



ANTITRUST POLICY AND COMPLIANCE GUIDELINES

Adopted by the ECOA Board of Directors on July 2, 2007

This document contains the “Antitrust Policy,” “Antitrust Reminders” and “Antitrust Compliance Guidelines” of the Ethics and Compliance Officer Association (“ECO A”). These items together represent the *ECO A Antitrust Policy and Compliance Guidelines* (the “*Guidelines*”). The *Guidelines* are not designed to provide definitive answers to specific legal questions. The purpose of the *Guidelines* is to alert ECOA members and staff to the kinds of activities most likely to raise antitrust concerns and to the precautions that must be taken to avoid potential antitrust problems. The document is intended to educate ECOA members about the United States federal antitrust laws that are applicable to trade association activities, and to serve as a basic guide to assist ECOA and its members in conducting ECOA meetings and activities in conformity with these laws.

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ANTITRUST POLICY

It is the policy of ECOA to comply strictly with all laws that relate to the conduct of its activities, including the antitrust laws of the United States. All ECOA members, officers, and staff must familiarize themselves with the *ECO A Antitrust Policy and Compliance Guidelines* and shall agree to conform all ECOA sponsored meetings and activities in strict accordance with the *Guidelines*. The *Guidelines* will be updated and revised as appropriate by the ECOA Board in consultation with counsel. The *Guidelines* are intended to provide basic guidance on the antitrust laws that may be applicable to ECOA activities. Counsel should be consulted in all cases involving specific situations, interpretations or advice. An ECOA staff member or counsel shall attend all meetings, and counsel shall attend any meeting in which issues with antitrust implications might be discussed.

ANTITRUST REMINDERS

The following checklist highlights several basic antitrust principles for use by ECOA staff and members in the conduct of ECOA sponsored meetings and social gatherings. Because a trade association necessarily involves communications and collaboration among competitors, its activities must be undertaken with extreme care to avoid even the appearance of an anticompetitive purpose or intent. These reminders are not intended as a complete list of antitrust guidelines. The *ECOA Antitrust Policy and Compliance Guidelines* should be consulted for additional information, and ECOA legal counsel should be contacted in all cases involving specific situations, interpretations or advice.

DOs

- Before a meeting, prepare and have ECOA legal counsel review agendas of particular items to be discussed at the meeting and adhere to the agenda unless additional matters for discussion have been approved in advance by ECOA staff and/or legal counsel.
- Take minutes that accurately reflect the content of the meeting. Ensure that draft meeting minutes are promptly prepared after each meeting, reviewed by ECOA legal counsel, and then circulated to members present at the meeting to determine that the minutes accurately reflect the proceedings.
- Protest any discussions or meeting activities that appear to violate the antitrust laws or the *ECOA Antitrust Policy and Compliance Guidelines*. Disassociate yourself from any such discussions or activities and leave any meeting in which they continue. Insist that the minutes reflect your departure. Be sure that ECOA staff and legal counsel are made aware of any such activities.
- When you deem it appropriate after studying this document, have ECOA legal counsel present at gatherings of peers to monitor and, if necessary, redirect the conversation to keep the group away from inappropriate discussions.
- Seek the advice of ECOA if your group wishes to consider membership eligibility or expulsion of a member, creation of a code of ethics or other forms of self-regulation, or the development of joint statistical or cooperative research programs.
- Have a copy of these reminders as well as the *ECOA Antitrust Policy and Compliance Guidelines* available for reference at all ECOA sponsored meetings.
- Consult with ECOA legal counsel on all antitrust questions related to ECOA's activities and educate yourself on the antitrust requirements related to your participation in the ECOA.

DON'Ts

- Do not – in fact or appearance – discuss or exchange information with actual or potential competitors regarding any of the following matters, either at ECOA sponsored meetings or social gatherings:
 - * Individual company or industry prices, price changes, price differentials, mark-ups, discounts, warranties, allowances, credit terms, costs, production levels, capacity, sales, etc. except in conjunction with an approved ECOA-sponsored confidential statistics program
 - * Plans of individual companies concerning the design, production, distribution or marketing of particular products or services, including proposed territories or customers.
 - * Division or limitation of sales to particular territories, customers or classes of customers.
 - * Refusal to sell to or purchase from, or termination or modification of sales or purchase arrangements with representatives, distributors, or other third parties, or prices or terms of sale or resale by customers.
 - * Matters relating to actual or potential individual suppliers or customers that might exclude them from any market or of influencing the business conduct of firms toward such suppliers or customers.
 - * Limiting or eliminating competition in any way, or efforts to create a monopoly.
- Do not discuss or exchange information regarding the above matters during social gatherings incidental to ECOA sponsored meetings, even in jest.
- Do not meet without ECOA staff or legal counsel present.

