

Antitrust Compliance Policy

of the

Ohio AgriBusiness Association

STATEMENT OF ANTITRUST COMPLIANCE POLICY

In view of ever-present government scrutiny of business activity and enforcement of the antitrust laws, all businesses, including trade associations, must be certain to maintain strict compliance with the antitrust laws. The Association is firmly committed to full compliance with Federal and state antitrust laws. This manual is a brief statement of the antitrust compliance program of the Ohio AgriBusiness Association and is meant as a general guide only. Association Board members and employees who have questions about the antitrust laws or their application to the activities of the Association should contact the President/CEO or the Association's legal counsel. Because the Association cannot and does not render legal advice to individual companies, specific questions of law should be referred to an individual's or company's legal counsel.

PROVISIONS OF THE ANTITRUST LAWS

The most important federal antitrust statutes relating to activities of trade associations are in Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act. Section 1 of the Sherman Act prohibits a "contract, combination . . . , or conspiracy . . . in restraint of trade or commerce" Section 5 of the Federal Trade Commission Act prohibits "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce," by individuals or corporations. Unlike the Sherman Act, the Federal Trade Commission Act reaches anticompetitive acts, whether or not there is any agreement or "combination"; however, like the Sherman Act, it also covers joint actions.

The Sherman Act and Federal Trade Commission Act apply not only to interstate commerce but also to activities "affecting" such commerce, which the government says includes practically every business, and especially those handling products from or to other states.

In addition to federal laws, every state (including Ohio) has antitrust and unfair competition statutes that apply to conduct within, or affecting commerce in, that state. States have been extremely active in investigating and prosecuting violations of their antitrust laws. Therefore, no local business can expect to avoid antitrust liability by claiming that the localized nature of its business shields it from the antitrust laws. States (including Ohio) have pursued violations of federal antitrust laws through so-called *parens patriae* actions. These actions, expressly authorized under federal law, permit states to bring treble damage actions against violators on behalf of their citizens who have been injured as a result of federal antitrust law violations.

A trade association by its very nature is a combination, associations and their members. Thus, members must be especially familiar with Sherman Act Section 1 and its prohibitions. The courts have interpreted Sherman Act Section 1 to prohibit only "unreasonable" restraints of trade. Certain types of agreements or understandings are so inherently unreasonable and anticompetitive, however, that they are considered *per se* illegal without regard to their reasonableness, effect or justification on economic or other grounds. In other words, **there is no defense to a per se violation**. For example, if competitors reach any form of an understanding or agreement concerning price, they cannot justify the understanding by showing that it is reasonable or that it will benefit consumers or other customers. Agreements considered *per se* illegal under the Sherman Act, and which the Association and its members **must avoid** in the conduct of Association activities or otherwise, include:

- Agreements or understandings among competitors, distributors or customers regarding prices, terms or conditions of sale.
- Agreements or understandings affecting the price of a product regardless of the purpose of the understanding.
- Agreements or understandings allocating markets, customers or territories.
- Agreements or understandings to limit production or supply.
- Agreements with others to refuse to deal with a potential or actual customer, supplier or competitor (known as "group boycotts" or "refusals to deal").

An agreement need not be an express written or oral agreement to constitute a violation of the antitrust laws. Informal, unwritten or even unspoken agreements or understandings are treated the same as written ones. An agreement or understanding may be inferred where casual communication is followed by similar or parallel conduct by competitors. Mere attendance at a meeting where competitors engage in an illegal discussion concerning price-fixing may imply acquiescence and make a non-participant criminally responsible and subject to as great a penalty as the active participants in the discussion. Moreover, innocent contacts with competitors, whether formal or informal, can often be misconstrued. Thus, great care must be taken to avoid even an *appearance* of improper conduct. This is especially true during trade association meetings, which often bring competitors together in formal and informal gatherings.

