q 4.48 Does the EU have a leniency procedure? .....   | 4-83 |
| <i>Mexico</i> .....   | 4-84 |
| Q 4.49 How does Mexican competition law address agreements among competitors? .....   | 4-84 |
| Q 4.50 Does Mexican law only apply to activities in Mexico? .....   | 4-84 |
| Q 4.51 How does Mexican competition law treat joint ventures? .....   | 4-84 |
| Q 4.52 Does Mexico have a leniency procedure? .....   | 4-85 |

|   |      |
|---|------|
| <i>United Kingdom</i> .....   | 4-85 |
| Q 4.53    How does the U.K. address agreements among competitors?.....    | 4-85 |
| Q 4.54    Can agreements be exempted from the Chapter 1 prohibition?..... | 4-86 |
| Q 4.55    Are joint ventures covered by Chapter 1?.....                   | 4-86 |
| Q 4.56    Does the U.K. have a leniency procedure?.....                   | 4-86 |

## **Chapter 5    Agreements Between Suppliers and Customers**

|  |      |
|--|------|
| <b>Vertical Agreements</b> .....   | 5-2  |
| <i>Generally</i> .....   | 5-2  |
| Q 5.1    What is a vertical agreement?.....  | 5-2  |
| Q 5.1.1    What federal antitrust statutes potentially apply to vertical agreements?.....                | 5-3  |
| <i>Antitrust Analysis of Vertical Agreements</i> .....   | 5-3  |
| Q 5.2    As a general matter, how are restrictions in vertical agreements analyzed?.....                 | 5-3  |
| Q 5.2.1    Has U.S. antitrust law always been so permissive with respect to vertical restrictions? ..... | 5-4  |
| Q 5.3    How does a court or agency analyze vertical agreements?.....                                    | 5-5  |
| Q 5.3.1    How does one determine whether the supplier has market power?.....                            | 5-6  |
| Q 5.3.2    What happens if the supplier is found <i>not</i> to have market power?.....                   | 5-6  |
| Q 5.3.3    What if the supplier is found to have market power? .....                                     | 5-6  |
| Q 5.4    How does a court determine if competition has been harmed by a vertical agreement?.....         | 5-6  |
| Q 5.4.1    What is the significance of the nature and extent of foreclosure?.....                        | 5-7  |
| Q 5.4.2    What is the significance of the duration of the agreement? .....                              | 5-8  |
| Q 5.4.3    What is the significance of the input to downstream competition? .....                        | 5-9  |
| Q 5.4.4    What is the significance of the impact of potential entry in the upstream market? .....       | 5-9  |
| Q 5.4.5    What is the significance of evidence of actual effects in the downstream market? .....        | 5-10 |

## Table of Contents

---

|   |  |      |
|---|--|------|
| Q 5.5                                       | How does a party considering a vertical agreement determine whether the restriction at issue is likely to result in anticompetitive effects? .....   | 5-11 |
| Q 5.6                                       | How does a party considering a vertical agreement analyze procompetitive effects if anticompetitive effects are possible or likely? .....  | 5-11 |
| <b>Dual-Distribution Arrangements</b> ..... |  | 5-12 |
| Q 5.7                                       | What is dual distribution? .....   | 5-12 |
| Q 5.7.1                                     | Are dual-distribution situations transformed into per se unlawful horizontal agreements? .....   | 5-12 |
| Q 5.7.2                                     | In dual-distribution situations, are restrictions on a distributor's resale prices transformed into per se unlawful horizontal agreements? .....   | 5-13 |
| Q 5.7.3                                     | What practical safeguards can minimize the risks inherent in dual-distribution relationships? .....  | 5-13 |
| <b>Exclusive Agreements</b> .....           |  | 5-14 |
| <i>General Considerations</i> .....         |  | 5-14 |
| Q 5.8                                       | Is a written contract required for a contract to be considered exclusive? .....  | 5-14 |
| Q 5.9                                       | How do justifications for exclusivity affect the antitrust analysis of such provisions? .....  | 5-15 |
| Q 5.10                                      | Is there any sort of "safe harbor" in which exclusive agreements do not pose any antitrust problems? .....   | 5-16 |
| <i>Exclusive Supply Agreements</i> .....    |  | 5-16 |
| Q 5.11                                      | What are exclusive supply agreements? .....  | 5-16 |
| Q 5.12                                      | What are the most important considerations for a purchaser regarding exclusive supply agreements? .....  | 5-16 |
| Q 5.13                                      | What role does the use of exclusive supply agreements by other competitors on an industry-wide basis play in the antitrust analysis of a particular agreement? .....                       | 5-17 |
| Q 5.14                                      | How can a series of bilateral exclusive supply agreements negotiated by a single customer raise antitrust risks? .....   | 5-17 |
| Q 5.15                                      | Can a purchaser seeking an exclusive supply agreement request that one of its suppliers terminate any relationships the supplier has with one or all of the purchaser's competitors? ..... | 5-18 |
| Q 5.16                                      | Instead of exclusivity, can a purchaser require a supplier not to deal with a particular company? .....  | 5-19 |

|        |  |      |
|--------|--|------|
| Q 5.17 | Is an exclusive supply agreement legal when it results in one of the purchaser's large competitors being unable to meet its supply needs?.....   | 5-19 |
| Q 5.18 | Is it legal if a retailer pays a supplier (e.g., an electronics manufacturer) additional money for earlier and preferential access to new products (e.g., large-screen HDTVs) during the holiday season? .....               | 5-20 |
| Q 5.19 | If a market leader is concerned that a new competitor will free ride on its investments, what should the market leader consider before imposing an exclusivity requirement on its upstream suppliers? .....                  | 5-21 |
| Q 5.20 | How can a retailer faced with increasing encroachments on its business from online vendors minimize antitrust risk when considering contractual restrictions on its suppliers?.....  | 5-22 |
|        | <i>Exclusive Distribution Agreements</i> .....   | 5-23 |
| Q 5.21 | What is an exclusive distribution agreement? .....   | 5-23 |
| Q 5.22 | Do exclusive distribution agreements raise any significant antitrust issues? .....   | 5-23 |
| Q 5.23 | What are the procompetitive justifications for an exclusive distribution system? .....   | 5-24 |
| Q 5.24 | Doesn't the transition to an exclusive distributorship from a system involving multiple retailers eliminate competition by definition? .....   | 5-24 |
| Q 5.25 | Can a manufacturer terminate an existing exclusive distributor and appoint a new exclusive distributor?.....   | 5-25 |
| Q 5.26 | How much control can a manufacturer assert over its exclusive distributors? .....  | 5-25 |
| Q 5.27 | What practical challenges and risks does a business face when considering an exclusive distributorship? .....  | 5-26 |
| Q 5.28 | Can a manufacturer restrict its distributors to selling only in certain geographic territories? .....  | 5-27 |
| Q 5.29 | Can a manufacturer that is having difficulty serving customers in certain geographies appoint a distributor in those areas and agree that the distributor will not compete with the manufacturer in its home territory?..... | 5-28 |
| Q 5.30 | Can a manufacturer designate certain customers for sales only by the manufacturer? .....   | 5-29 |
| Q 5.31 | Can a manufacturer prohibit its distributors from selling to consumers on the Internet? .....  | 5-30 |
| Q 5.32 | Can a manufacturer penalize its dealers for selling outside of their assigned geographic territory?.....   | 5-30 |



## Table of Contents

---

|  |      |
|--|------|
| <i>Exclusive Dealing</i> .....   | 5-32 |
| Q 5.33 What is exclusive dealing? .....  | 5-32 |
| Q 5.33.1 How can exclusive dealing encourage retailers to invest adequately in the services essential to sell the supplier's products effectively?.....  | 5-32 |
| Q 5.33.2 How can exclusive dealing enhance the competitiveness of the supplier's products?.....  | 5-32 |
| Q 5.33.3 How can exclusive dealing enhance procompetitive collaborations involving confidential or proprietary information?.....   | 5-33 |
| Q 5.33.4 What are the most important considerations for a supplier regarding exclusive dealing arrangements? .....   | 5-33 |
| Q 5.34 How do courts analyze exclusive dealing arrangements? .....   | 5-33 |
| Q 5.34.1 What are the roles of duration and terminability in the antitrust analysis of exclusive dealing agreements? .....   | 5-34 |
| Q 5.34.2 What role do justifications play in analyzing exclusive dealing agreements? .....   | 5-35 |
| Q 5.35 Do minimum purchase requirements raise antitrust risks? .....   | 5-37 |
| Q 5.36 What kind of antitrust risks arise from making promotional allowance programs contingent upon exclusivity within certain stores, or on certain portions of the shelf, or in retail promotional materials (like Sunday newspaper circulars)? ..... | 5-37 |
| <b>Most-Favored-Nation Clauses</b> .....   | 5-40 |
| Q 5.37 What is a most-favored-nation clause? .....   | 5-40 |
| Q 5.37.1 Do most-favored-nation clauses pose antitrust risks? .....  | 5-40 |
| <b>Reciprocal Dealing</b> .....  | 5-42 |
| Q 5.38 What is reciprocal dealing? .....   | 5-42 |
| Q 5.38.1 Does reciprocity pose antitrust risks?.....   | 5-42 |
| <b>Resale Price Maintenance/Vertical Price Fixing</b> .....  | 5-42 |
| Q 5.39 What is resale price maintenance? .....   | 5-42 |
| Q 5.39.1 Isn't resale price maintenance just another form of illegal price fixing?.....  | 5-42 |
| Q 5.40 What are the risks that a supplier should consider in its decision to impose an RPM program? .....  | 5-45 |
| Q 5.41 Can a manufacturer implement an RPM program where several retailers have asked it to do so to help them compete more effectively against big-box retailers who also distribute the manufacturer's products? .....                                 | 5-46 |
| Q 5.42 What legal methods exist for influencing resale prices short of entering formal or informal agreements with resellers?.....   | 5-47 |

