

Common Pitfalls and Antitrust Compliance Risks with Association-Sponsored Market Research Programs

Monday, October 7, 2013, 12:30 p.m. – 2:00 p.m. EDT
Venable LLP, Washington, DC

Moderator:

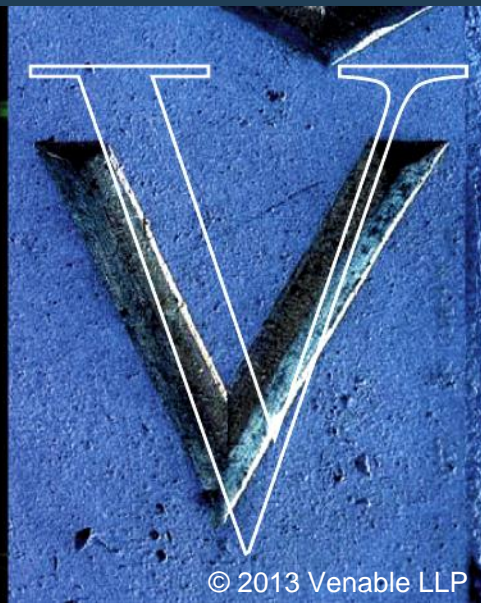
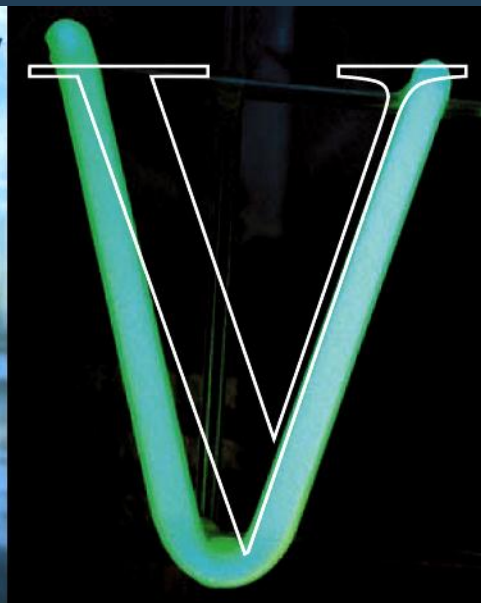
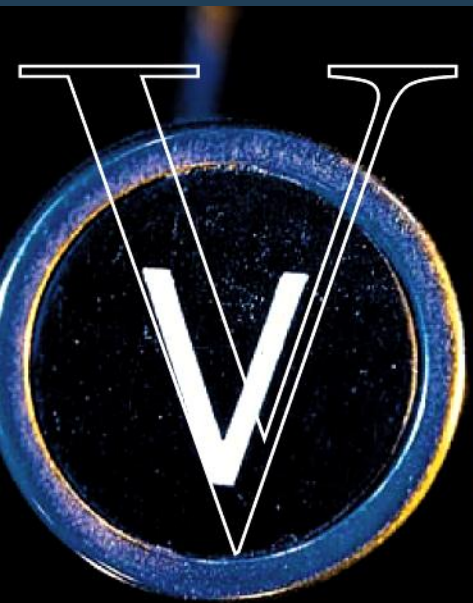
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Panelists:

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Upcoming Venable Nonprofit Legal Events

October 24, 2013 – [The IRS Final Report on Nonprofit Colleges and Universities: Lessons for All Tax-Exempt Organizations](#)

November 14, 2013 – [Donor Intent, Restricted Funds, and Gift Acceptance Policies: What Every Nonprofit Needs to Know to Effectively Accept and Utilize Contributions](#)

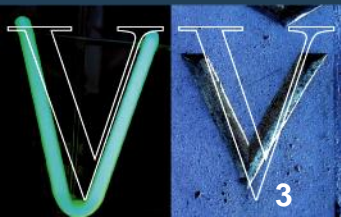
December 5, 2013 – [Work & Family: What Nonprofit Employers Should Know about Family-Oriented Employment Laws](#)





Agenda

- Introduction
- Value of Market Research Programs to Associations
- Antitrust Laws Applied to Information Exchanges and Benchmarking
 - Overview
 - Recent Developments
- Case Study
- Best Practices and Practical Applications