ANTITRUST COMPLIANCE GUIDELINES

Overview of Antitrust and Competition Laws

United States Antitrust Laws

The United States antitrust laws are intended to foster and protect competition. As such, the laws prohibit particular anticompetitive activities, and more generally those that are deemed to unreasonably restrain trade. Agreements among competitors are inherently suspect under the antitrust laws. Therefore, while the purpose of ECOA is to promote the exchange of ideas and developments in ethics and compliance practices among ethics and compliance professionals, group activities of representatives of competing companies – such as those conducted by a trade association – are inherently suspect under the antitrust laws. For this reason, ECOA has developed these Antitrust Compliance Guidelines to provide a general overview of antitrust laws and specific guidelines to assist ECOA members and staff in conducting ECOA activities in conformity with antitrust laws. The basic United States statutes that are applicable to trade associations are the Sherman Act and the Federal Trade Commission Act.

Sherman Act

Section 1 of the Sherman Act prohibits “contracts, combinations or conspiracies in restraint of trade or commerce.” Taken together, the contract, combination or conspiracy element has been found to exist when there is some form of agreement between two or more parties. Such agreements may be explicit, *e.g.*, taking the form of a contract or other oral or written communication, or implicit, *e.g.*, implied by the conduct of the parties and construed to indicate an agreement was formed. An anticompetitive agreement need not be formal (*i.e.*, written) or even express, and can be proven by circumstantial evidence. Therefore, if such circumstances as the exchange of pricing plans permit the inference of a tacit understanding to “act in concert” or “follow the leader”, a jury may be allowed to find an intentional violation of the law.

In this light, ECOA members and staff should be aware that courts have sometimes deemed trade associations as possible “hotbeds of conspiracy.” As indicated above, an “agreement” among trade association members need not be in writing. A “gentleman’s agreement” to “hold the line” on prices may be more than sufficient for a court to permit a jury to infer an unlawful conspiracy to fix prices. An “agreement” also can be inferred by the parallel actions of trade association members that happen to follow the discussion of the topic at an association meeting or other gathering.

Finally, keep in mind that the Sherman Act is aimed at both express and tacit conspiracies. Even if one does not actively participate in discussing or implementing a prohibited activity or practice, an individual may be held liable just as if (s)he were an active participant. For example, merely attending a meeting at which a discussion of price fixing takes place may be enough to constitute acquiescence in the discussion and result in the silent participant being in violation of the antitrust laws.

Taken literally the Sherman Act's prohibition of all contracts, combinations or conspiracies in restraint of trade would condemn every commercial contract. Therefore, this prohibition has always been interpreted as condemning only *unreasonable* restraints of trade. Certain activities, discussed in more detail below, are inherently unreasonable. They are considered "*per se*" illegal – they are condemned without a detailed examination of their context or effects on competition. No pro-competitive excuse can justify such activities because they have significant, unredeemable anticompetitive effects. These types of violations, which include horizontal agreements among competitors on prices, price levels, or output, are prohibited as a matter of law regardless of their purpose or intent. For example, members of an association who agree on a certain price at which they will sell their goods or services cannot justify the agreement by demonstrating that it will benefit consumers or is a rational business decision. Similarly an agreement among competitors to cut production or decline to expand capacity because the market already is saturated or capacity already too high cannot be justified and is illegal *per se*.

Restraints that do not fall into the *per se* category are analyzed under the "rule of reason." Here, whether a restraint is unreasonable is determined on a case-by-case basis. A restraint is reasonable if its pro-competitive benefits outweigh its anticompetitive effects. A restraint is unreasonable only if its anticompetitive effect outweighs its pro-competitive benefits. Applying this "rule of reason" to alleged anticompetitive business activities often requires courts to conduct an extensive economic analysis of the alleged restraint on trade, the business context in which it arose, its purpose and probable anticompetitive effects, and the business or economic justification for the restraint. Joint ventures, distribution schemes, technology sharing agreements, and vertical agreements on terms or conditions other than price are typically analyzed under the rule of reason. Sometimes a shortened or truncated rule-of-reason is available, often referred to as a "quick look," where significant pro-competitive benefits are readily apparent.

The distinction between *per se* and rule-of-reason offenses is important for several reasons. Most importantly, the U. S. Department of Justice considers *per se* violations to be criminal violations and will prosecute them as crimes. Second, a *per se* violation is easy to recognize and evaluate. Rule-of-reason offenses often require in-depth analysis to assess their legality.

Section 2 of the Sherman Act prohibits monopolization and attempts to monopolize. The statute does not prohibit the existence of a monopoly, only the acquisition of monopoly power by illegal means. Natural monopolies (for example local utilities) and monopolies acquired through "superior skill, foresight and industry" (for example the development of a new technology) are not forbidden. ECOA members and staff are unlikely to face questions of whether their activities relating to the association could be considered monopolization forbidden by the Sherman Act. If you do think you see a monopolization problem, however, refer the matter to ECOA antitrust counsel.