|   |  |      |
|---|--|------|
| Q 5.43                                  | How does a national accounts program work? .....   | 5-48 |
| Q 5.43.1                                | What kind of legal exposure does a national accounts program create? .....   | 5-48 |
| Q 5.44                                  | As a practical matter, how should businesses deal with RPM issues?.....  | 5-48 |
| Q 5.45                                  | What is a minimum advertised price (MAP) policy? .....   | 5-49 |
| Q 5.45.1                                | What are the benefits of a MAP policy?.....  | 5-50 |
| Q 5.45.2                                | How is a MAP policy different from resale price maintenance or a <i>Colgate</i> policy?.....   | 5-50 |
| Q 5.45.3                                | Can a business use promotional funds (like advertising payments) to influence retailer prices?.....  | 5-51 |
| Q 5.45.4                                | What are the risks associated with MAP policies? .....   | 5-51 |
| Q 5.45.5                                | What are the key safeguards to minimize risk when designing a MAP policy?.....   | 5-52 |
| Q 5.46                                  | Is a unilateral refusal to deal likely to give rise to antitrust risks? .....  | 5-53 |
| <b>Outside the United States</b> .....  |  | 5-54 |
| Q 5.47                                  | How are vertical distribution issues generally treated outside the United States?.....   | 5-54 |
| Q 5.48                                  | How are <i>Colgate</i> and MAP policies treated outside the United States? .....   | 5-54 |
| <i>European Union</i> .....             |  | 5-54 |
| Q 5.49                                  | How are vertical distribution issues treated in the European Union? .....  | 5-54 |
| Q 5.49.1                                | How does an agreement qualify under the Vertical Agreements Block Exemption (VABE)?.....   | 5-55 |
| Q 5.49.2                                | How are exclusive dealing arrangements, territorial restrictions, and other kinds of vertical arrangements with customers or suppliers treated in the EU?..... | 5-56 |
| <i>People's Republic of China</i> ..... |  | 5-57 |
| Q 5.50                                  | How are vertical distribution issues treated in China? .....   | 5-57 |
| <i>Japan</i> .....                      |  | 5-58 |
| Q 5.51                                  | How are vertical distribution issues treated in Japan? .....   | 5-58 |
| <i>Mexico</i> .....                     |  | 5-59 |
| Q 5.52                                  | How are vertical distribution issues treated in Mexico?.....   | 5-59 |
| <i>United Kingdom</i> .....             |  | 5-60 |
| Q 5.53                                  | How are vertical distribution issues treated in the United Kingdom? .....  | 5-60 |

## Table of Contents

---

|        |   |      |
|--------|---|------|
| Q 5.54 | How are exclusive dealing arrangements, territorial restrictions, and other kinds of vertical non-price arrangements with customers or suppliers treated in the United Kingdom? ..... | 5-61 |
|--------|---|------|

## Chapter 6 Mergers and Acquisitions

|  |      |
|--|------|
| <b>Premerger Planning</b> .....  | 6-3  |
| <i>Identifying Potential Antitrust Issues</i> .....  | 6-3  |
| Q 6.1 When should a party to a planned merger get its antitrust counsel involved?.....   | 6-3  |
| Q 6.2 How can antitrust considerations affect terms of the deal? .....   | 6-5  |
| Q 6.3 What kinds of antitrust issues can arise in due diligence and integration planning?.....   | 6-8  |
| <i>Potential Violations of the HSR Act—“Gun Jumping”</i> .....   | 6-9  |
| Q 6.4 What is gun jumping?.....  | 6-9  |
| Q 6.4.1 How is the existence of control or beneficial ownership determined for purposes of premerger notification and waiting period requirements? ..... | 6-9  |
| <i>Potential Violations of the Sherman Act</i> .....   | 6-12 |
| Q 6.5 What type of premerger coordination violates the Sherman Act? .....  | 6-12 |
| Q 6.6 What is competitively sensitive information? .....   | 6-13 |
| <i>Due Diligence</i> .....   | 6-14 |
| Q 6.7 What specific things can parties do in evaluating and negotiating the transaction to avoid gun jumping and section 1 concerns?.....                | 6-14 |
| Q 6.8 How should competitively sensitive information be handled in the context of due diligence?.....  | 6-15 |
| Q 6.8.1 How is the treatment of competitively sensitive information affected by who receives the information?.....                                       | 6-15 |
| Q 6.8.2 How is the treatment of competitively sensitive information affected by the form in which the information is provided? .....                     | 6-16 |
| Q 6.8.3 How is the treatment of competitively sensitive information affected by how current the information is?.....                                     | 6-16 |

|  |   |      |
|--|---|------|
| Q 6.8.4  | How is the treatment of competitively sensitive information affected by the frequency of the information exchanges? ..... | 6-16 |
| Q 6.8.5  | How is the treatment of competitively sensitive information affected by the purpose of the information exchange? .....    | 6-17 |
| <i>Integration Planning</i> .....                      |   | 6-17 |
| Q 6.9  | How can parties avoid section 1 concerns during integration planning? .....   | 6-17 |
| <b>Premerger Notification and Reporting</b> .....      |   | 6-20 |
| <i>Identifying Potential Filing Obligations</i> .....  |   | 6-20 |
| Q 6.10   | What merger control filings will be required? .....   | 6-20 |
| <i>Reporting Under the Hart-Scott-Rodino Act</i> ..... |   | 6-21 |
| Q 6.11   | Generally speaking, what does the Hart-Scott-Rodino (HSR) Act require? .....  | 6-21 |
| Q 6.11.1   | What is the purpose of the HSR Act?.....  | 6-22 |
| Q 6.12   | What transactions are subject to the HSR Act's reporting obligations? .....   | 6-22 |
| Q 6.12.1   | How does the HSR Act apply to options, warrants, notes, and other convertible securities? .....                           | 6-24 |
| Q 6.12.2   | How does the HSR Act apply to mergers and consolidations?.....  | 6-25 |
| Q 6.12.3   | How does the HSR Act treat the formation of joint ventures? .....   | 6-25 |
| Q 6.13   | What types of formations are exempt from the HSR Act's reporting requirements?.....                                       | 6-25 |
| Q 6.14   | What is a secondary acquisition? .....  | 6-26 |
| <i>Exemptions</i> .....                                |   | 6-26 |
| Q 6.15   | What types of transactions are exempt from the HSR Act? .....   | 6-26 |
| Q 6.15.1   | Which acquisitions made in the ordinary course of business may qualify as exempt? .....                                   | 6-27 |
| Q 6.15.2   | Which classes of real property may qualify for the exemption? .....   | 6-27 |
| Q 6.15.3   | When does the exemption apply to acquisitions made solely for the purpose of investment? .....                            | 6-28 |
| Q 6.15.4   | When are acquisitions of foreign assets or voting securities of foreign issuers exempt? .....                             | 6-29 |
| Q 6.15.5   | What are exempt intra-person transactions? .....  | 6-31 |

## Table of Contents

---

|   |      |
|---|------|
| <i>Filing the Notification and Report Form</i> .....  | 6-31 |
| Q 6.16 What kind of information is required for the HSR filing? .....   | 6-31 |
| Q 6.16.1 What specific documents are required in Notification and Report Form Items 4(c) and 4(d)? .....                                | 6-33 |
| Q 6.16.2 What are the consequences for not providing all of the documents required in Items 4(c) and 4(d)? .....                        | 6-36 |
| Q 6.17 When must a Notification and Report Form be filed? .....   | 6-37 |
| Q 6.17.1 Are there circumstances under which an HSR Act filing must be or may be withdrawn? .....                                       | 6-38 |
| Q 6.18 How much is the filing fee? .....  | 6-39 |
| Table 6-1: FTC Notification and Report Form Filing Fees .....   | 6-39 |
| Q 6.19 What are the penalties for failure to file? .....  | 6-39 |
| Q 6.20 Will the information contained in an HSR filing or the fact that the company submitted an HSR filing be kept confidential? ..... | 6-42 |
| <b>Substantive Issues in Merger Review</b> .....  | 6-43 |
| <i>Evaluation of Harmful Effects</i> .....  | 6-43 |
| Q 6.21 What are the federal antitrust agencies investigating when they review a merger? .....   | 6-43 |
| <i>Nature of the Merger</i> .....   | 6-44 |
| Q 6.22 What type of mergers raise competitive concerns with the antitrust agencies? .....   | 6-44 |
| Q 6.23 What do the antitrust agencies look for when investigating a horizontal merger? .....  | 6-45 |
| Q 6.23.1 What kinds of coordinated effects are examined in horizontal mergers? .....  | 6-46 |
| Q 6.23.2 What kinds of unilateral effects are examined in horizontal mergers? .....   | 6-47 |
| <i>Other Factors and Considerations in Horizontal Merger Analysis</i> .....   | 6-49 |
| Q 6.24 What are the Horizontal Merger Guidelines? .....   | 6-49 |
| Q 6.25 What is the importance of market shares in the agency's antitrust analysis? .....  | 6-50 |
| Q 6.25.1 Do high shares doom a merger? .....  | 6-50 |
| Q 6.25.2 How is market concentration measured? .....  | 6-51 |
| Q 6.26 How is merger review affected by entry arguments? .....  | 6-51 |
| Q 6.27 How is merger review affected by claims of efficiencies? .....   | 6-52 |
| Q 6.28 How is merger review affected by harm to innovation claims? .....  | 6-53 |