Value of Market Research Programs to Associations



Value of Market Research Programs

- Provides important member benefit
- Establishes association's industry expertise
- Elicits confidence – reports based on actual data submitted by participants
- Provides business intelligence metrics not available elsewhere
- Tracks industry growth in specific segments





Additional Benefits of Market Research Programs

- Becomes a differentiator when competing associations exist
- Stimulates active member participation
- Promotes the association and industry through press releases and data-driven marketing material
- Creates non-dues revenue
 - Participants pay to participate
 - Participants can purchase customized reports
 - Sold to interested parties / subscription program
 - Additional topics for meetings / webinars



Antitrust Laws Applied to Information Exchanges and Benchmarking



U.S. Antitrust Laws

Overview

■ Federal Laws

- The U.S. federal antitrust statutes of principal concern are Sections 1 and 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act (“FTC Act”).
 - Section 1 of the Sherman Act prohibits all contracts, combinations, and conspiracies that unreasonably restrain trade.
 - Section 2 of the Sherman Act prohibits monopolization and attempted monopolization.
 - Section 5 of the FTC Act prohibits unfair methods of competition.
- U.S. antitrust laws apply to conduct outside the U.S. that has an effect on trade or commerce in the U.S.

■ State Laws

- The states typically interpret and apply their respective laws in a similar fashion to the federal laws. In general, strict compliance with the federal antitrust laws will result in compliance with the state laws.





U.S. Antitrust Laws

Federal Enforcement Agencies

- The Federal Trade Commission and U.S. Department of Justice share federal jurisdiction over antitrust enforcement.
- Other agencies such as the Federal Communications Commission, the Federal Energy Regulatory Commission, the Department of Transportation, the Federal Maritime Commission, and the Federal Reserve also have limited antitrust enforcement authority.
- Current federal antitrust agency leadership:

Edith Ramirez, Chairwoman of the FTC



William Baer, Asst. AG for Antitrust, DOJ





U.S. Antitrust Laws

Anticompetitive Conduct

- Certain conduct is per se illegal under the antitrust laws without regard to its justification:
 - Agreements to set prices or components of price; agreements to rig bids; agreements to allocate markets or limit production / output; and most agreements to boycott suppliers, customers, or competitors.
- Other conduct is analyzed under the “rule of reason” by balancing the anticompetitive effects against the procompetitive justifications.
 - This type of conduct generally requires proof that the defendant possesses market power.





U.S. Antitrust Laws

Penalties

■ Companies

- Companies may be fined up to \$100 million per antitrust violation. Courts also may impose an “alternate fine” of up to twice the gain to the perpetrator or twice the loss to the victim as a result of illegal behavior.
- Courts or government antitrust agencies may impose permanent restrictions limiting business activity.
- Private actions – by customers or competitors who show they were harmed by the perpetrator’s actions – may result in treble damages suits and the award of attorneys’ fees.

■ Individuals

- Violations of the Sherman Antitrust Act are felonies.
- Individuals may be imprisoned for up to ten years, fined up to \$1 million, or both, for each violation.





Information Exchanges/Benchmarking

Rule of Reason Analysis

- Information exchanges and benchmarking are reviewed under the Rule of Reason test.
- The main antitrust concern is that the exchange of information may facilitate a collusive agreement (e.g., price-fixing). Key considerations include:
 - More scrutiny for the exchange of
 - Pricing or cost data;
 - Output levels;
 - Business strategies / future forecasts;
 - Detailed or firm specific information; and
 - Information regarding a highly concentrated industry.
 - Potential for pro-competitive benefits:
 - Helps provide information to consumers;
 - Promotes business planning and investment; and
 - Supports R&D.





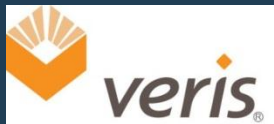
Information Exchanges/Benchmarking

FTC/DOJ Safe Harbor

- **FTC / DOJ Statements of Antitrust Enforcement Policy in Health Care (1996):** Sets up antitrust Safety Zone for information exchanges.
 - Managed by independent third party;
 - Data more than three months old;
 - Data aggregated from at least five providers;
 - No single provider's data represents more than 25% of the information provided; and
 - Aggregation of data prevents identification of individual provider data.