Federal Trade Commission ("FTC") Act

Section 5 of the FTC Act prohibits "unfair methods of competition" and "unfair or deceptive acts or practices." The FTC Act's broad enforcement provision empowers the

Federal Trade Commission to determine the meaning of “unfair.” Because violations of the Sherman Act also are unfair methods of competition, activities considered illegal under the Sherman Act are generally prohibited under § 5 of the FTC Act. Furthermore, § 4 of the FTC Act empowers the FTC to take action against “incipient” unfair practices; that is, conduct that does not yet amount to – but is likely to lead to – a violation of the other antitrust statutes.

Why You Should Be Concerned – Enforcement and Penalties

The U.S. Department of Justice¹, individual states, and private parties harmed by the anticompetitive conduct of others may bring suit for violations of the Sherman Act. Enforcement of the FTC Act is vested exclusively in the FTC. Violations of the Sherman Act may result in both criminal and civil penalties. Violations of the FTC Act can result in a cease-and-desist order governing the future activities of the association and its members, and, in extreme cases, disgorgement of profits. Even if a government or private investigation or suit is successfully defended, the expenses and business disruption associated with investigations and litigation can be overwhelming. Thus, taking antitrust precautions is not only advisable – it is imperative.

In addition to the enormous legal fees and expenses associated with antitrust investigations and litigation, the penalties, damages or other relief that can be assessed include:

- theoretically limitless fines – the Sherman Act specifies a maximum fine of up to \$100,000,000 for a corporation and \$1,000,000 for individuals for each offense, but an alternative fine provision allows fines up to twice the gain from the illegal conduct or twice the loss suffered as result of the offense; the highest fine so far imposed is \$500,000,000.
- for criminal violations by individuals, jail sentences of up to ten years, and possibly more if mail or wire fraud is involved.
- cease and desist orders.
- three times their damages (“treble damages”), plus reasonable attorneys’ fees and expenses and injunctive relief to private companies and individuals who sue successfully for injuries and damages caused by an antitrust violation of an association, its members or individuals.

¹ The federal antitrust enforcement agencies are the Federal Trade Commission and the Antitrust Division of the U. S. Department of Justice. In addition, all fifty states now have some type of antitrust statute. There is little uniformity, however, among the various states’ statutory schemes. It is, therefore, essential to be familiar with the specifics of each state statute that may be implicated by an association’s activities. Nevertheless, all state statutes contain a section in their code that is analogous to § 1 of the Sherman Act (restraints of trade) and, with few exceptions, to § 2 of the Sherman Act (monopolization) as well. Most states have statutes that specify that their antitrust laws are to be interpreted consistently with federal antitrust law. Thus, judicial interpretations of the Sherman Act generally are applicable to interpretations of state antitrust laws.

- penalties of up to \$11,000 per day for failure to adhere to cease and desist orders issued by the Federal Trade Commission.
- a criminal conviction for a violation of the Sherman Act, in a subsequent civil lawsuit arising out of the same offense is a virtual guarantee of liability – this means that the only issue left for trial is the amount of the damages, which, as stated above, can be substantial.

In the past, not only organizations but their officers and directors have been found criminally and civilly liable for antitrust violations. In addition to the strict penalties associated with antitrust violations, the courts and the FTC have ordered the dissolution of associations found to have engaged in anticompetitive practices. Therefore, it is imperative that all ECOA members and staff take all appropriate measures to minimize the risk of antitrust violations.

European Competition Laws

The European Union and its Member States have competition laws that condemn conduct similar to the conduct condemned by U.S. antitrust law. Article 81 of the Treaty of Rome is analogous to Section 1 of the Sherman Act: it condemns agreements among undertakings (businesses) that prevent, restrict or distort competition. Article 82 is analogous to Section 2 of the Sherman Act: it condemns abuses of dominant position. Infringements of Article 81 and Article 82 are investigated by the European Commission’s Directorate General for Competition, known as DG-Comp. Such infringements are not criminal because the EC does not have authority to prosecute crimes. The EC may impose significant fines, however, up to 10% of an undertaking’s world-wide turnover. DG-Comp’s analysis of competition issues has become similar to that of the US antitrust enforcement agencies, using sophisticated economic tools. The US and the EU treat hard-core anticompetitive behavior, such as price fixing and bid rigging, similarly and even have similar leniency programs. It is important to note, however, with respect to conduct that would be analyzed under the Rule of Reason in the US, that EU competition law, Article 81(3), is more restrictive than US law, often condemning conduct that would not be found to be illegal in the United States. Similarly, the prohibition of “abuse of dominant position” in Article 82 condemns a broader range of conduct than the US prohibition of illegal acquisition or maintenance of a monopoly in Section 2 of the Sherman Act.