|  |   |             |
|--|---|-------------|
| Q 6.29   | How is merger review affected by the poor financial performance of one or both merging parties?.....                      | 6-54        |
| Q 6.30   | How is merger review affected by customers' views? .....  | 6-55        |
| Q 6.31   | How is merger review affected by "power buyers"? .....  | 6-56        |
| Q 6.32   | How is merger review affected by the discovery of "bad" documents? .....  | 6-57        |
| Q 6.33   | How is merger review affected by complaints from competitors about the merger? .....                                      | 6-58        |
| Q 6.34   | Do the DOJ and FTC investigate partial acquisitions? .....  | 6-59        |
| Q 6.35   | What is a "vertical" merger? .....  | 6-61        |
| Q 6.35.1   | What do the antitrust agencies look for when investigating a vertical merger? .....                                       | 6-61        |
| Q 6.35.2   | What is "foreclosure" in a vertical merger? .....   | 6-62        |
| Q 6.35.3   | What is the "raising rivals' costs" theory in a vertical merger?.....   | 6-63        |
| Q 6.35.4   | How can vertical mergers raise concerns related to information sharing?.....  | 6-65        |
| Q 6.35.5   | How can a vertical merger increase the likelihood of industry coordination? .....   | 6-65        |
| Q 6.35.6   | Is there a "safe harbor" for vertical mergers? .....  | 6-66        |
| Q 6.35.7   | What are the practical characteristics of vertical mergers that are more likely to be investigated (or challenged)? ..... | 6-66        |
| Q 6.35.8   | How does a company defend a vertical merger? .....  | 6-67        |
| <b>Merger Review Process</b> .....                     |   | <b>6-69</b> |
| <i>Overview</i> .....                                  |   | 6-69        |
| Q 6.36   | Under what circumstances will a merger be investigated? .....   | 6-69        |
| Q 6.36.1   | How is the merger review conducted for a transaction that does not require reporting? .....                               | 6-70        |
| Q 6.37   | Which agency will investigate the merger?.....  | 6-71        |
| Q 6.37.1   | Are there ever clearance disputes between the agencies? .....   | 6-72        |
| Q 6.37.2   | Do state agencies ever get involved in federal antitrust investigations?.....   | 6-72        |
| Q 6.38   | What is the basic timeline for a preliminary investigation under the HSR Act? .....                                       | 6-75        |
| Q 6.38.1   | What is the basic timeline for an agency review that is not reportable under the HSR Act? .....                           | 6-76        |
| Figure 6-1: HSR Reportable Transaction—FTC Model ..... |   | 6-78        |
| Figure 6-2: HSR Reportable Transaction—DOJ Model.....  |   | 6-79        |

## Table of Contents

---

|                                 |  |      |
|---------------------------------|--|------|
| Q 6.39                          | What is the length of an investigation when the reviewing agency issues a second request? .....                                  | 6-80 |
| Q 6.39.1                        | What effect can entering into a timing agreement to delay closing the transaction have on the length of the investigation? ..... | 6-80 |
| Q 6.40                          | How do the agencies block a merger? .....  | 6-82 |
| <i>The Waiting Period</i> ..... |  | 6-83 |
| Q 6.41                          | What is the HSR waiting period? .....  | 6-83 |
| Q 6.41.1                        | How long is the waiting period? .....  | 6-83 |
| Q 6.41.2                        | Can the waiting period be extended? .....  | 6-84 |
| Q 6.41.3                        | What does it entail for the parties to pull and refile? .....  | 6-84 |
| Q 6.42                          | How do the agencies make their initial assessment of the merger during the waiting period?.....                                  | 6-86 |
| <i>The Second Request</i> ..... |  | 6-88 |
| Q 6.43                          | What is a second request? .....  | 6-88 |
| Q 6.43.1                        | How do the agencies use interviews and depositions in second requests?.....  | 6-89 |
| Q 6.43.2                        | What kinds of third-party documents and data do the agencies use in their investigation? .....                                   | 6-90 |
| Q 6.43.3                        | What are the agencies looking for in the information collected in a second request? .....  | 6-90 |
| Q 6.44                          | Why are second requests so burdensome? .....   | 6-91 |
| Q 6.45                          | Can the scope of the second request response be negotiated? .....  | 6-92 |
| Q 6.45.1                        | Can the merging parties object to a second request based on burden or lack of relevance?.....                                    | 6-93 |
| Q 6.45.2                        | How are second request compliance disputes resolved? .....   | 6-93 |
| Q 6.46                          | Do the agencies publicly disclose when they decide to issue a second request?.....   | 6-94 |
| Q 6.47                          | Are there any alternatives to complying with a second request that the parties can use to address agency concerns? .....         | 6-94 |
| Q 6.47.1                        | What is a “quick-look” approach? .....   | 6-95 |
| Q 6.47.2                        | How do parties negotiate a settlement?.....  | 6-95 |
| Q 6.48                          | What happens after the parties comply with the second request? .....   | 6-96 |
| Q 6.48.1                        | How will the parties know if the agency is planning to challenge the transaction? .....  | 6-97 |
| Q 6.48.2                        | When should the parties enter into a consent agreement?.....   | 6-97 |

|   |       |
|---|-------|
| <i>Managing the Process</i> .....   | 6-98  |
| Q 6.49 How can the parties ensure that the initial merger review process will be managed effectively? .....               | 6-98  |
| Q 6.49.1 What are the pros and cons of organizing a presentation? .....   | 6-99  |
| Q 6.50 What can the parties to the merger do to ensure that the second request process will be managed effectively? ..... | 6-101 |
| Q 6.51 What team should a party to a merger assemble?.....  | 6-101 |
| Q 6.51.1 Should the parties hire an economist?.....   | 6-102 |
| Q 6.51.2 What is the role of an economist?.....   | 6-102 |
| Q 6.51.3 What can an economist do to supplement legal advice of antitrust counsel?.....                                   | 6-104 |
| Q 6.52 How will the composition of the team differ if the parties anticipate that the merger will be challenged? .....    | 6-105 |
| Q 6.53 What can the parties do to limit the burden of a merger investigation? .....                                       | 6-106 |
| <b>Merger Challenges</b> .....  | 6-107 |
| <i>Preliminary Injunctions</i> .....  | 6-107 |
| Q 6.54 How do the agencies challenge a merger? .....  | 6-107 |
| Q 6.54.1 What is the threshold of proof for a preliminary injunction?.....  | 6-107 |
| Q 6.55 Can the government challenge a merger or acquisition after it is closed? .....                                     | 6-108 |
| Q 6.56 How do challenges to consummated mergers differ from challenges to mergers not yet consummated?.....               | 6-109 |
| Q 6.57 Can states and private citizens challenge mergers and acquisitions? .....  | 6-109 |
| <i>Litigation</i> .....   | 6-111 |
| Q 6.58 How does merger litigation differ from other litigation?.....  | 6-111 |
| Q 6.59 Who should be part of the team for merger litigation? .....  | 6-112 |
| Q 6.59.1 What is the role of an economist in connection with merger litigation?.....                                      | 6-112 |
| Q 6.60 What will the litigation schedule look like? .....   | 6-113 |
| Q 6.60.1 How extensive will litigation discovery be?.....   | 6-114 |
| Q 6.60.2 Does merger litigation include live testimony? .....   | 6-115 |
| Q 6.61 How much will litigation of a merger challenge cost? .....   | 6-115 |
| Q 6.62 Will the court decide the case before the merger agreement expires? .....  | 6-115 |



## Table of Contents

---

|   |   |       |
|---|---|-------|
| Q 6.62.1                                    | If the parties to the merger win the preliminary injunction and any appeal, may they close their merger? .....  | 6-116 |
| Q 6.62.2                                    | Will the government continue the challenge by pursuing a trial on the merits even if it fails to get a preliminary injunction and the deal closes?..... | 6-116 |
| Q 6.63                                      | Is arbitration available as an alternative to litigation? .....   | 6-116 |
| <i>Merger Remedies</i> .....                |   | 6-117 |
| Q 6.64                                      | What kinds of remedies will the antitrust agencies consider? .....  | 6-117 |
| Q 6.64.1                                    | What are structural remedies? .....   | 6-117 |
| Q 6.64.2                                    | What are conduct remedies? .....  | 6-117 |
| Q 6.65                                      | Do the agencies have a preference for structural or conduct remedies? .....   | 6-118 |
| Q 6.66                                      | What will the agencies require as part of a structural remedy? .....  | 6-119 |
| Q 6.67                                      | Will the agencies permit a divestiture to occur after the parties have closed their main transaction? .....   | 6-119 |
| Q 6.68                                      | What is the process for negotiating a remedy?.....  | 6-120 |
| <b>Outside the United States</b> .....      |   | 6-121 |
| <i>European Union</i> .....                 |   | 6-121 |
| Q 6.69                                      | How does the EU's merger review system compare with the U.S. system?.....   | 6-121 |
| Q 6.69.1                                    | What are the EU thresholds for reporting a transaction? .....   | 6-122 |
| Q 6.69.2                                    | What does the EU notification and review process entail?.....   | 6-123 |
| <i>The People's Republic of China</i> ..... |   | 6-125 |
| Q 6.70                                      | Does China have a merger review regime? .....   | 6-125 |
| Q 6.70.1                                    | What transactions are "concentrations" under China's AML?.....  | 6-125 |
| Q 6.70.2                                    | What are China's thresholds for reporting a transaction? .....  | 6-126 |
| Q 6.70.3                                    | What does China's notification/review process entail? .....   | 6-126 |
| Q 6.70.4                                    | What are some of the consequences for failure to comply with China's notification requirements? .....   | 6-128 |

|  |       |
|--|-------|
| <i>Mexico</i> .....  | 6-128 |
| Q 6.71 Does Mexico have a merger review regime? .....                              | 6-128 |
| Q 6.71.1 What does Mexico’s notification and review<br>process entail? .....       | 6-129 |
| Q 6.71.2 Are there consequences for not filing a transaction<br>in Mexico? .....   | 6-130 |
| <i>United Kingdom</i> .....  | 6-130 |
| Q 6.72 How does the UK merger review system compare with<br>the U.S. system? ..... | 6-130 |
| Q 6.72.1 What are the UK jurisdictional thresholds? .....                          | 6-130 |
| Q 6.72.2 What does the UK merger regime process entail? .....                      | 6-132 |