- **Antitrust Guidelines for Collaborations Among Competitors (2000):** Recognizes that the exchange of information can have procompetitive benefits, but regards exchange of competitively sensitive information (price, cost, output, etc.) as inherently risky because it can facilitate direct or indirect collusion.





Information Exchanges/Benchmarking

European Union

■ European Commission

- Articles 101 and 102 of the Treaty on the Functioning of the European Union generally mirror Sections 1 and 2 of the Sherman Act.
- Focus on the full context of the information exchange, including:
 - Nature of the market;
 - Nature of the information exchanged (type and age);
 - Manner in which the information is exchange; (aggregate data / publicly available); and
 - Potential for procompetitive benefits.

■ Other Foreign Competition Laws

- Many foreign competition regimes are modeled on U.S. and EU antitrust principles. Most EU member states also have their own antitrust regimes.





Information Exchanges/Benchmarking

Recent Developments

- Recent developments in line with settled law . . .
 - FTC Staff Letter to The Money Services Round Table (“TMSRT”) (9/4/13)
- . . . But with some new wrinkles?
 - FTC Consent Order with Sigma Corp. (1/4/12)
 - *Cason-Merenda v. Detroit Medical Center*, 862 F.Supp.2d 603 (E.D. Mich. 2012); *Fleischman v. Albany Medical Center*, 728 F.Supp.2d 130 (S.D.N.Y. 2010)
- **BOTTOM LINE:** The starting point for structuring any information exchange or benchmarking program is the DOJ and FTC safe harbor.





Information Exchanges/Benchmarking

Recent Developments

- **FTC Staff Letter to The Money Services Round Table (“TMSRT”) (9/4/13)**
 - Trade association of six licensed national money transmitters.
 - Money transmitters are subject to certain federal and state laws governing money laundering, terrorist financing, etc.
 - TMSRT proposed an information exchange consisting of a database with information on former U.S. sending and receiving agents whose contractual relationships were terminated due to failure to comply with applicable law or money transmitter contract terms.
 - Proposed Information Exchanged
 - Name of the Exchange Member that supplied the terminated agent;
 - Agent’s name and contact information, including information on owners, directors, and management; and
 - Date and reason of termination.





Information Exchanges/Benchmarking

Recent Developments

- **FTC Staff Letter to The Money Services Round Table (“TMSRT”) (9/4/13) (cont’d.)**
 - Exchange Structure
 - Independent, third-party vendor;
 - Open to all licensed non-bank money transmitters;
 - Voluntary participation;
 - Members retain right to decide unilaterally whether to work with an agent terminated by another exchange member.
 - FTC Determination
 - Goals of the information exchange did not appear to be either directly or indirectly anticompetitive or designed to further coordination on any significant competitive factor (price, cost, or output);
 - Exchange included safeguards (Safe Harbor); and
 - Exchange appeared that it could generate efficiencies that would enhance consumer welfare.



Information Exchanges/Benchmarking

Recent Developments

- **FTC Consent Order with Sigma Corp. (1/4/12)**
 - FTC alleged that Sigma and two competitors participated in a price fixing agreement for imported ductile iron pipe fittings (DIPF). In addition, the three companies allegedly exchanged information on their DIPF monthly sales through an association.
 - Consent Order imposes restrictions on future exchanges that go beyond the DOJ/FTC Safe Harbor requirements:
 - Data must be at least **six** months old.
 - No communications related to the information exchange other than communications (1) occurring at official meetings, (2) relating to topics identified on a written agenda circulated in advance, and (3) **occurring in the presence of antitrust counsel**.
 - All aggregated industry data communicated to a contributor must be made **publicly available**.





Information Exchanges/Benchmarking

Recent Developments

- **In the Matter of Bosley, Inc. (2013)**
 - FTC alleged that Bosley, Inc. and Hair Club, Inc. exchanged competitively sensitive information on:
 - Future product offerings;
 - Price floors, discounting;
 - Business strategies; and
 - Operations and performance.
 - The Consent Order
 - Prohibits the future exchange of competitively sensitive information with competitors.
 - Requires annual compliance training for all officers, executives, and employees who have contact with competitors or have sales, marketing, or pricing responsibilities for Bosley's hair transplantation operations.