Member States of the European Union have their own competition laws which apply to conduct that occurs within one or two member states and that does not involve a large enough amount of commerce to cross the EU’s jurisdictional thresholds. The aggressiveness of enforcement of competition laws varies among the Member States, and sometimes changes within a particular state as the government changes. On the whole, however, the Member States are becoming more likely to outlaw, investigate or condemn anticompetitive practices. Indeed, Great Britain recently criminalized price fixing.

Competition Laws of Other Jurisdictions

A number of other jurisdictions forbid and prosecute anticompetitive behavior. Japan, Switzerland, Australia and Korea, for example, have very active competition enforcement agencies. There is a noticeable trend toward criminalizing hard-core cartel

behavior. Enforcement agencies of several jurisdictions often work together to investigate anticompetitive conduct, especially hard-core cartelization, that spans many countries. Indeed, enforcement agencies sometimes coordinate raids so that, for example, DG-Comp, the U.S. Department of Justice and the Japan Fair Trade Commission (JFTC) can nearly simultaneously seize documents relating to a cartel under investigation in all three jurisdictions.

The guidelines presented here are designed to limit the likelihood that meetings and other function sponsored by the ECOA will lead to violations of the competition laws of the major non-US jurisdictions as well as of the antitrust laws of the US. Particular concerns about specific jurisdictions should be addressed to ECOA counsel.

General Antitrust Guidelines

This section describes types of activities and practices that courts have found to constitute violations of the Sherman Act. ECOA board members, officers, staff and members must take extreme care to avoid even the appearance of engaging in these types of activities, as well as any others that could be construed as having an anticompetitive intent or purpose. These *Guidelines* contain a set of “Antitrust Reminders” that may serve as a “checklist” for the ECOA to circulate to members on a regular basis and prior to meetings, by furnishing a copy with the meeting agenda. The *Guidelines* also will be posted on the ECOA’s internet website – www.theecoa.org

Per se violations have traditionally included agreements among competitors that have the purpose and effect of “fixing prices,” “allocating territories,” or limiting or coordinating output. Under the antitrust laws, “price fixing” includes much more than an agreement to set prices at a particular level, within a specific range, or in accordance with a particular formula. It potentially includes any agreement that tends to raise, fix, stabilize or otherwise affect price. Thus, even if the parties permit the price to vary somewhat under the agreement, the agreement is illegal if it has the effect of stabilizing the price among those participating in the conspiracy. Similarly, price fixing includes agreements to control other factors that directly or indirectly affect price, such as establishing production levels, setting uniform discounts, credit or warranty terms, shipping or insurance terms, or agreeing on matters relating to costs, especially when those costs account for a substantial percentage of the final price. An agreement among competitors to fix the prices or terms at which they sell goods or services to others is *per se* illegal.

At no time shall any discussion or agreement among ECOA members take place regarding product or service prices, price changes, supply and demand for products, services or raw materials, or any other subjects bearing on product or service pricing.

Territorial or market allocation involves an agreement among competitors operating at the same level of the market structure – such as manufacturers or distributors – to divide the market in such a way as to allow each party to the agreement to serve its share of the market without competition from the others. Such prohibited allocations in the past have been made on the basis of geographical boundaries or particular types of customers.

No discussions or agreements shall take place concerning allocation or division of markets or geographical or other restrictions on representatives, distributors or other customers of ECOA members' products or services.

Group boycotts or “concerted refusals to deal” generally are analyzed under the rule of reason but may sometimes be considered *per se* violations. Agreements or collective action to refuse to deal with certain suppliers, customers, or other competitors, or to undertake actions that tend to exclude certain participants from the marketplace or deny them access to a significant competitive benefit available to others in the market are prohibited. Before the *per se* rule is applied, several factors are considered, such as whether the activity was undertaken for an anticompetitive purpose, whether the group possesses market power, and whether it holds exclusive or unique access to a business element necessary for effective competition.

In the trade association context, group boycott issues may arise in relation to membership and/or exhibition restrictions, or in disciplinary or expulsion action against members. Because these situations must be analyzed carefully in accordance with strictly defined legal guidelines, counsel should be notified prior to ECOA's consideration of any of these actions.

ECOA members shall not engage in any discussion or agreement concerning particular representatives, distributors, other customers, or suppliers involving decisions to deny, limit or terminate business relations between any ECOA member and such firms. Also, ECOA legal counsel shall be notified prior to any discussion by ECOA concerning restricting or denying membership or exhibition space to any nonmember firm that competes with any ECOA member.