POTENTIAL ANTITRUST PROBLEM AREAS FOR TRADE ASSOCIATIONS

Trade associations bring competitors together. Thus, considerable caution must be exercised in the conduct of the formal meetings of the Association and the conduct of individual members in their contacts with competitors during these meetings and informal gatherings. Not only must individual members and their employees avoid engaging in communications with competitors that might be interpreted by a third party as an illegal agreement or understanding, but the Association must also avoid such things as adopting or undertaking restrictive membership requirements, restrictive codes of ethics or conduct, compulsory or discriminatory performance or product standards, and exchanges of confidential financial information, each of which may be subject to antitrust scrutiny.

The Association undertakes antitrust safeguards that are intended to avoid violations of the antitrust laws. These safeguards include the retention of legal counsel, who reviews the minutes and agenda and who attends meetings with potential antitrust significance.

TOPICS TO AVOID IN DISCUSSIONS WITH OTHER INDUSTRY MEMBERS

There are several topics that industry members should never discuss with another industry member or members. This applies whether the discussions take place in an office, at a convention, on a golf course, or anywhere else that two or more industry members may get together. This also applies to correspondence and telephone calls. **NEVER DISCUSS:**

- (1) Current or future prices (The only safe policy is to avoid any mention whatsoever of prices, even of past prices);
- (2) What constitutes a "fair" profit level;
- (3) Possible increases or decreases in prices;
- (4) Standardization or stabilization of prices;
- (5) Pricing procedures, including margins, markups, cost percentages, or formulas or policies for arriving at prices;
- (6) Cash discounts;
- (7) Credit terms;
- (8) Control of sales;
- (9) Allocation of markets by territory or customer;
- (10) Blacklisting or boycotting certain customers or suppliers;
- (11) Refusal to deal with a supplier because of its pricing or distribution practices;
- (12) Whether or not the pricing practices of any industry member or supplier are unethical or constitute an unfair trade practice;
- (13) Restricting or limiting production, supply or output; or
- (14) Bids, or your intent to bid or not to bid a contract.

PENALTIES FOR VIOLATION OF THE ANTITRUST LAWS

Federal antitrust laws may be enforced against individuals and corporations both by government officials and by private parties through treble damage actions. In both cases, penalties are severe. A violation of the Sherman Act is a felony. An individual convicted of a criminal violation of the Sherman Act may be fined as much

as \$1 million and imprisoned for up to ten years for each violation. A corporation (including a trade association) convicted of such a criminal offense may be fined as much as \$100 million for each violation. Both may be subjected to court injunctions severely restricting their activities, and to further penalties for violating such injunctions. This can result in dissolution of a trade association.

Violation of the Federal Trade Commission Act can result in issuance of a cease and desist order, which can place extensive governmental restraints on the activities of an association and its members. Failure to obey such an order can result in penalties of as much as \$10,000 per day.

In addition to governmental prosecution for a criminal or civil violation, antitrust lawsuits brought by private parties pose a comparably substantial risk to the Association and its members. Competitors, customers or suppliers who are financially injured as a result of an antitrust law violation can recover "treble damages," or three times actual damages, plus the costs of bringing the lawsuit and attorneys' fees. These suits are often brought as class actions on behalf of all persons injured as a result of an alleged violation, making such suits a potentially devastating economic weapon. Even if an antitrust lawsuit lacks merit, such suits are extremely expensive to defend. Thus, it is very important not only to comply with the antitrust laws, but also to avoid even the **appearance** of unlawful conduct which could raise suspicions that a violation has occurred and lead to antitrust litigation.

YOUR ASSOCIATION AND THE ANTITRUST LAWS

The provisions of the antitrust laws and the penalties for violation can be applied to associations, their officers, staffs and members. Illegal conduct is not made less so because it is done in the course of Association activities.

Strict compliance with the antitrust laws is and always has been the policy of the Association. To this end, competent counsel attends the Annual meeting, all Board of Directors meetings, as well as other meetings where antitrust issues could arise. Counsel also reviews all meeting agendas to determine when presence of counsel is required and reviews all minutes before they are disseminated. The Association exercises extreme care, with the advice and assistance of its legal counsel, to avoid not only violations, but anything that might justify even a suspicion of possible violations, of the antitrust laws.

This policy is essential for the protection of all members and for the Association's continued existence and activities for the improvement and promotion of the industry, and it will be continued.