Information Exchanges/Benchmarking

Recent Developments

- **Nat'l Ass'n of Music Merchants, Inc. (2009)**
 - FTC alleged that NAMM organized meetings at which members shared information about prices and strategy.
 - The Consent Order:
 - Bars NAMM from coordinating or aiding price exchanges among members or forming anticompetitive agreements.
 - Requires NAMM to adopt an antitrust compliance program.
 - Requires NAMM antitrust counsel to review written materials, prepared remarks related to price terms and MAP policies, and to provide guidance on complying with competition laws.





Information Exchanges/Benchmarking

Recent Developments

- **U.S. v. Professional Consultants Insurance Company, Inc. (2005):**
 - Professional Consultants Insurance Company Inc. (PCIC), and its actuarial consulting firm members, agreed to stop sharing certain information on the use of contractual limitations of liability (LOL) in their dealings with clients
 - PCIC was owned and managed by three actuarial consulting firms.
 - DOJ alleged that employee benefit clients were denied significant competition among the actuarial consultants in their setting of contract terms.
 - The consent decree prohibits PCIC and its members from exchanging LOL information, except that subject to certain safeguards.





Information Exchanges/Benchmarking

Recent Developments

- **Cason-Merenda v. Detroit Medical Center, 862 F.Supp.2d 603 (E.D. Mich. 2012); Fleischman v. Albany Medical Center, 728 F.Supp.2d 130 (S.D.N.Y. 2010)**
 - Series of cases brought by nurses alleging that hospitals exchanged wage data without meeting the Safety Zone requirements and that the data was relied on by defendants in deciding to reduce RN compensation.
 - In 2012, *Cason-Merenda* went to trial even though limited evidence on actual coordination. Information on current and future wages exchanged through:
 - Direct contacts between HR employees;
 - Industry organizations and meetings; and
 - Third party salary surveys.
- **Todd v. Exxon, 275 F.3d 191 (2d Cir. 2001)**
 - Employee class action against 14 oil and petrochemical industry employers alleging a conspiracy to set salaries at artificially low levels.



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Case Study



Starting a New Program

- Dental Implant Market Data Collection Program (DIMDC) – founded in 2010
- Growing industry with lack of reliable industry information
- Objective: To improve the quality of market data available





New Program Action Items

- Get buy-in from major industry players
- Draft Standard Operating Procedures
 - Submission process and timing
 - Data retention policy
 - Reporting definitions
 - Disclosure guidelines
 - Report distribution and usage guidelines
 - Meeting schedule and future program changes
- Create recruiting material and recruitment schedule for potential participants
- Conduct legal review
- Initial data collection/publication of first report





Recruitment Material

ABOUT DIMDC

PROGRAM BACKGROUND

DIMDC is a unique participant driven program that seeks to reveal the industry size for dental implant products. The DIMDC program tracks quarterly shipments of Dental Implants and Abutments for over 20 countries in Europe, Asia-Pacific, North America and Latin America. These cost-effective reports are only available to participating manufacturers.

Conducted by Veris Consulting, Inc., an independent third party fiduciary with no vested interest in the performance of the dental implant industry, DIMDC reports provide participants with confidential and reliable data on today's industry trends within the dental implants market.

YOUR DATA IS SECURE AND CONFIDENTIAL

Participants submit data through a secure web portal. Veris follows strict disclosure rules to protect this data and only industry aggregate totals are ever published. Veris has broad experience in market data collection and is trusted with confidential data from hundreds of companies in many industries.

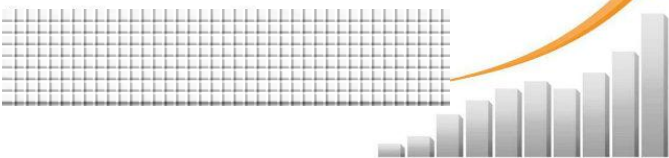
RELIABLE SHIPMENT DATA

The DIMDC Industry Statistics provide superior market information by using actual sales data submitted by participating manufacturers. All data is thoroughly reviewed each quarter prior to publication. In addition, Veris conducts annual data reviews of each participant's internal reporting procedures.