## **Chapter 7 Acting Alone: Monopolization Claims**

|  |      |
|--|------|
| <b>Section 2 of the Sherman Act</b> .....  | 7-2  |
| <i>Statutory Framework</i> .....   | 7-3  |
| Q 7.1 Are monopolies illegal? .....  | 7-3  |
| Q 7.2 What is the basic framework for monopolization claims? .....   | 7-3  |
| Q 7.2.1 What is required for the offense of monopolization? .....  | 7-4  |
| Q 7.2.2 What is required for the offense of attempted<br>monopolization? .....   | 7-4  |
| Q 7.2.3 What is required for the offense of conspiracy<br>to monopolize? .....   | 7-4  |
| <i>Monopoly Power Versus Market Power</i> .....  | 7-5  |
| Q 7.3 What is monopoly power as a legal matter? .....  | 7-5  |
| Q 7.3.1 What is the difference between monopoly power and<br>market power? .....   | 7-5  |
| Q 7.3.2 How is the “relevant market” determined for purposes<br>of assessing monopoly power? .....   | 7-6  |
| Q 7.4 In assessing its antitrust risks, how should a company<br>determine whether it possesses monopoly power in a<br>relevant market? ..... | 7-9  |
| Q 7.4.1 Is a large market share enough to show that a<br>company is a monopolist? .....  | 7-12 |

## Table of Contents

---

|  |      |
|--|------|
| <b>Elements of Monopolization</b> .....  | 7-13 |
| <i>Exclusionary Conduct</i> .....  | 7-13 |
| Q 7.5 What types of potentially exclusionary conduct most frequently give rise to section 2 claims? .....                              | 7-13 |
| Q 7.6 How do courts define “exclusionary” conduct? .....   | 7-15 |
| Q 7.6.1 How can burdens of proof affect the evaluation of unilateral conduct? .....  | 7-16 |
| Q 7.6.2 In the absence of any single test, how should unilateral conduct be analyzed? .....  | 7-17 |
| <i>Causation</i> .....   | 7-17 |
| Q 7.7 Is all conduct by a monopolist that harms a rival considered exclusionary? .....   | 7-17 |
| Q 7.7.1 Does conduct need to drive somebody from the market in order for it to be considered exclusionary?.....                        | 7-18 |
| Q 7.7.2 What if there are other causes contributing to the failure of competitors?.....  | 7-19 |
| Q 7.8 How can a “but-for world” inquiry be used to prove causation? .....  | 7-19 |
| <i>Intent</i> .....  | 7-22 |
| Q 7.9 What role does “intent” play? .....  | 7-22 |
| Q 7.9.1 Where there is no useful evidence of intent, where should counsel look to determine whether conduct may be exclusionary? ..... | 7-23 |
| <i>Defenses</i> .....  | 7-23 |
| Q 7.10 What defenses are available to a claim of monopolization? .....   | 7-23 |
| Q 7.10.1 How does one balance exclusionary behavior against the potential harm?.....   | 7-25 |
| <b>Outside the United States</b> .....   | 7-26 |
| <i>European Union</i> .....  | 7-26 |
| Q 7.11 How does the EU’s treatment of monopolies compare to U.S. antitrust treatment? .....  | 7-26 |
| Q 7.11.1 How does EU law determine that a company is “dominant”? .....   | 7-27 |
| Q 7.11.2 What kinds of conduct constitute an abuse of a dominant position? .....   | 7-27 |
| Q 7.11.3 What role does intent play in the EU’s treatment of monopolies? .....   | 7-28 |

|   |      |
|---|------|
| <i>The People’s Republic of China</i> .....   | 7-28 |
| Q 7.12 How does China’s treatment of monopolies compare to U.S. antitrust treatment? .....  | 7-28 |
| Q 7.12.1 How does China’s law determine that a company is dominant?.....                    | 7-28 |
| Q 7.12.2 Under China’s law, what is collective dominance? .....                             | 7-28 |
| Q 7.12.3 Are presumptions of dominance rebuttable? .....                                    | 7-30 |
| Q 7.13 What kind of conduct does China’s law define as exclusionary? .....                  | 7-30 |
| <i>Japan</i> .....  | 7-31 |
| Q 7.14 How does Japan’s treatment of monopolies compare to U.S. antitrust treatment? .....  | 7-31 |
| Q 7.14.1 Under Japan’s law, when does a “monopolistic situation” exist? .....               | 7-31 |
| Q 7.15 What kind of conduct does Japan’s law define as exclusionary? .....                  | 7-32 |
| <i>Mexico</i> .....   | 7-33 |
| Q 7.16 What kinds of conduct constitute an abuse of a dominant position in Mexico? .....    | 7-33 |
| <i>United Kingdom</i> .....   | 7-33 |
| Q 7.17 What is the U.K.’s approach to monopolies and the abuse of a dominant position?..... | 7-33 |

## **Chapter 8 Acting Alone: Unilateral Pricing Issues**

|  |     |
|--|-----|
| <b>Predatory Pricing</b> .....   | 8-3 |
| Q 8.1 What is predatory pricing? .....   | 8-3 |
| Q 8.1.1 When does low pricing become an antitrust violation?.....  | 8-3 |
| Q 8.1.2 What is required to prove a violation of antitrust laws based on low pricing?.....               | 8-3 |
| Q 8.1.3 Do the antitrust laws limit the extent to which a company can raise its prices? .....            | 8-5 |
| <i>“Appropriate Measure of Cost”</i> .....   | 8-5 |
| Q 8.2 How do courts evaluate the relationship between prices and costs in a predatory pricing case?..... | 8-5 |
| Q 8.3 What costs are included in the price-cost comparison?.....   | 8-7 |

## Table of Contents

---

|   |   |             |
|---|---|-------------|
| Q 8.4                                     | What sales are considered in calculating “prices” and “costs”?.....   | 8-8         |
| Q 8.4.1                                   | Can a dominant company price its products above its costs, but at levels that it suspects are below its competitors’ costs?.....  | 8-9         |
| Q 8.4.2                                   | Can a dominant business target lower prices at a particular competitor’s customers? .....   | 8-9         |
| Q 8.4.3                                   | Can a seller still face liability for pricing below cost in an industry where the existence of other businesses makes it impossible for the seller to attain a monopoly or near-monopoly position?.....                       | 8-10        |
| Q 8.4.4                                   | If a business transfers its products to a subsidiary at a below-cost transfer price and the subsidiary sells the products at retail, are there any antitrust limitations on the prices at which the subsidiary may sell?..... | 8-11        |
| Q 8.4.5                                   | Are there any antitrust limitations on a company’s ability to market a product as a loss leader?.....   | 8-11        |
| Q 8.4.6                                   | May a business sell one product at below-cost prices and charge higher prices for other products that are compatible with, or required to use, that product? .....  | 8-12        |
| Q 8.4.7                                   | May a business offer an entry-level product for a very low price and then offer upgrades at a much higher price? .....  | 8-12        |
| Q 8.4.8                                   | How should a company evaluate predatory pricing issues when offering “buy-one-get-one-free” deals on its products? .....  | 8-13        |
| Q 8.4.9                                   | Do introductory promotional programs raise antitrust risk?.....   | 8-13        |
| Q 8.4.10                                  | Are there any limitations on an established company that wants to revive languishing sales of its older but still leading product by selling the product at below-cost prices?.....   | 8-14        |
| Q 8.4.11                                  | Can a dominant company respond to a new entrant’s introductory, below-cost pricing promotion? .....   | 8-14        |
| Q 8.5                                     | As a practical matter, how should a company evaluate any predatory pricing issues in its business planning? .....   | 8-14        |
| <b>Predatory Buying (Overbuying).....</b> |   | <b>8-16</b> |
| Q 8.6                                     | How does predatory buying differ from predatory pricing? .....  | 8-16        |
| Q 8.6.1                                   | Under what circumstances can a dominant company be accused of predatory buying?.....  | 8-16        |

|   |      |
|---|------|
| <b>Price Squeeze</b> .....  | 8-17 |
| Q 8.7 What is a price squeeze? .....  | 8-17 |
| Q 8.7.1 When does a price squeeze raise problems under<br>the antitrust laws?.....  | 8-17 |
| Q 8.7.2 Can a company that sells its products to wholesale<br>distributors and also directly to the retailers to<br>which those wholesalers sell ever violate section 2<br>by selling to its distributors at too high a price? .....  | 8-18 |
| Q 8.7.3 If a company sells its products to distributors<br>at wholesale and also transfers products to its<br>subsidiaries at an internal transfer price for sale to<br>dealers at retail, does that company have to<br>worry about monitoring its subsidiaries’<br>wholesale-to-retail prices? .....   | 8-19 |
| Q 8.7.4 If a company’s retail (but not wholesale) prices<br>are regulated by a government agency, are there<br>restrictions on the prices at which the company can<br>price at the wholesale level? What if the company<br>is selling at the wholesale level to other businesses<br>whose retail prices are also regulated by the<br>government agency? ..... | 8-19 |
| Q 8.8 As a practical matter, how should a company evaluate<br>potential price squeeze issues in its business planning?.....   | 8-20 |
| <b>Price Discrimination Under the Robinson-Patman Act</b> .....   | 8-20 |
| <i>Jurisdiction</i> .....   | 8-20 |
| Q 8.9 What is the Robinson-Patman Act? .....  | 8-20 |
| Q 8.9.1 Do states have their own counterparts to the<br>Robinson-Patman Act?.....   | 8-21 |
| Q 8.10 What does “price” mean for purposes of determining<br>whether a company has engaged in “price discrimination”<br>under the Robinson-Patman Act?.....   | 8-21 |
| Q 8.11 Does the Robinson-Patman Act apply to leases, licenses,<br>and similar relationships? .....  | 8-22 |
| Q 8.12 Does the Robinson-Patman Act apply to the sale of<br>services or other intangible items? .....   | 8-22 |
| <i>Seller Violations Generally</i> .....  | 8-23 |
| Q 8.13 Does the Robinson-Patman Act require a company to sell<br>its products at the same price to all customers? .....   | 8-23 |
| Q 8.13.1 Does the Robinson-Patman Act apply to the extent<br>a company sells its products at different prices to<br>different end-use customers? .....  | 8-24 |