In addition to the issues described above, other antitrust problems may arise when trade association activities are undertaken that may have anticompetitive effects on non-members. Particular guidelines (discussed below) must be followed in conducting ECOA-sponsored meetings or before undertaking any association project such as developing “best practices,” petitioning industry or government organizations on matters that may have a competitive impact on non-members, restricting membership or access to association benefits, standard setting, product or service endorsements. Accordingly, ECOA legal counsel must be contacted before discussing or planning these programs.

Meeting Guidelines

To minimize the possibility of antitrust problems at ECOA gatherings, the following guidelines should be followed at all meetings of the ECOA Board of Directors, its committees, conferences, trade shows, training seminars, best-practices discussions, colloquiums, and task forces and working group sessions.

Procedures for Meetings

- Meetings should be held only when there are proper items of substance to be discussed that justify a meeting.

- In advance of every meeting, a notice of meeting, along with an agenda, should be sent to each member of the group. The agenda should be specific and such broad topics as “marketing practices” should be avoided.
- Participants at the meeting should adhere to the agenda. Subjects not included on the agenda generally should not be considered at the meeting. If additional subjects are raised for discussion, those additional matters should not be discussed unless approved by ECOA staff and/or legal counsel.
- An ECOA staff member should attend all meetings. During any discussion between meeting participants that occurs outside the formal meeting, the guidelines contained in the next section, “Topics to Avoid at Meetings,” must be followed.
- If a member brings up a subject of doubtful legality for discussion at a meeting, he or she should be told immediately that the subject is not a proper one for discussion. The ECOA officer or staff or any member present who is aware of the legal implications of a discussion of the subject should attempt to halt the discussion. If the subject of prices, costs, or other competitive practices is raised by others at the meeting, the ECOA officer or staff or other members must disassociate themselves unequivocally from the discussion. If necessary, staff, officers and members must leave or halt the meeting.
- Minutes of all meetings should be kept by ECOA. Minutes should summarize accurately the actions taken at meetings, if any. Minutes should not contain comments made by particular meeting participants because of the potential for incompleteness or inaccuracy in attempting to report precise remarks.
- Members should not be coerced in any way into taking part in ECOA activities.
- It is essential that members cooperate with ECOA’s leadership and staff, particularly when ECOA leadership or staff has ruled adversely about a particular activity or topic of discussion.

Topics to Avoid at Meetings

The following topics are some of the primary ones that should not be discussed at meetings attended by ECOA members or staff, including meetings or other gatherings sponsored by organizations independent of ECOA:

- Current or future prices of competitors
- Matters related to prices, such as discounts, credit terms, profit levels, or volume of service
- Wage and salary rates, product or service costs, or other actual costs of individual companies, since these costs are elements of price

- Dividing up, allocating, or rationalizing markets, bids, geographic areas, types of business, or customers among competitors
- Refusals to deal with suppliers, customers, or other competitors. For example, if a group of ethics officers were to agree to boycott a particular supplier of compliance software for the purpose of forcing that supplier to lower its prices, such an agreement could run afoul of the antitrust laws. Critiques of supplier products or customer practices can also raise the danger of being construed as an unlawful group boycott, and should only be conducted after consultation with ECOA legal counsel. Such discussions may be permissible when efficiencies will be achieved through the exchange of ideas and when precautions are taken to avoid the inference of an agreement to deal with suppliers or customers only on certain terms.

“Best Practices” Discussions

The following guidelines apply to any “best practices” discussion:

- All industry practices discussed should involve an attempt to reduce costs or realize some other efficiency. Discussions should be limited to what is reasonably necessary to accomplish these legitimate goals.
- As in other areas of ECOA activity, price and other competitively sensitive terms of trade should not be discussed in the “best practices” context. Specific present or future competitive plans and strategies of individual companies should not be discussed. Specific customer information or specific companies’ costs also should not be discussed.
- In discussing “best practices,” no agreement should be reached to use a particular practice, to deal with suppliers or customers on particular terms, or to exclude members or other competitors because they use a different practice.
- Prior to a “best practices” discussion, an agenda or program outline should be prepared and reviewed by staff and/or counsel. Minutes should be kept of all meetings at which “best practices” are discussed. Should questions arise about the propriety of a “best practices” discussion, the discussion should be discontinued until ECOA staff and/or legal counsel can be consulted.

Joint Activities to Influence the Government

Joint efforts by competitors to influence all levels and branches of government — legislatures, government agencies and departments, and courts — are shielded from antitrust liability by the First Amendment of the United States Constitution, even when the efforts are conducted with the purpose of putting competitors at a disadvantage. The courts have recognized this general exemption from antitrust liability under a doctrine known as *Noerr-Pennington*.