FOLLOW INDUSTRY TRENDS

The DIMDC reports show the Unit Volume, Price Per Unit and Value for Dental Implants and Abutments shipped each quarter for over 20 countries. Using this information, program participants can see industry growth trends in these markets and are able to track their company's market share.

CURRENT PARTICIPANTS



Frequently Asked Questions

How do DIMDC reports differ from national programs that collect implant and abutment sales?

- DIMDC reports provide market information in over 20 countries in the same format for accurate comparisons between countries.
- Data is collected using the point of sale local currency and the exchanging into USD and Euros using fixed currency rates. Data is published for all countries in local currency, USD and Euros. This allows companies to compare sales between countries in a common currency most useful to them (example, USD) and you can be confident that currency fluctuations are not affecting the trends.
- DIMDC program rules are determined by the participants and can change in the future based on the needs of the participant.

How do DIMDC reports compare to other industry reports?

- DIMDC reports are more accurate because they are based on actual sales figures submitted by participating companies. Unlike other industry reports, no secondary sources are required to publish the DIMDC reports.
- Veris works closely with the finance departments of all DIMDC participants to review the data at the product level to ensure accuracy.
- The DIMDC reports are published more frequently and are priced competitively with other sources of dental implant market statistics.

What if I want to see breakouts that aren't in the current report?

- The report categories are determined by the participants and will continue to grow and evolve in the future. All participants are encouraged to provide input in order to enhance the structure and quality of the DIMDC reports.
- Report modifications are discussed and determined annually at the DIMDC Steering Committee Meeting.

How is company specific information kept confidential?

- DIMDC reports only published aggregated industry results. No individual company data is ever revealed. Published categories in a report must have at least three participants. If a company has over 65% market share they must give approval to show the country or category.
- All DIMDC security rules are reviewed and approved by DIMDC outside legal counsel (Freshfields Bruckhaus Deringer LLP).

How do DIMDC reports meet the needs of different sized companies?

- DIMDC reports track the overall market and break out sales by company size based on annual global sales revenue. The current report breakouts are Large (above \$200M), Medium (\$20M—\$200 M), and Small (less than \$20M).
- Having an understanding of the market trends in each of these categories helps companies price and position their products appropriately.
- At current participation levels the Medium and Small categories are combined to protect company confidentiality. As the participation grows, these categories will be broken out.

How do I benefit from DIMDC reports if I only have sales in a few countries?

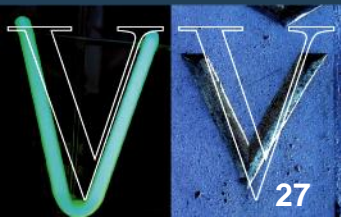
- Regional reports provide insights into additional markets, allowing you to view other countries where your country could possibly expand in the future.
- Report participation is available on a country or regional basis.





Legal Review

- Purpose: Identify antitrust risks and provide guidance to minimize those risks
- Interviews with industry participants to determine procompetitive reasons
- Considered EU and U.S. antitrust laws
- Offered revisions to SOP and guidelines for future meetings
- End Result: Participants were confident that program risks were minimal and moved ahead with data collection



Best Practices and Practical Applications

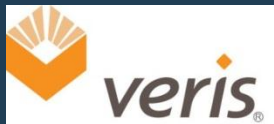


Best Practices

Antitrust Compliance Program

- Implementation of an effective compliance program is essential
 - Preparation of a user-friendly antitrust compliance manual
 - Periodic training for employees to ensure that they can detect antitrust issues in the first instance to prevent them from occurring
 - The commitment of high-level personnel to oversee the program and institute a culture of compliance
 - Circulation of an antitrust statement in advance of all association meetings





Best Practices

Antitrust Manual

- Antitrust Compliance Manual should provide a basic overview of the antitrust laws and how they apply to the company and its employees.
- Information Exchange Guidelines
 - Prohibit discussions or exchanges of information among competitors concerning prices, costs, terms of sale, business plans, suppliers, customers, territories, capacity, production, or any other competitively sensitive information without prior written approval from counsel.
 - Any information exchange or benchmarking programs should have a legitimate business purpose and not produce significant anticompetitive results.
 - Ensure that information exchange program complies with DOJ / FTC Safe Harbor, or that any departures are approved in advance by counsel.