## Table of Contents

---

|                                     |  |      |
|-------------------------------------|--|------|
| Q 8.13.2                            | Does the Robinson-Patman Act apply to a company that sells its products to competing customers in the same state where the company's plants are located? .....   | 8-24 |
| Q 8.13.3                            | Does the Robinson-Patman Act apply to a company that produces its products in one state and then ships them to another state where they are placed in warehouses until they are sold to customers in that state? .....   | 8-24 |
| Q 8.13.4                            | Does the Robinson-Patman Act apply to a company that sells at one price to customers in the United States and at a different price to customers overseas, or at a different price to domestic companies that then sell to customers overseas? .....            | 8-25 |
| <i>Reciprocal Dealing</i> .....     |  | 8-25 |
| Q 8.14                              | Can a company set its prices to its customers based on the prices at which it buys products from them? .....   | 8-25 |
| Q 8.14.1                            | Can a company set its prices to its customers based on the volumes at which the customers buy from the company? .....  | 8-26 |
| Q 8.14.2                            | Can a company set its prices to its customers based on the extent to which the customers exhibit loyalty to the company in their purchases or the extent to which the customers emphasize the resale of that company's products over competing products? ..... | 8-26 |
| Q 8.14.3                            | How can a company structure its prices in order to encourage customer loyalty? .....   | 8-27 |
| Table 8-1:                          | Loyalty Programs .....   | 8-27 |
| Q 8.14.4                            | Can a company condition the prices at which it sells to customers on the customers' provision of services for the company? .....   | 8-27 |
| <i>Competitive Bidding</i> .....    |  | 8-28 |
| Q 8.15                              | How does the Robinson-Patman Act apply to offers to sell or in a competitive bidding setting? .....  | 8-28 |
| <i>Like Grade and Quality</i> ..... |  | 8-29 |
| Q 8.16                              | If a company sells branded products and generic or private-label equivalents, does it have to sell them at the same price to competing customers? .....  | 8-29 |

|  |      |
|--|------|
| <i>Sales by Subsidiaries</i> .....   | 8-30 |
| Q 8.17 Does a company need to consider the price at which its subsidiary is selling to customers when those customers compete with customers to which the company itself is selling? .....                     | 8-30 |
| Q 8.17.1 Can a company be responsible under the act for the prices at which its wholesaler customers thereafter resell the company’s products? .....   | 8-30 |
| <i>Sales to Wholesalers and Retailers</i> .....  | 8-31 |
| Q 8.18 Does a company raise Robinson-Patman Act concerns where it sells to wholesalers and directly to some retailers? .....   | 8-31 |
| Q 8.18.1 What concerns are raised where a company sells to wholesalers that also sell at retail?.....  | 8-31 |
| <i>Spot Sales</i> .....  | 8-32 |
| Q 8.19 If a business sells to some customers pursuant to long-term, fixed-price contracts and to other customers on a spot basis at different prices, to what extent does the Robinson-Patman Act apply? ..... | 8-32 |
| <i>Secondary- and Tertiary-Line Violations</i> .....   | 8-32 |
| Q 8.20 Are all price discriminations between competing customers automatically prohibited by the Robinson-Patman Act? .....  | 8-32 |
| Q 8.21 How does a disfavored customer prove that there has been a reasonable possibility of an adverse effect on competition as a result of a discriminatory price offered to a competing customer? .....      | 8-33 |
| <i>Exclusive Territories/Markets</i> .....   | 8-34 |
| Q 8.22 Can a company sell at different prices to customers who sell in different geographic areas? To different customers? .....   | 8-34 |
| Q 8.22.1 Can a company avoid Robinson-Patman issues by selling at different prices to different customers and then creating exclusive territories for its customers?.....                                      | 8-34 |
| <i>Violations by Buyers</i> .....  | 8-35 |
| Q 8.23 When can a buyer be liable under the Robinson-Patman Act?.....  | 8-35 |
| Q 8.23.1 What constitutes “knowing” inducement or receipt of discrimination by a buyer? .....  | 8-35 |



## Table of Contents

---

|  |      |
|--|------|
| <i>Brokerage/Commercial Bribery</i> .....  | 8-35 |
| Q 8.24 How does the Robinson-Patman Act apply to sellers that use brokers to sell their products? .....  | 8-35 |
| Q 8.24.1 May a company pass along the savings from not dealing with a broker to its direct-buying customers?.....  | 8-36 |
| Q 8.24.2 Does the Robinson-Patman Act apply to commercial bribery? .....   | 8-36 |
| <i>Advertising and Promotional Services</i> .....  | 8-36 |
| Q 8.25 What advertising and promotional services are covered by the Robinson-Patman Act?.....  | 8-36 |
| Q 8.25.1 To what extent is a company required to offer different programs to customers that cannot take advantage of a particular advertising or promotional program? .....                        | 8-37 |
| Q 8.25.2 Does a company have to make programs it offers to its direct-buying retailers available to retailers that buy through wholesalers that it also sells to?.....                             | 8-37 |
| Q 8.25.3 Can a company condition the availability of cooperative advertising funds on a commitment by its customers not to use those funds in advertisements that display discounted prices? ..... | 8-38 |
| Q 8.25.4 Do these rules on cooperative advertising programs apply equally to sales through online retailers? .....   | 8-39 |
| Q 8.25.5 Can a company develop “right-for-us” promotional programs for certain customers?.....   | 8-40 |
| Q 8.25.6 To what extent can a company provide only selected customers with free product samples? .....   | 8-40 |
| Q 8.25.7 Can a company require its customers receiving advertising or other promotional allowances to satisfy certain standards? .....   | 8-40 |
| Q 8.25.8 Can a company’s decision to sell different product sizes to different customers be construed as a prohibited promotional service or facility?.....  | 8-41 |
| Q 8.26 As a practical matter, how can a company avoid Robinson-Patman violations in its capacity as a seller? .....  | 8-41 |
| <b>Defenses to Price Discrimination</b> .....  | 8-42 |
| Q 8.27 What are the defenses to a price discrimination claim? .....  | 8-42 |
| Q 8.27.1 Do these defenses potentially apply to volume discount schedules? .....   | 8-43 |

|   |      |
|---|------|
| <b>Cost Justification Defense</b> .....   | 8-43 |
| Q 8.28 What is the cost justification defense?.....   | 8-43 |
| Q 8.28.1 Is a business required to pass on savings from<br>cost-based differences to its customers?.....  | 8-44 |
| Q 8.28.2 Can a company offer “functional discounts” to<br>customers?.....   | 8-44 |
| <i>Meeting Competition Defense</i> .....  | 8-44 |
| Q 8.29 What is the meeting competition defense?.....  | 8-44 |
| Q 8.29.1 Can a company rely on the meeting competition<br>defense when it lowers its price to a customer in an<br>effort to prevent the customer from seeking a price<br>from one of the company’s competitors? ..... | 8-45 |
| Q 8.29.2 Whose price does the seller have to meet? .....  | 8-45 |
| Q 8.29.3 How can a company satisfy its obligation under the<br>meeting competition defense to prove that it lowered<br>its price in a good-faith effort to meet competition?.....                                     | 8-46 |
| Q 8.29.4 Does a company that has lowered its prices to some<br>customers in a good-faith effort to meet competition<br>have to lower its prices to all other competing<br>customers?.....                             | 8-47 |
| Q 8.29.5 Can a company lose its meeting competition defense<br>if, in fact, it turns out that the company undercut its<br>competitor’s price in selling to a customer? .....  | 8-47 |
| Q 8.29.6 Assuming that a company’s lower prices to some<br>customers satisfy the meeting competition defense,<br>how long can the company continue to sell to those<br>customers at those lower prices? .....         | 8-47 |
| <i>Changing Conditions Defense</i> .....  | 8-48 |
| Q 8.30 What is the changing conditions defense?.....  | 8-48 |
| <i>Functional Availability Defense</i> .....  | 8-48 |
| Q 8.31 Why is “functional availability” not strictly speaking a<br>defense?.....  | 8-48 |
| <b>Loyalty Discounts, Tying, and Bundling</b> .....   | 8-48 |
| Q 8.32 What are loyalty discounts?.....   | 8-48 |
| Q 8.32.1 Do loyalty discounts raise antitrust issues?.....  | 8-49 |
| Q 8.32.2 What are some rules of thumb for evaluating<br>whether a loyalty discount program might create<br>antitrust risks?.....  | 8-51 |

## Table of Contents

---

|          |  |      |
|----------|--|------|
| Q 8.32.3 | As a practical matter, what considerations are important in structuring an exclusive dealing or loyalty discount program? .....  | 8-52 |
| Q 8.33   | What is a tying arrangement? .....   | 8-53 |
| Q 8.33.1 | What is technological tying? .....   | 8-53 |
| Q 8.33.2 | What are the competitive benefits and costs of tying arrangements? .....   | 8-53 |
| Q 8.34   | What is the legal framework for analyzing tying arrangements? .....  | 8-54 |
| Q 8.34.1 | How can it be determined whether the offer involves separate products or services? .....   | 8-55 |
| Q 8.34.2 | How can it be determined whether the seller is forcing buyers to take the package? .....   | 8-56 |
| Q 8.34.3 | How can it be determined whether a seller has power in the tying product market? .....   | 8-56 |
| Q 8.34.4 | When can business justifications be relevant to analyzing a tie? .....   | 8-56 |
| Q 8.35   | Is it a violation for a company to sell two of its products (or services) together as a package? .....   | 8-57 |
| Q 8.35.1 | Does a company that sells Product A and Product B in a package also have to offer to sell those products separately? .....   | 8-57 |
| Q 8.36   | What are bundled discounts and bundled purchases? .....  | 8-59 |
| Q 8.36.1 | If two products are or can be mixed or combined together, is there a point at which they should be viewed as a single product and not a bundle of multiple products? .....   | 8-60 |
| Q 8.37   | How can bundled discounts raise antitrust issues? .....  | 8-60 |
| Q 8.38   | As a practical matter, how does a seller deal with bundling? .....   | 8-62 |
| Q 8.38.1 | Is a dominant company safe from liability if its bundled revenues exceed the aggregate costs of the bundled products? .....  | 8-64 |
| Q 8.38.2 | In an industry where fixed costs are high, but variable costs are low, are there limitations on the extent to which a dominant seller can bundle products where it is dominant with those products where it is not dominant? ..... | 8-65 |
| Q 8.38.3 | If a company sells a much broader line of products than its competitors, to what extent is that company limited in selling its products in bundles or packages? .....  | 8-66 |