It is important to understand, however, that *Noerr-Pennington* immunity is not absolute. There is no immunity from joint lobbying activity that is a “sham” or cover-up to

harass competitors or to reach an unlawful agreement through the use of the governmental process. Such joint activities by ECOA and its members, therefore, should be undertaken with caution and should be limited to good-faith efforts to influence legislative or regulatory action. ECOA legal counsel should be consulted if there are any questions involving lobbying activities that might affect competitors.

Surveys and Other Exchanges of Information

ECOA and its members should proceed cautiously in conducting or participating in surveys of groups of competing companies. Collection and dissemination of prices, costs, and other competitively significant information among competing companies can raise serious antitrust concerns. Such exchanges of information may be found to reduce competition unlawfully if they facilitate collusion or coordinated interaction among the competing companies.

Certain surveys and other exchanges of information through trade associations, however, may have pro-competitive effects by reducing information or transaction costs and thereby increasing the efficiency of a market's operations and the competitiveness of the surveyed companies. Even permissible exchanges of data, however, must be carefully implemented to ensure that they facilitate, rather than impair, the competitive process.

Accordingly, in addition to having a goal of reducing information or transaction costs and increasing the efficiency of a market's operations and the competitiveness of the surveyed companies, a proposal to survey and report data on competing companies' prices, costs, product or service volumes, or other competitively-sensitive matters should adhere to the following guidelines:

- The information exchanged needs to be limited to what is reasonably necessary to achieving the legitimate efficiency goal.
- Information from any one company should be submitted only to a trade association or another independent data-gathering organization. The data-gathering organization, in turn, should provide access to the information only to those of its staff who are running the program, and should otherwise keep the information strictly confidential. An individual company's raw data should never be provided to another competing company. If possible, the raw data furnished by each company should be returned to that company upon release of any survey or report reflecting the data;
- The information provided by competing companies should be based on data more than three (3) months old;
- There must be at least five (5) respondents reporting data upon which each statistic disseminated in any report or survey is based. Statistics that are based on data from fewer than five (5) participants should be excluded;
- No individual company's data should represent more than 25 percent on a weighted basis of each statistic disseminated in any survey or report;

- Any information disseminated in a survey or report should be sufficiently aggregated so as to prevent recipients from identifying the data provided by any individual participant; and
- ECOA meetings that are necessary to develop and implement a program to survey and report competitively sensitive information should cover only the administrative aspects of organizing and running the program. At such meetings, participants should not discuss their own or other individual companies' survey responses or competitive plans. ECOA staff should generally be present at member meeting necessary to design and implement the program. Once the program is up and running, ECOA (or other independent data-gathering organization) staff alone should handle its administration.
- ECOA antitrust counsel should be consulted at all phases of the project to minimize the risk that the program violates the antitrust laws.

Restricting Membership or Access to Association Benefits

Restrictions on trade association membership or on access to association benefits may raise “group boycott” or “concerted refusal to deal” concerns under the antitrust laws. Courts have recognized, however, that every trade association must be allowed to have some reasonable membership or access criteria, as well as disciplinary rules, to function efficiently and achieve its legitimate goals. As a result, restrictions on membership and access are today generally analyzed under the rule of reason rather than deemed *per se* violations of the antitrust laws. Exclusion or denial of access nevertheless may be found illegal if the trade association possesses market power or provides the exclusive access to an element essential to effective competition.

Guidelines: To minimize exposure under antitrust laws, ECOA members and staff should consider the following factors in setting restrictions on membership or on access to association benefits:

- *What is the industry market share represented by ECOA for which membership or access to benefits is sought?* While there is no bright-line test, if the share of industry competitors represented by the association is large, the association is more likely to be deemed to have market power, and have to open its doors to other companies or provide access to association benefits.
- *Are membership restrictions and restrictions on access to benefits carefully tailored to accomplish the legitimate purposes and efficient functioning of the trade association?* Requirements that ensure the viability and efficient operation of the association, such as a requirement to pay dues on time or space restrictions at a trade show, generally are acceptable.
- *Does the trade association perform a service or provide information that has become absolutely vital to the survival of a competitor in the marketplace?* If so, it may at least have to make that service or information available to non-members for a fee. If,

on the other hand, the service or information is not sufficiently unique, and can be had from other sources, exclusion of non-members or others should be permissible.

- *Does the trade association have procedures that guarantee a company seeking membership or access an objective assessment, or a member a fair hearing before expulsion? While such “due process” efforts are no longer an absolute requirement under the antitrust laws, they still serve to demonstrate the legitimacy of an association’s actions under a rule of reason analysis. Such procedural requirements can provide a written record of the association’s actions and the bases for its decisions, and can also serve to discourage anticompetitive, arbitrary, or secretive behavior within the association.*

Because evaluation of these criteria can often be complex, ECOA members and staff involved in setting or reviewing membership and access requirements should consult with ECOA legal counsel when developing a particular set of membership or access rules, and when application of those rules in a particular situation is unclear or potentially problematic.