Best Practices

Role of Third-Party Fiduciary

- Protect the association
- Protect members / individual companies
- Adhere to antitrust and data retention rules
- Facilitate committee meetings and discussions
- Enforce / recommend market research program best practices
- Ensure data accuracy (data reviews)
- Work closely with member companies to ensure accurate and reliable data





Best Practices

Structuring the Information Exchange

- Program funding and potential revenue
- Establish meeting procedures
- Establish program and disclosure rules
- Establish process for participation changes
- Determine appropriate report timing
- Develop copyright language and report usage guidelines
- Develop value-added reports





Best Practices

Funding Models

- Participants pay and reports are available to participants only
- Participants pay and reports are sold to interested parties (subscription program)
- Free to participants and reports are sold to membership only
- Free to participants and reports are sold to interested parties (subscription program)





Best Practices

Pricing Considerations

- Availability of public data
- Other industry sources
 - BEA, Census, other associations / companies
- Depth of data published
 - How much detail?
- Perceived value to members
 - Importance to strategic direction

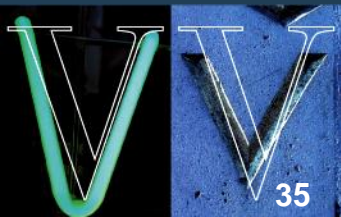




Best Practices

Meeting Procedures

- Market research committee representative of overall membership
 - Suggest changes to keep the program relevant
- Antitrust guidelines review
- Legal counsel presence
- Keep accurate meeting minutes





Best Practices

Program Rules and Disclosure of Information

- Number of participants required to publish specific line items
- Market share limitations
- Submission deadlines
- QA procedures
- Publication dates
- Procedures for data revisions, category changes, and estimations
- Annual program review process





Best Practices

Participation Changes

Participants may not be constant throughout the year. How do we keep an apples to apples comparison throughout?

- Estimation procedures
- Use of projection factors
 - Pros: projects for the entire market and produces a reliable trend line.
 - Cons: uses a constant estimate throughout the year and is less accurate for detail lines.

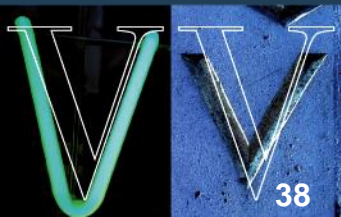




Best Practices

Report Timing

- Determine report frequency
 - Annual / quarterly / monthly / weekly
- Determine when to publish report results
 - Rules regarding the publication of certain types of data
 - Public company members
 - Financial information
 - Market pricing or production data

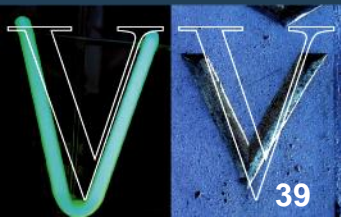




Best Practices

Copyright, Confidentiality and Usage Guidance

- Data is generally not subject to copyright protection, but can be protected contractually.
- Creative, original arrangement / presentation of data can be subject to copyright protection.
- Be sure to secure copyright assignment from all contributors of “copyrightable contributions,” if any.
- If there are restrictions on distribution by recipients, be sure to include those in a usage agreement.
- Also be sure to include in a usage agreement an affirmative obligation to not copy or otherwise infringe the association’s ownership interests.





Best Practices

Increasing Report Value

- 24/7 Access to reports
- Customized Market Share Reports
- Executive Summaries
- Forecasting
- Industry summary reports
- Webinars and breakout sessions at conferences to discuss results and other analyses