|   |   |      |
|---|---|------|
| Q 8.38.4                                    | What if a dominant company does not know prior to undertaking a bundling program how successful the program will be in taking business from its competitors in one or more of the products in the bundle? ..... | 8-66 |
| <b>Outside the United States</b> .....      |   | 8-67 |
| <i>European Union</i> .....                 |   | 8-67 |
| Q 8.39                                      | How does EU competition law compare to U.S. antitrust law in the treatment of pricing practices? .....  | 8-67 |
| Q 8.39.1                                    | How does EU law treat predatory pricing? .....  | 8-67 |
| Q 8.39.2                                    | How does EU law treat price squeezes? .....   | 8-67 |
| Q 8.39.3                                    | How does EU law treat loyalty (or fidelity) rebates? .....  | 8-68 |
| Q 8.39.4                                    | How does EU law treat price discrimination?.....  | 8-69 |
| Q 8.39.5                                    | How does EU law treat excessive pricing?.....   | 8-69 |
| <i>The People’s Republic of China</i> ..... |   | 8-70 |
| Q 8.40                                      | How does China’s competition law address pricing issues? .....  | 8-70 |
| <i>Japan</i> .....                          |   | 8-71 |
| Q 8.41                                      | How does Japan’s competition law address pricing issues? .....  | 8-71 |
| <i>Mexico</i> .....                         |   | 8-72 |
| Q 8.42                                      | How does Mexican competition law address pricing issues? .....  | 8-72 |
| <i>United Kingdom</i> .....                 |   | 8-72 |
| Q 8.43                                      | How does U.K. competition law treat pricing practices? .....  | 8-72 |

## **Chapter 9    Acting Alone: Unilateral Conduct Not Related to Price**

|                               |  |     |
|-------------------------------|--|-----|
| <b>Refusals to Deal</b> ..... |  | 9-2 |
| Q 9.1                         | Can a company be required to deal with certain parties, such as downstream customers, upstream suppliers, or direct competitors? ..... | 9-2 |
| Q 9.2                         | Can a company refuse to deal with certain customers? .....   | 9-3 |
| Q 9.3                         | Can a company refuse to deal with its competitors? .....   | 9-3 |
| Q 9.3.1                       | When can a refusal to deal with competitors be exclusionary?.....  | 9-4 |
| Q 9.3.2                       | When must a monopolist continue business relationships with a rival?.....  | 9-4 |

## Table of Contents

---

|   |   |      |
|---|---|------|
| Q 9.3.3                                       | Is a vertically integrated monopolist required to sell to competitors or give competitors access to the monopolist's resources?.....  | 9-5  |
| Q 9.3.4                                       | What is the "essential facilities" doctrine? .....  | 9-6  |
| Q 9.3.5                                       | What elements are necessary to establish liability under the essential facilities doctrine? .....   | 9-6  |
| Q 9.3.6                                       | What facilities are "essential"? .....  | 9-7  |
| Q 9.3.7                                       | When is a monopolist's refusing access to an essential facility considered exclusionary? .....  | 9-7  |
| Q 9.4   | What are the implications of allegations that a refusal to deal is not unilateral?.....   | 9-8  |
| Q 9.4.1                                       | How can a company practically demonstrate whether it is acting unilaterally?.....   | 9-8  |
| Q 9.5   | How should a business handle refusals to deal as a practical matter? .....  | 9-10 |
| <b>Product Design and Modifications</b> ..... |   | 9-11 |
| Q 9.6   | Can a company that develops a superior product that eliminates all competitors be liable for unlawful monopolization? .....   | 9-11 |
| Q 9.7   | In an industry where rivals' products work with each other, can a company's introduction of product changes that make its product incompatible with rivals' products be unlawful exclusionary conduct?..... | 9-12 |
| Q 9.8   | Does it make a difference whether the innovation genuinely or only superficially creates an improved product?.....  | 9-13 |
| Q 9.9   | Is there an obligation to mitigate any adverse impact on rivals as a result of innovation?.....   | 9-15 |
| Q 9.10  | What other justifications may exist for product modifications?.....   | 9-16 |
| Q 9.10.1                                      | What other theories can be used to challenge product modifications?.....  | 9-17 |
| Q 9.11  | How should a business deal with product design and modifications as a practical matter?.....  | 9-17 |
| <b>Commercial Speech</b> .....                |   | 9-18 |
| Q 9.12  | Is commercial speech actionable under the antitrust laws? .....   | 9-18 |
| Q 9.13  | Can false or misleading advertising or other disparaging statements about competitive products be considered exclusionary? .....  | 9-18 |
| Q 9.13.1                                      | What if the statements do not have a negative effect on a competitor or do not mislead consumers? .....   | 9-19 |
| Q 9.13.2                                      | What if the statements are in response to advertising from a competitor?.....   | 9-19 |

|  |  |      |
|--|--|------|
| Q 9.14                                 | Can making false or misleading statements about a company’s own products ever violate the Sherman Act?.....                                  | 9-20 |
| Q 9.15                                 | How should a business deal with commercial speech issues under the antitrust laws as a practical matter? .....                               | 9-20 |
| <b>Business Torts</b> .....            |  | 9-22 |
| Q 9.16                                 | What is a business tort? .....   | 9-22 |
| Q 9.17                                 | When does a business tort become an antitrust violation? .....   | 9-22 |
| Q 9.18                                 | What types of business torts have been considered exclusionary conduct for purposes of a monopolization claim? .....                         | 9-23 |
| Q 9.18.1                               | Can misrepresentations or false statements be considered exclusionary conduct? .....   | 9-24 |
| Q 9.18.2                               | Can “stealing” employees be considered exclusionary conduct? .....   | 9-24 |
| Q 9.18.3                               | Can interfering with a competitor’s supplier or other relationships be considered exclusionary conduct?.....                                 | 9-24 |
| Q 9.18.4                               | Can industrial espionage be considered exclusionary conduct?.....  | 9-25 |
| Q 9.18.5                               | Can vandalism be considered exclusionary conduct? .....  | 9-25 |
| Q 9.19                                 | Does proof of a business tort suffice to establish an antitrust violation? .....   | 9-25 |
| Q 9.20                                 | Do business torts require proof of competitive injury? .....   | 9-26 |
| Q 9.21                                 | Is it an antitrust violation if a company’s business tort forces rivals out of business? .....   | 9-26 |
| <b>Section 5 of the FTC Act</b> .....  |  | 9-26 |
| Q 9.22                                 | What does section 5 cover? .....   | 9-26 |
| Q 9.23                                 | What does section 5 of the FTC Act prohibit? .....   | 9-29 |
| Q 9.23.1                               | Are there different legal standards for challenging certain conduct under section 5 as opposed to other statutes like the Sherman Act? ..... | 9-29 |
| Q 9.23.2                               | Do plaintiffs have a private right of action under the FTC Act?.....   | 9-30 |
| Q 9.24                                 | Have courts taken a narrow or expansive view of section 5?.....  | 9-30 |
| Q 9.24.1                               | What is the current state of section 5 enforcement?.....   | 9-31 |
| <b>Outside the United States</b> ..... |  | 9-34 |
| <i>European Union</i> .....            |  | 9-34 |
| Q 9.25                                 | How does EU competition law compare to U.S. antitrust law in the treatment of refusals to deal? .....  | 9-34 |

## Table of Contents

---

|   |   |      |
|---|---|------|
| Q 9.26                                      | How does EU competition law compare to U.S. antitrust law in treatment of product design and modifications issues? .....          | 9-35 |
| Q 9.27                                      | How does EU competition law compare to U.S. antitrust law in the treatment of commercial speech issues? .....                     | 9-36 |
| <i>The People's Republic of China</i> ..... |   | 9-37 |
| Q 9.28                                      | How does China's competition law compare to U.S. antitrust law in the treatment of unilateral conduct not related to price? ..... | 9-37 |
| <i>Japan</i> .....                          |   | 9-38 |
| Q 9.29                                      | How does Japan's competition law compare to U.S. antitrust law in the treatment of unilateral conduct not related to price? ..... | 9-38 |
| <i>Mexico</i> .....                         |   | 9-39 |
| Q 9.30                                      | How does Mexican competition law treat refusals to deal? .....  | 9-39 |
| <i>United Kingdom</i> .....                 |   | 9-39 |
| Q 9.31                                      | How does UK competition law treat refusals to deal? .....   | 9-39 |

## Chapter 10 Intellectual Property

|   |   |      |
|---|---|------|
| <b>General Principles</b> .....                                   |   | 10-3 |
| Q 10.1  | How can IP rights raise antitrust issues? .....   | 10-3 |
| Q 10.2  | For antitrust purposes, how does intellectual property differ from other forms of property? .....   | 10-3 |
| Q 10.3  | Is there a general framework for analyzing antitrust issues involving IP? .....   | 10-4 |
| Q 10.3.1  | How are market definition and market power relevant to the analysis? .....  | 10-5 |
| <b>Unilateral Refusals to License Intellectual Property</b> ..... |   | 10-6 |
| Q 10.4  | Can a party refuse to license its IP without raising antitrust issues? .....  | 10-6 |
| Q 10.4.1  | Does it make any difference if the IP owner has licensed other companies? .....   | 10-8 |
| Q 10.5  | Is there any difference between unilaterally refusing to license intellectual property and unilaterally refusing to sell a product incorporating patented technology or copyright-protected material? ..... | 10-9 |

