

Part 1

NATIONAL GRAIN AND FEED ASSOCIATION:

STATEMENT OF ANTITRUST COMPLIANCE POLICY

In view of everpresent 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 National Grain and Feed 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 or the Association's antitrust 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"; but, 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 other states.

In addition to federal laws, every state has antitrust and unfair competition statutes that apply to conduct within, or affecting commerce in, that state. Indeed, 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 have also actively pursued violations of federal antitrust laws through *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.

Because a trade association by its very nature is a combination, associations and their 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 to be 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").

To constitute a violation of the antitrust laws, an agreement need not be an express written or oral agreement. 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 pricefixing may imply acquiescence and make a nonparticipant 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

Because trade associations bring competitors together, 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 antitrust 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 Executive Committee and Board of Directors meetings, as well as other meetings where antitrust issues could arise, such as Trade Rules Committee meetings. 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.

Part 2

SUGGESTED ANTITRUST COMPLIANCE POLICY FOR MEMBERS

OF NATIONAL GRAIN AND FEED ASSOCIATION

It is the policy of this company [name of company] to comply fully with all federal and state antitrust

laws. This memorandum restates our commitment to that goal, and describes what is expected of each employee.

Antitrust laws in this country date back to the 1800's. They have become an increasingly important factor in the day-to-day conduct of a business. Of course, monopolies are still attacked under the antitrust laws, just as the infamous trusts were challenged by Teddy Roosevelt. More important today is the applicability of the antitrust laws to such day-to-day business problems as our pricing practices and other relations with customers, suppliers, and competitors. The theme behind most antitrust laws is preservation of our free enterprise system. Both the public interest and our corporate best interests will be served best by vigorous competition, unhindered by such artificial restraints as pricefixing agreements among competitors.

There is another practical reason for compliance with the antitrust laws. Violations can subject the Company to heavy fines and to costly lawsuits for damages and injunctions. Individual violators can be sent to jail for as long as ten years and fined up to \$1 million for each violation, and the Company can be fined up to \$100 million per violation.

In many instances the antitrust laws are clear and you can guide your conduct accordingly, both as to what you should and should not do. In those areas which are not as clear, however, we can only alert you to the pitfalls. It is absolutely essential that you consult with your superiors or counsel whenever questions arise. Any infraction of this Policy will subject the employee or employees involved to disciplinary measures.

This manual addresses the principal Federal antitrust statutes: the Sherman Act, the Clayton Act (as amended by the Robinson-Patman Act) and the Federal Trade Commission Act. Together, these laws govern the conduct of our business with respect to our competitors, suppliers, distributors and customers.

AGREEMENTS WITH COMPETITORS

Section 1 of the Sherman Act prohibits any "contract, combination . . . , or conspiracy . . . in restraint of trade or commerce" The courts have interpreted this law to prohibit only "unreasonable" restraints of trade. However, certain types of activities are regarded as so inherently anticompetitive 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. Agreements considered to be per se illegal include:

1. Agreements to Fix Prices. It is per se unlawful to reach any agreement or understanding with a competitor (whether formal or informal) regarding the price at which products or services will be sold. This applies to agreements to raise, lower, or stabilize prices, and to agreements that either directly or indirectly affect prices. This prohibition includes discussions of demurrage. No officer, employee or representative of [name of company] should ever discuss prices with any officer, employee or representative of a competitor.
2. Agreements to Divide Markets or Territories. It is per se unlawful to enter into any agreement or understanding concerning the markets or territories in which [name of company] or a competitor sells, or regarding any division or allocation of markets or territories. Unlawful behavior includes agreements with competitors to stay out of their territory in return for their staying out of your territory, agreements to share business, or agreements to divide or allocate geographic markets.
3. Agreements to Divide Customers. It is per se unlawful to enter into any agreement or understanding concerning the customers to which [name of company] or a competitor sells, or any division or allocation of customers. This includes any agreement whereby competitors agree to stay away from each other's customers or potential customers.
4. Agreements Restricting Production. It is per se unlawful to enter into any agreement or understanding with a competitor regarding production volume, supply or output, or any restrictions on the level of production, supply or output;
5. Agreements Regarding Terms and Conditions of Sale. It is per se unlawful to enter into any agreement or understanding with a competitor regarding any terms or conditions of sale used by

[name of company] or its competitors. This includes such things as discounts, rebates, freight and delivery charges, deposits, and allowances.