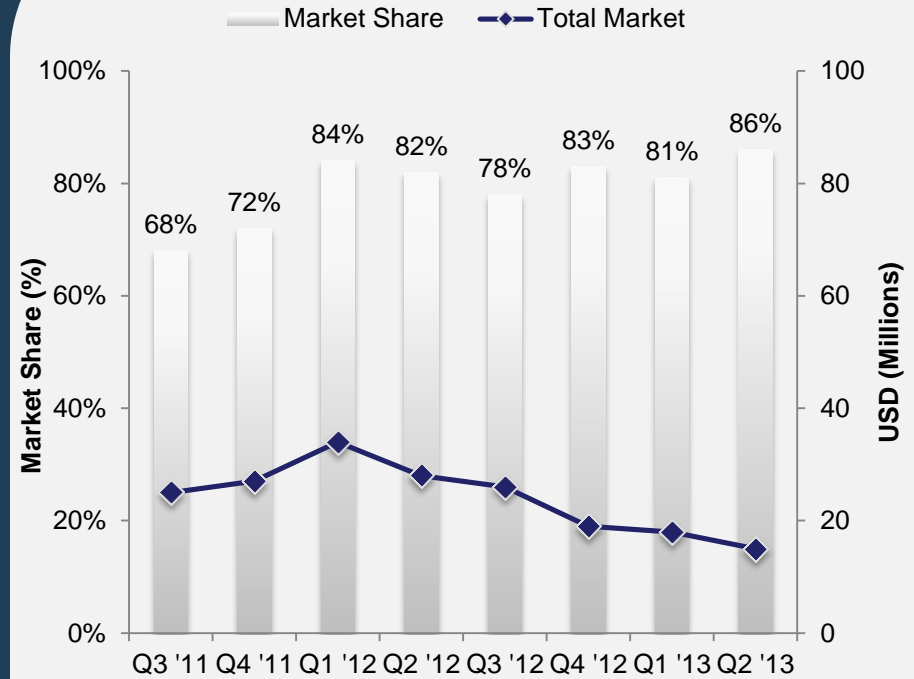
COMPANY MARKET SHARE DASHBOARD

Product Type X



MAT Value	Q3'11-Q2'12	Q3'12-Q2'13	Growth
Total Market	256	334	30%
Market Share	47%	59%	+12 pts

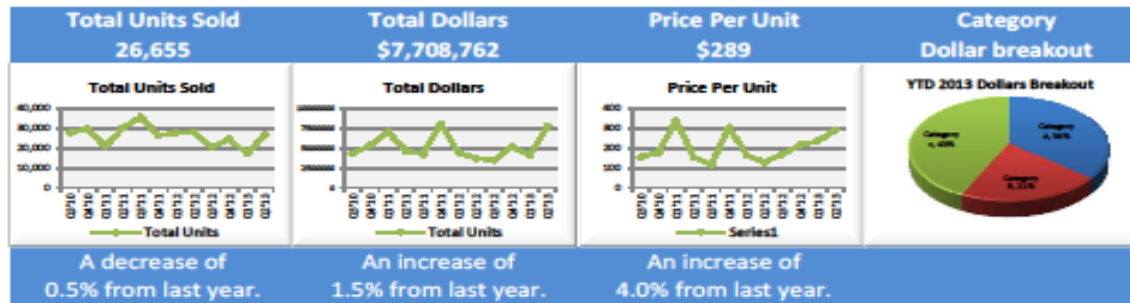
Product Type X



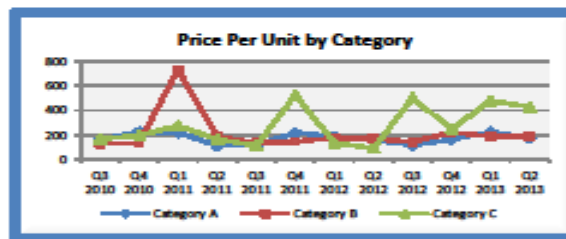
MAT Value	Q3'11-Q2'12	Q3'12-Q2'13	Growth
Total Market	114	78	-32%
Market Share	77%	81%	+4 pts



Large Equipment Association Large Equipment Sales Statistical Summary Page 2nd Quarter 2013 Total Industry



The Large Equipment industry had an over all decrease of 0.5% in unit amounts from 2nd Quarter 2013 and 2nd Quarter 2012. The total dollar amount increased by 1.5% in the same period and the price per unit raised to \$289 in 2nd Quarter 2013 from \$167 in 2nd Quarter 2012.



The Price Per Unit by Category stayed consistent for Category A. There was a decline in price per unit for all three categories in 2nd Quarter 2013 compared to 1st Quarter 2013. Category C had a large increase in price per unit in 2nd Quarter compared to the previous year.