Standard-Setting, Including Model Contracts and Forms

Standard-setting is a legitimate, pro-competitive activity for a trade association to the extent that the activity lowers transaction costs and facilitates market transactions. Standard-setting, however, can prompt antitrust concerns when competitors use the activity to reduce their competition with one another or to disadvantage rivals.

Guidelines: Before engaging in standard-setting, including issuing “recommended practices” and drafting model contracts and forms, ECOA members and staff should ask the following questions:

- *Will significant efficiencies, such as a reduction in market transaction costs, result from the standard-setting? If so, the association is in clear “rule of reason” territory, and all relevant factors will be considered to determine if competition and customers are, on balance, likely to be harmed or helped by the standard-setting activity. If not, the activity should be abandoned altogether. Any cooperation among competitors regarding market variables that does not hold the potential for meaningful efficiencies and cost reductions runs the risk of being characterized as inherently suspect, and ultimately *per se* illegal.*
- *Does the standard-setting activity involve “core” economic terms in market transactions, such as price or other terms that are closely related to price? If so, the association could be running into antitrust trouble. As a general rule, so-called “standards” should not be set for price or other highly sensitive contract terms. Efficiency gains from standard-setting generally come from reduced transaction costs or facilitation of a common language or interface between suppliers and customers, not joint setting of competitively sensitive market terms. If not, the association is on much safer ground to proceed with its standard-setting. For example, mere boilerplate contract terms that involve significant time and expense to negotiate are good candidates for inclusion in a standard form contract, while terms relating to core financial negotiations between the contracting parties should be left out.*

- *Are the standards voluntary, leaving individual parties free to disregard the standard and strike their own deal if they so choose? If so, regulators and courts are much more likely to approve the standards and related activity. This is because the standards will rise or fall on their own competitive merits in individual transactions, without any exercise of market power or coercion by the trade association. If not, the standard-setting activity can run a significant anti-trust risk of being construed as a concerted refusal to deal with customers or suppliers except on standardized terms.*
- *What is the collective market share of the companies setting the standards? All other things being equal, joint activity such as standard-setting will be scrutinized more closely the greater the collective market power of the companies involved. However, trade associations that represent entire industries often engage in efficient and lawful standard-setting. It is essential that the standard-setting activity be tailored to facilitate, rather than impair, the efficient workings of the market. In addition, the greater the combined market share involved, the more important it is that everyone involved understand that the standards are voluntary.*
- *Do the procedures give all interested parties a chance to have meaningful input into the development of the standards, either through direct involvement or through a notice and comment procedure? Industry standards will be viewed much more favorably by regulators and courts when customers of the companies formulating the standards have been participants in the standard-setting process. This is because they have had the opportunity to protect their own interests in the process, and presumably would not have approved any standards that would harm them.*
- *Are the activities of the standard-setting body or committee no broader than necessary to formulate and promulgate the efficiency-enhancing standards? All activities of the standard-setting body should be carefully limited to what is reasonably necessary to achieving the efficiency goals of the standard-setting. If a group is developing technical standards, for example, there should be no need to discuss prices. Discussion of price and other competitively sensitive terms should be strictly avoided at meetings of the standard-setting body or group because such a discussion can create the risk of an inference of agreement even apart from the legitimate activities of the group. Moreover, all such meetings should have an advance agenda and minutes should be kept to ensure that discussion does not spill over into inappropriate areas.*

Endorsement of Products or Services

Under certain circumstances, a trade association's certification or endorsement of a product or service may raise antitrust questions. If the endorsement provides the seller of the endorsed product or service with a competitive advantage, a disappointed competitor may claim that the association's failure to endorse its offering amounts to a group boycott, which could be a *per se* violation of the antitrust laws.

Guidelines: In endorsing or certifying a product or service, ECOA should adhere to the following principles:

- Before a response is made to any request for an ECOA endorsement of a product or service, ECOA legal counsel should be consulted. Special care should be taken concerning any endorsement application from a competitor of ECOA or one of its member companies.
- Criteria for endorsement decisions should be objective, in writing, and applied evenly and with attention paid to whether an ECOA endorsement could be deemed essential to the applicant's ability to compete in a relevant market or could have significant anticompetitive effects. These criteria should be distributed to decision-makers and applicants.
- The decision making process should provide applicants with a reasonable opportunity to provide information applicable to the endorsement decision. Rejected applicants should be informed of the reasons for ECOA's decision.
- ECOA members should not be required to purchase only ECOA-endorsed products or services.
- ECOA members should not agree among themselves not to do business with a company whose products or services are not endorsed by the ECOA.
- ECOA should not refuse to endorse products or services simply because they are made or provided by a non-member.