|   |   |       |
|---|---|-------|
| Q 10.6  | Does it matter whether the company requesting a license is a competitor or a potential customer? .....  | 10-9  |
| Q 10.7  | Can an IP holder refuse to license to one company at the request of an existing licensee? .....   | 10-9  |
| Q 10.8  | As a practical matter, how should a holder of intellectual property approach refusals to license? .....   | 10-10 |
| <b>Enforcing Intellectual Property</b> .....    |   | 10-11 |
| Q 10.9  | Can merely asserting and enforcing IP result in antitrust liability? .....  | 10-11 |
| Q 10.9.1  | Under what circumstances can fraud on the PTO create antitrust liability? .....   | 10-11 |
| Q 10.9.2  | Can a purchaser be liable under the antitrust laws if it acquires patents previously obtained by fraud on the PTO and subsequently enforces them? ..... | 10-12 |
| Q 10.10   | Absent fraud on the PTO or sham litigation, can an actual or threatened infringement action create antitrust liability? .....                           | 10-13 |
| Q 10.10.1                                       | When is infringement action considered “sham litigation”? .....   | 10-13 |
| Q 10.10.2                                       | Does immunity apply to pre-litigation threats made to the alleged infringer or to communications to customers of the alleged infringer? .....           | 10-14 |
| Q 10.10.3                                       | Does the involvement of the patent holder’s licensee in litigation decisions raise antitrust issues? .....  | 10-14 |
| Q 10.10.4                                       | Do multiple lawsuits involving the same IP increase antitrust risk? .....   | 10-14 |
| Q 10.11   | As a practical matter, how should parties deal with potential <i>Walker Process</i> and sham litigation claims? .....                                   | 10-14 |
| <b>Licensing Intellectual Property</b> .....    |   | 10-15 |
| <i>Factors in Antitrust Risk Analysis</i> ..... |   | 10-15 |
| Q 10.12   | What facts are most likely to raise antitrust risk when evaluating a licensing agreement? .....   | 10-15 |
| Q 10.12.1                                       | How is it determined whether businesses that are parties to a licensing agreement are horizontal competitors? .....                                     | 10-16 |
| Q 10.12.2                                       | Is a relationship horizontal where a license enables a company to begin competing against the licensor? .....   | 10-17 |
| Q 10.13   | If an IP holder, even a monopolist, can refuse to license any company, then how can it be liable for licensing restrictions? .....                      | 10-18 |
| Q 10.13.1                                       | How can one tell whether restrictions are inside or outside the scope of the IP? .....  | 10-18 |



## Table of Contents

---

|                              |  |       |
|------------------------------|--|-------|
| Q 10.13.2                    | What if a contract does not prevent a party from acting outside the scope of the license, but changes its incentives in a manner that makes such action unlikely?..... | 10-19 |
| <i>Misuse Defenses</i> ..... |  | 10-19 |
| Q 10.14                      | What is patent misuse?.....  | 10-19 |
| Q 10.14.1                    | How does patent misuse relate to antitrust law?.....   | 10-20 |
| Q 10.15                      | What is copyright misuse?.....   | 10-22 |
| <i>Royalties</i> .....       |  | 10-22 |
| Q 10.16                      | Does antitrust law limit the royalty rate or amount an IP holder may charge for licensing its IP?.....   | 10-22 |
| Q 10.16.1                    | Does charging different royalties for the same IP rights raise antitrust or misuse issues?.....  | 10-23 |
| Q 10.16.2                    | Is it permissible for an IP holder to continue to collect royalties after licensed IP has expired?.....  | 10-24 |
| Q 10.16.3                    | Is it permissible to obtain royalties on a patent that has not yet issued?.....  | 10-24 |
| Q 10.16.4                    | May an IP holder collect royalties from two or more parties at different levels of the chain of manufacturing, distribution, and sale?.....                            | 10-24 |
| Q 10.16.5                    | When licensing a portfolio of IP rights with different expiration dates, must the IP holder reduce the royalty rate as parts of the licensed IP bundle expire?.....    | 10-27 |
| Q 10.17                      | When charging competitors royalties, what safeguards are advisable from an antitrust perspective?.....   | 10-27 |
| <i>Restrictions</i> .....    |  | 10-28 |
| Q 10.18                      | When can territorial restrictions or allocations in a licensing agreement raise antitrust issues?.....   | 10-28 |
| Q 10.18.1                    | Can a patent holder prevent its licensees from exporting their products from the United States?.....   | 10-28 |
| Q 10.18.2                    | Can patent holders require their licensees not to import infringing products from outside the country?.....  | 10-29 |
| Q 10.19                      | What are field-of-use restrictions?.....   | 10-29 |
| Q 10.19.1                    | When can field-of-use restrictions raise antitrust issues in licensing agreements?.....  | 10-30 |
| Q 10.20                      | When can customer allocations or restrictions in a licensing agreement raise antitrust issues?.....  | 10-30 |
| Q 10.21                      | Can licensors identify specific customers to which their licensees cannot sell?.....   | 10-30 |

|   |       |
|---|-------|
| <i>Exclusivity</i> .....  | 10-31 |
| Q 10.22 When do exclusive licenses raise antitrust issues?.....   | 10-31 |
| Q 10.23 When can exclusive dealing contracts involving licensed<br>IP raise antitrust issues?.....  | 10-32 |
| Q 10.23.1 What potential justifications exist for exclusive<br>dealing restrictions involving licensed IP? .....  | 10-33 |
| Q 10.23.2 Are antitrust issues raised by arrangements that<br>create incentives likely to result in exclusive dealing<br>even if exclusive dealing is not compelled?..... | 10-33 |
| <b>Tying, Bundling, and Package Licensing of Intellectual Property</b> .....  | 10-34 |
| Q 10.24 How do tying and bundling arrangements arise in the<br>context of IP licensing?.....  | 10-34 |
| Q 10.24.1 In the context of IP licensing, what is classic tying? .....  | 10-34 |
| Q 10.24.2 In the context of IP licensing, what is package<br>licensing?.....  | 10-34 |
| Q 10.24.3 In the context of IP licensing, what is bundling?.....  | 10-34 |
| Q 10.25 How have courts treated IP tying arrangements under<br>the antitrust laws?.....   | 10-34 |
| Q 10.25.1 Will courts infer tying agreements from certain<br>unilateral refusals to sell or license that would<br>otherwise be protected? .....                           | 10-35 |
| Q 10.25.2 If the owner’s IP covers both the tying and tied<br>products at issue, are there still potential antitrust<br>issues?.....                                      | 10-36 |
| Q 10.26 How can an IP holder reduce the risk of tying claims when<br>granting a license to its IP and also entering into<br>an agreement to sell related products? .....  | 10-36 |
| Q 10.27 When can a company’s package licensing of multiple IP<br>rights for a single license fee or royalty raise antitrust<br>issues?.....                               | 10-37 |
| Q 10.28 How can businesses reduce the antitrust risks associated<br>with package or bundled licensing?.....   | 10-38 |
| <b>Collateral Licensing Restraints</b> .....  | 10-39 |
| Q 10.29 What kinds of collateral restraints between licensors and<br>licensees can raise antitrust issues?.....   | 10-39 |
| <i>Grant-Back Provisions</i> .....  | 10-39 |
| Q 10.30 What is a grant-back?.....  | 10-39 |
| Q 10.30.1 When can grant-back obligations raise issues under<br>the antitrust laws?.....  | 10-39 |

## Table of Contents

---

|   |       |
|---|-------|
| <i>Non-Assert Provisions</i> .....  | 10-41 |
| Q 10.31 What is a non-assertion provision?.....   | 10-41 |
| Q 10.31.1 When can non-assertion provisions raise antitrust issues?.....  | 10-42 |
| <i>No-Challenge Provisions, Automatic Termination Provisions</i> .....  | 10-42 |
| Q 10.32 What is a no-challenge provision?.....  | 10-42 |
| Q 10.33 What is an automatic termination clause?.....   | 10-42 |
| Q 10.33.1 How do courts treat no-challenge and automatic termination clauses?.....  | 10-43 |
| <i>Non-Assignment Provisions, Approval Provisions</i> .....   | 10-43 |
| Q 10.34 What is a non-assignment provision? .....   | 10-43 |
| Q 10.35 What is an approval provision?.....   | 10-43 |
| Q 10.35.1 When do non-assignment or approval clauses raise antitrust issues? .....  | 10-43 |
| <i>Other Restraints</i> .....   | 10-44 |
| Q 10.36 When is it problematic for a licensor to set the resale price of its licensee's products? .....                                     | 10-44 |
| Q 10.37 When do restrictions on the amount of output raise antitrust issues in a licensing agreement? .....                                 | 10-46 |
| <b>Settlement of Intellectual Property Disputes</b> .....   | 10-46 |
| Q 10.38 How are IP settlements evaluated under the antitrust laws? .....  | 10-46 |
| Q 10.39 How do patent settlement agreements in the pharmaceutical industry differ from patent settlement agreements in other contexts?..... | 10-48 |
| Q 10.39.1 What has been the agencies' focus in pharmaceutical patent settlement cases?.....   | 10-49 |
| Q 10.40 How are interference settlements analyzed under the antitrust laws? .....   | 10-49 |
| Q 10.40.1 What kinds of additional defenses might be available for such settlements under the antitrust laws? .....                         | 10-50 |
| <b>Cross-License Agreements</b> .....   | 10-50 |
| Q 10.41 How is cross-licensing evaluated under the antitrust laws?.....   | 10-50 |
| Q 10.42 What kinds of relationships among patents are relevant to antitrust analysis of cross-license agreements?.....                      | 10-51 |
| Q 10.42.1 When is a relationship between patents considered blocking? .....   | 10-51 |
| Q 10.42.2 When is a relationship between patents considered complementary?.....   | 10-51 |

|   |  |              |
|---|--|--------------|
| Q 10.42.3                                       | When is a relationship between patents considered competitive?.....  | 10-52        |
| Q 10.42.4                                       | When is a relationship between patents considered essential?.....  | 10-52        |
| Q 10.43   | Under what circumstances can competitors impose restrictions on one another in a cross-license that would otherwise be impermissible between competitors?..... | 10-52        |
| Q 10.43.1                                       | Can antitrust issues arise even if the IP involved in cross-licensing agreements is essential?.....  | 10-53        |
| Q 10.43.2                                       | If the licensed IP is essential, what, if any, issues arise from exclusivity?.....   | 10-53        |
| Q 10.43.3                                       | What royalty provisions can raise antitrust issues in cross-licensing agreements? .....  | 10-55        |
| <b>Industry Standards and Patent Pools.....</b> |  | <b>10-55</b> |
| Q 10.44   | What is the relationship between industry standards and patent pools? .....  | 10-55        |
| Q 10.45   | What antitrust issues can arise from patent pools? .....   | 10-56        |
| Q 10.46   | What procompetitive and anticompetitive effects can arise from the creation of patent pools?.....  | 10-56        |
| Q 10.47   | How does antitrust law apply to the question of what patents may be included in a patent pool?.....  | 10-57        |
| Q 10.47.1                                       | What antitrust concerns are raised where a patent pool contains blocking or essential patents? .....   | 10-57        |
| Q 10.47.2                                       | What antitrust concerns are raised where a patent pool contains implementation patents?.....   | 10-58        |
| Q 10.47.3                                       | What antitrust concerns are raised where a patent pool contains competing patents?.....  | 10-58        |
| Q 10.48   | How does antitrust law apply to the structure and administration of a patent pool?.....  | 10-59        |
| Q 10.48.1                                       | How can a patent pool avoid antitrust issues raised by membership?.....  | 10-60        |
| Q 10.48.2                                       | How can a patent pool avoid antitrust issues raised by sharing of information? .....   | 10-60        |
| Q 10.48.3                                       | How can a patent pool avoid antitrust issues raised by distribution of royalties?.....   | 10-60        |
| Q 10.49   | What analysis ordinarily applies to any ancillary restraints that may accompany a patent pool?.....  | 10-61        |
| Q 10.49.1                                       | What kinds of grant-backs raise antitrust issues in the context of patent pools? .....   | 10-61        |
| Q 10.49.2                                       | What kind of antitrust issues arise from exclusivity?.....   | 10-61        |

