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Client Alert: Jury Clears 5-Hour Energy of Liability for Antitrust Violations, But the Damage Is Done

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On Monday, October 21, 2019, a jury found that the maker of 5-Hour Energy – Living Essentials LLC – did not violate the Robinson-Patman Act when it offered Costco lower wholesale prices and instant rebates that it didn't make available to other resellers. Although 5-Hour Energy ultimately prevailed in court, the company spent scores of money on experts and legal fees to defend the case. The litigation and the costs associated with its defense highlight why companies should obtain legal advice when pricing and promoting their products.

The lawsuit, *U.S. Wholesale Outlet & Distribution Inc., et al. v. Living Essentials LLC, et al.* (pending as Case No. 2:18-cv-01077 in the U.S. District Court for the Central District of California) was brought by family-owned wholesalers who alleged that 5-Hour Energy was engaging in illegal price discrimination in violation of the Robinson-Patman Act. Specifically, Plaintiffs' expert testified that between 2012 and 2018, Costco's average net price per bottle was \$1.13, while other wholesalers had to pay an average of \$1.34 per bottle. Plaintiffs claimed that the \$0.22 price differential – which was the result of spoilage allowances, early payment discounts, rebates at the point of sale, advertising rebates, and discounts for electronic orders – had the effect of steering consumers to Costco and away from convenience stores, club stores, and drugstores. In defending the claims, 5-Hour Energy engaged multiple experts and presented expert testimony that the differences in pricing and promotions were part of a broader strategy for multichannel marketing across the United States, and that Costco was in a different market channel and not a competitor of Plaintiffs. The jury ultimately sided with 5-Hour Energy.

Despite its legal victory in court, the cost of the lawsuit from a monetary, business, and reputational perspective cannot be overstated. Throughout the case, e-mail correspondence between top executives at 5-Hour Energy exposed embarrassing and harmful communications. In one e-mail, a 5-Hour Energy executive stated, "If I was an Independent retailer I would buy my 5 Hour Energy at Costco.... They can get at Costco for .27 cent less per bottle!" In another e-mail, a high level executive stated, "I think this is very obvious as to the cause of the

Wholesaler decline... Costco.” The disclosure of these emails in court may impact 5-Hour Energy’s existing business relationships, as well as the development of future business partners.

Along with the possible public relations fallout, 5-Hour Energy spent considerable sums of money defending the case. It paid numerous experts witnesses to testify on pricing and market analyses. It also incurred significant legal fees. The fact that this issue made it all the way to a jury determination serves as an important reminder that aggressive pricing and promotional strategies bear risk.

In addition to alerting companies to the potential legal exposure they can face for failure to comply with antitrust laws, Vorys is committed to helping companies navigate these issues and implement appropriation measures to ensure antitrust compliance, and to limit the risk of a lawsuit. We recognize that antitrust compliance can be expensive and time consuming, but addressing antitrust risk on the front end will provide invaluable efficiencies and assurances to not only the company and its employees, but also to a company’s downstream distribution. Vorys has significant experience advising companies on how they can comply with the Robinson-Patman Act and other antitrust laws associated with pricing and promotions. We welcome the opportunity to discuss these issues further, and implement recommended protocols should the need arise.

If you have questions regarding this alert, please contact Ken Rubin at kjrubin@vorys.com or Kara Mundy at kmmundy@vorys.com.