AGREEMENTS WITH DISTRIBUTORS AND CUSTOMERS

1. TieIn Arrangements. It is generally illegal to condition the sale of one product or service upon the purchaser's agreement to purchase another product from the seller. Therefore, you may not force a customer to carry more of our product line than it wants, or refuse to sell a product that a customer wants unless it also buys another product or group of products which it does not want.

2. Reciprocal Arrangements. It is illegal to enter into an agreement or understanding that conditions the purchase of a product from another company upon that company's purchase of products from this Company. These "I'll buy from you if you buy from me" arrangements may violate both the Sherman Act and the Federal Trade Commission Act. It is not unlawful for a company to buy from its own customers, but it is unlawful to exert pressure (subtle or otherwise) by threatening to withdraw patronage in order to obtain reciprocal purchasing.

3. Exclusive Dealing Arrangements and Requirements Contracts. Arrangements which take a person or company out of the market by limiting his dealings to one person or product may be illegal if a substantial amount of business is involved and there are insufficient alternatives for other firms wishing to deal with the Company. Examples of these arrangements include (i) requirements contracts, or agreements to purchase all of a company's requirements of a product from a single seller, and (ii) exclusive dealing arrangements, by which a dealer agrees not to sell the products of a competitor. Because the antitrust analysis of these arrangements is complex, you must consult with Company counsel prior to entering into any such arrangements.

4. Resale Price Maintenance. The antitrust laws prohibit agreements between a seller and its customers relating to resale prices. Although it is permissible for a seller to suggest or recommend resale prices, the customers must be free to decide independently what retail prices they will charge for the seller's products. Never attempt to enforce or police suggested prices.

5. Boycotts. It is per se unlawful to agree with other parties to refuse to deal with, or boycott, a particular supplier, customer or competitor.

6. Unilateral Refusals to Deal. A company is generally free to make a unilateral decision that it will not deal with a particular customer or supplier. There are certain limitations on this right, generally when there are inadequate alternative sources of supply. There are many lawful reasons for terminating customer or supplier relationships (i.e., refusing to deal), including slow pay or other credit problems, inability to receive deliveries, a history of consumer complaints, and failure to maintain product quality. These reasons should be fully documented. If you have any doubts about whether your reasons for desiring not to deal with a customer or prospective customer are legally sufficient, check with your superiors or counsel before you act.

RELATIONSHIPS WITH CUSTOMERS

Price Discrimination. With certain exceptions noted below, the Robinson-Patman Act makes it illegal to discriminate against a customer or group of customers by charging another customer a lower price for goods of like grade and quality, if the effect is to injure competition.

Unjustified differences in terms of payment, delivery or other conditions of sale, as well as disparate rebates, cash allowances or service charges, can also constitute price discrimination.

A lower price can be charged if (1) the lower price is cost justified by lower manufacturing costs, selling costs, or some other circumstance affecting the cost of serving that particular customer; (2) the lower price is offered in a good faith effort to meet, but not beat, the price of a competitor; or (3) some other legally acceptable defense, such as the noncontemporaneous nature of the sales, permits the lower price.

Promotions, such as allowances, payments, services or facilities provided in connection with the sale of a product, must also be made available on proportionately equal terms to all customers who compete in the resale of the products involved. Merchandising, advertising or warehousing assistance must therefore be made available on a pro rata basis to all competing purchasers.

Finally, a buyer who knowingly receives or induces a supplier to extend discriminatory prices or terms of sale may also be liable.

Contact your superiors or counsel if you have any question about the legality of a price or promotion which you are contemplating.

WHAT IS AN "AGREEMENT"

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TRADE ASSOCIATIONS

Because trade associations bring competitors together, considerable caution must be exercised in the conduct of Company employees and their contacts with competitors during these meetings. This also applies to any informal gatherings that may take place in connection with the formal meetings. Not only must you avoid engaging in prohibited conduct or communications with competitors, it is also essential to avoid engaging in communications that could somehow be misconstrued or interpreted by a third party as resulting in an illegal agreement or understanding.

If the subject of pricing, bidding, territorial or customer allocation or refusal to deal is mentioned during any trade association meeting, you must promptly leave the meeting, request that your departure be recorded in the minutes, and contact your supervisor and the Company's counsel as soon as possible.

In no event should Company information, including pricing information, distribution or sales practices, or any other proprietary information be distributed or exchanged during trade association meetings.