## Table of Contents

---

|   |  |              |
|---|--|--------------|
| Q 10.50   | Other than the formation of patent pools, what steps are available to protect against patent hold-up? .....  | 10-63        |
| Q 10.50.1   | Do the antitrust laws require standards organizations or private consortia to adopt measures to reduce the likelihood of patent hold-up? .....   | 10-64        |
| Q 10.50.2   | Under what circumstances might antitrust law require a patent holder to affirmatively disclose the existence of patents or pending patent applications to actual or potential future infringers? ..... | 10-64        |
| Q 10.50.3   | Under what circumstances might antitrust law require a patent holder to license patents relating to a product or industry standard? .....  | 10-65        |
| Q 10.51   | How is it determined whether FRAND terms are fair, reasonable, and non-discriminatory? .....   | 10-67        |
| <b>Acquisition of Existing Intellectual Property Rights .....</b> |  | <b>10-68</b> |
| Q 10.52   | When must an acquisition of IP be reported to the antitrust agencies? .....  | 10-68        |
| Q 10.53   | When must the signing of an IP license agreement be reported to the antitrust agencies? .....  | 10-68        |
| Q 10.54   | What kinds of antitrust issues can arise from the acquisition of IP? .....   | 10-68        |
| Q 10.54.1   | What circumstances in IP acquisitions create unilateral effects? .....   | 10-69        |
| Q 10.54.2   | What circumstances in IP acquisitions create coordinated interaction? .....  | 10-70        |
| Q 10.54.3   | What circumstances in IP acquisitions create exclusionary effects? .....   | 10-70        |
| Q 10.54.4   | What circumstances in IP acquisitions create effects on innovation? .....  | 10-72        |
| Q 10.55   | Can IP rights make mergers more likely to escape antitrust challenge from the agencies? .....  | 10-72        |
| <b>Outside the United States .....</b>                            |  | <b>10-73</b> |
| <i>Refusal to License Intellectual Property .....</i>             |  | <i>10-73</i> |
| Q 10.56   | How do jurisdictions outside the United States treat refusals to license IP? .....   | 10-73        |
| <i>Tying, Bundling, and Package Licensing .....</i>               |  | <i>10-74</i> |
| Q 10.57   | How do jurisdictions outside the United States treat tying, bundling, and package licensing of IP? .....   | 10-74        |

|  |       |
|--|-------|
| <i>Global Licensing Agreement</i> .....  | 10-75 |
| Q 10.58 How do jurisdictions outside the United States treat global licensing agreements?..... | 10-75 |
| <i>Patent Pools and Industry Standards</i> .....   | 10-75 |
| Q 10.59 How do jurisdictions outside the United States treat patent pools?.....                | 10-75 |
| Q 10.60 How are IP settlements evaluated under EU competition law? .....                       | 10-76 |

## **Chapter 11 Antitrust Compliance Programs**

|  |      |
|--|------|
| <b>Overview</b> .....  | 11-2 |
| <i>Goals and Purpose of a Compliance Program</i> .....   | 11-2 |
| Q 11.1 What are the goals of an antitrust compliance program?.....   | 11-2 |
| Q 11.2 Why does a company need an antitrust compliance program? .....  | 11-3 |
| Q 11.2.1 Do small companies need compliance programs?.....   | 11-4 |
| Q 11.2.2 Does a global organization that operates under the laws of numerous countries need more than one compliance program? .....                          | 11-4 |
| Q 11.3 How can an effective compliance program mitigate the consequences of an antitrust offense? .....  | 11-5 |
| Q 11.3.1 Can the company receive credit for having a compliance program in place, even if one of its high-level employees violates the antitrust laws? ..... | 11-6 |
| Q 11.3.2 Can the compliance program be used against the company?.....  | 11-7 |
| Q 11.3.3 Is the company’s compliance program discoverable in any litigation or government investigation? .....   | 11-7 |
| <b>Developing an Effective Compliance Program</b> .....  | 11-7 |
| <i>Standards and Format</i> .....  | 11-7 |
| Q 11.4 How does the DOJ define “an effective compliance program”?.....   | 11-7 |
| Q 11.5 What resources can a company use to craft a compliance program? .....   | 11-8 |
| Q 11.6 How frequently should my company update its antitrust compliance program? .....   | 11-9 |

## Table of Contents

---

|           |  |       |
|-----------|--|-------|
| Q 11.7    | What are the different formats and techniques for delivering compliance training?.....   | 11-9  |
| Q 11.7.1  | What should an antitrust compliance statement look like?.....  | 11-10 |
| Q 11.7.2  | What information should a company's antitrust manual include?.....   | 11-10 |
| Q 11.7.3  | What should supplemental compliance material look like?.....   | 11-11 |
| Q 11.7.4  | What kind of mechanisms and/or incentives should an antitrust compliance program establish for employees to report potential violations? ..... | 11-11 |
|           | <i>Education and Training</i> .....  | 11-12 |
| Q 11.8    | What information should antitrust compliance training include?.....  | 11-12 |
| Q 11.9    | Who should conduct the training?.....  | 11-13 |
| Q 11.10   | Which employees need to participate in antitrust compliance training?.....   | 11-13 |
| Q 11.10.1 | Should all employees receive the same training? .....  | 11-13 |
| Q 11.10.2 | Should employees be required to acknowledge that they have participated in antitrust compliance training?.....                                 | 11-15 |
| Q 11.11   | How often should the company conduct antitrust compliance training?.....   | 11-15 |
|           | <b>Business Communications and Documents</b> .....   | 11-15 |
|           | <i>Document Creation</i> .....   | 11-15 |
| Q 11.12   | Why should a company care about the content of the documents that its employees create?.....   | 11-15 |
| Q 11.13   | What kinds of communications are most likely to raise antitrust risk?.....   | 11-16 |
| Q 11.14   | What are the most important considerations when it comes to document creation? .....   | 11-17 |
| Q 11.14.1 | What kinds of documents should counsel review before they are distributed in final form? .....   | 11-18 |
|           | <i>Document Retention Policy</i> .....   | 11-18 |
| Q 11.15   | Why does the company need to have a document retention policy?.....  | 11-18 |
| Q 11.15.1 | What is the effect of Sarbanes-Oxley on a company's document retention policy?.....  | 11-19 |

|                                    |   |       |
|------------------------------------|---|-------|
| Q 11.16                            | What are the elements of an effective document retention policy?.....   | 11-19 |
| Q 11.17                            | Under what circumstances should the company suspend its document retention policy?.....   | 11-20 |
| Q 11.17.1                          | What are the risks of not suspending the company's document retention policy during an antitrust investigation or litigation? ..... | 11-21 |
| <b>Monitoring Compliance</b> ..... |   | 11-21 |
| Q 11.18                            | How can a company monitor its compliance with the antitrust laws? .....   | 11-21 |
| <i>Compliance Officers</i> .....   |   | 11-22 |
| Q 11.19                            | Does the company need to have a compliance officer? .....   | 11-22 |
| Q 11.19.1                          | What are the duties of a compliance officer? .....  | 11-22 |
| Q 11.19.2                          | To whom should a compliance officer report?.....  | 11-23 |
| <i>Compliance Audits</i> .....     |   | 11-23 |
| Q 11.20                            | What is the purpose of conducting an antitrust compliance audit? .....  | 11-23 |
| Q 11.21                            | What form must a compliance audit take?.....  | 11-24 |
| Q 11.21.1                          | What should an advance announcement entail? .....   | 11-24 |
| Q 11.21.2                          | What kind of background information should be reviewed? .....   | 11-25 |
| Q 11.21.3                          | What should employee interviews entail? .....   | 11-25 |
| Q 11.21.4                          | What should audit document review entail? .....   | 11-26 |
| Q 11.22                            | How should the findings of the compliance audit be presented?.....  | 11-26 |
| Q 11.23                            | How often should the company conduct antitrust audits? .....  | 11-26 |
| Q 11.24                            | What kinds of information should the company look for in conducting the audit? .....  | 11-27 |
| Q 11.24.1                          | Does review of employees' email and other documents require advance notice and consent? .....                                       | 11-28 |
| Q 11.24.2                          | What measures should be taken during compliance audits to preserve any applicable privileges?.....                                  | 11-28 |
| Q 11.24.3                          | Are issues of privilege different outside the United States? .....  | 11-29 |
| <i>Mock Dawn Raids</i> .....       |   | 11-30 |
| Q 11.25                            | What is a "mock dawn raid"? .....   | 11-30 |
| Q 11.26                            | What are the possible consequences for violations of a compliance program? .....  | 11-31 |
| <b>Index</b> .....                 |   | I-1   |