Regional at a glance: 2010 to 2013 Quarterly Sales Dollars

Description	Q4'10	Q4'10	Q1'11	Q2'11	Q3'11	Q4'11	Q1'12	Q2'12	Q3'12	Q4'12	Q1'13	Q2'13	YTD 2013	YTD 2012	YTD 13 VS. YTD 12 % Change
PACIFIC	42,121	38,155	40,861	41,848	36,351	37,974	35,091	38,059	40,166	32,659	36,042	39,064	73,150	75,106	2.7%
MOUNTAIN	64,147	52,286	68,224	54,865	57,584	54,466	58,557	59,165	63,455	65,744	58,932	53,708	117,722	112,640	-4.3%
WEST SOUTH CENTRAL	30,433	23,594	30,672	27,435	34,643	32,095	28,834	2,971	29,716	34,612	29,119	31,102	31,805	60,221	89.3%
EAST SOUTH CENTRAL	30,709	32,298	24,015	31,509	30,424	24,833	30,157	32,893	32,170	31,164	34,031	25,740	63,050	59,771	-5.2%
WEST NORTH CENTRAL	53,709	51,123	51,228	52,984	56,177	50,398	52,127	49,607	53,005	52,508	52,454	43,838	101,734	96,292	-5.3%
NEW ENGLAND	41,778	44,628	41,521	49,403	45,226	48,256	47,273	47,217	53,458	40,311	44,579	47,204	94,690	91,783	-3.9%
MIDDLE ATLANTIC	41,754	34,384	33,524	41,088	39,243	39,187	39,608	40,335	36,168	39,772	37,560	35,621	75,943	73,181	-3.5%
SOUTH ATLANTIC	60,458	57,950	60,915	54,184	53,016	59,687	61,675	62,747	50,749	57,946	56,698	58,453	124,422	115,151	-7.5%
EAST NORTH CENTRAL	35,070	36,836	34,539	40,203	32,776	37,956	38,579	37,254	36,830	37,922	45,390	36,984	75,833	82,374	8.6%
TOTAL	401,179	371,807	385,499	353,119	385,440	384,852	391,901	370,248	395,717	392,648	394,805	371,714	762,149	766,519	0.6%





CE MarketMetrics - Custom Views

https://secure.verisconsulting.com/CEA/customviews.aspx?CRID=8LGfWJfomk%3d&Mode=C7x5NQ3QicU%3d&User=BGxgPWCbJAw%3d

Veris Master: Veris Consulting | Account | Help | Sign Out

CEA
Consumer Electronics Association

HOME | SUBMIT | REPORTS | YOUR SHARE | **CUSTOM VIEWS** | RESEARCH | GLOBAL CE SALES | DIRECTOR'S CHAIR BLOG

Browse All | Browse Mine | Create New

Design Your View

Name: LCD v Plasma (2005)

Analysis Type: Trend
 Comparison
 Composition

Fiscal Year: Standard Calendar Year
 Custom Fiscal Year

Units of Time: Month
 Quarter
 Year

Dates: Define start year and end year
 2005 | 2012

Data to Include

- Accessories and Blank Media
- Audio
- Communication and Information Products (CITP)
- Video
- CE Market Summary (MS-100-M)
- LCD Flat Panel Displays (MS-109-M-LCD)
 - LCD TVs 20" & Under
 - LCD TVs 21" - 23"
 - LCD TVs 24" - 29"
 - LCD TVs 30" - 34"

View Grid | **View Chart**

LCD v Plasma (2005)
Yearly Trend Analysis
Define start year and end year

Grid display options
 DOLLARS
 UNITS
 AVG WHOLESALE PRICE

Report Month	Total LCD TV (Units)	Total Plasma TVs (Units)
2005	1,636,843	4,076,327
2006	10,324,537	3,027,840
2007	16,842,726	1,666,295
2008	24,115,864	3,572,293
2009	29,726,601	3,366,310
2010	28,519,169	4,415,982
2011	28,584,053	3,807,275
2012	31,199,210	2,936,008

Data Source: CEA, CE MarketMetrics

Data Points: On Off
 Chart Width: Standard





Questions?

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