Memoranda and Other Documents

In any antitrust investigation or lawsuit involving a trade association, virtually any association document (except privileged attorney-client communications) may be compelled to be turned over to a government agency or private litigant. Conduct that is perfectly legal can become suspect because of a poor choice of words or a misleading manner of expression.

Guidelines: All ECOA correspondence, minutes, reports, memoranda, notes, or other documents, therefore, should be carefully written to avoid misstatements or hyperbole that may be misinterpreted or taken out of context. Use the rule of "How is your document going to look with an exhibit sticker on it?" Some specific guidelines with examples:

- Do not speculate about the legal propriety or consequences of conduct. For example, do not write "This program may not be lawful – we'll have to check with counsel." Instead, check with ECOA legal counsel about the lawfulness of the program before going forward with it.
- Avoid using guilt-complex works (for example, "Please destroy after reading" or "Don't put anything in writing").
- Do not give the false impression that companies in the industry are excluded from some organization or activity for competitive reasons.

- Do not falsely or deceptively criticize the products or competitors.
- Be especially careful when describing ECOA activities to avoid any implication that ECOA or its members are following a particular course relating to prices or costs.

Examples of Hazards Faced by Trade Associations and Their Members

Trade associations and their members can sometimes unwittingly fall into very serious antitrust violations. Moreover, because trade association meetings provide opportunities for competitors to meet for entirely appropriate reasons, some people who are determined to violate the antitrust laws use association meetings as a cover for illegal meetings. Accordingly, antitrust enforcement agencies know that trade associations meetings are good places to look for antitrust violations.

A number of years ago at a meeting of real estate agents, one agent made an impassioned plea – too many upstart agents were coming into the area and offering their services to home sellers at less than the traditional fee of six percent of the selling price. He announced that he would stick to the six percent fee and would refuse to do business with anyone who discounted the fee. He urged his colleagues to join him and many, of course, did. He and his colleagues were prosecuted for criminal violations of the Sherman Act.

A trade association of miners and processors of a particular raw material retained a consultant to explain the reasons for falling prices in the industry and to present his analysis at a trade association meeting. The consultant drafted a report showing falling demand, analyzing the capacity of the various processors, and suggesting, on the basis of efficiency, that certain processors should shut down certain operations in order to reduce excess supply and restore prices. The report was printed and prepared for circulation at the meeting. This association, with a history of antitrust trouble, regularly had antitrust counsel review material that was to be circulated among members. Counsel prevented the release of the report and avoided the obvious potential antitrust exposure.

An informant told government enforcers that he had refused to go along with a bid rigging scheme in a series of contracts for the Department of Defense. He had some evidence in writing but not enough to identify the leaders of the scheme. Attorneys of the Antitrust Division of the Department of Justice, accompanied by investigators, checked in at the hotel where the next annual international trade association meeting for the industry was held. They attended some sessions and “hung out” in bars. Within a few days they had identified the “ringleaders” and the followers. Raids, subpoenas and indictments soon followed.

A disgruntled executive unhappy with his job and his recent bonus attended a dinner held in connection with a trade association meeting of very large government contractors. During a discussion of a significant job then out for bid, he heard a colleague describe the bid as being all set up. Shortly thereafter the executive filed a whistleblower action alleging a wide-ranging conspiracy to rig the bids on hundreds of millions of dollars of U.S. government contracts. That lawsuit began an investigation that eventually netted well more than \$100 million in fines and civil damages. Under the whistleblower statute, the

whistleblower stands to receive approximately 25% of the civil damages, a much better bonus than the one his employer had paid him.

A group of conspirators in the food and feed additives industry often used trade association meetings as a cover for their regular get-togethers to allocate market shares. A participant had alerted the US government to the conspiracy. The Antitrust Division, working with the FBI, arranged for that informant to wear a wire and even bring a hidden video camera to the meeting. When the meeting began, the camera view was blocked. An FBI agent put on a waiter's uniform and knocked on the door ostensibly to deliver a tray of food and drink. When one of the conspirators heard the knock, he joked: "Hello, FTC?" The waiter came in, moved the things on the table around to make space for the tray, in the process, of course, unblocking the camera. The participants were caught on video plotting to raise prices by allocating output. Indictments and massive civil class actions followed. Excerpts from that video tape and other recordings made during the investigation are available from the Department of Justice.

Conclusion

Although a failure to comply with all of these provisions does not mean the antitrust laws have necessarily been violated, following them will give ECOA and its members a high degree of confidence that the activity is safe from antitrust attack. Any proposed deviation from these *Guidelines* should be thoroughly discussed in advance with ECOA legal counsel.