Southwestern Fertilizer Conference, Inc.

Guide to Antitrust Compliance

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This Guide to Antitrust Compliance is designed to help SWFC members comply with state and federal antitrust laws when participating in SWFC meetings or activities. This Guide, which emphasizes common antitrust risks, is limited in scope and does not attempt to describe the complexities of antitrust law. Instead, it is intended to further SWFC members' understanding of basic antitrust principles and enhance their ability to identify antitrust issues. Keep in mind that antitrust laws are complex and subject to change. Conduct permissible under one set of facts may be questionable under another.

While this Guide provides helpful guidelines for proper conduct, it is not intended as legal advice to cover particular fact patterns. By necessity, it does not discuss rare situations that may violate the antitrust laws. Therefore, it is imperative that you consult with legal counsel when you have concerns about whether any particular action may violate the antitrust laws. Further, this guidance is limited to antitrust issues that arise in the context of SWFC activities, and does not attempt to provide guidance concerning issues SWFC members may face in their respective businesses. Each SWFC member should rely on his or her company counsel for guidance on issues relating to company business.

SUMMARY OF THE ANTITRUST LAWS

The antitrust laws are designed to encourage competition, discourage anticompetitive behavior, and permit persons engaged in business activities to compete freely and vigorously. As a result, the laws are particularly sensitive to actions that interfere with the free market factors of price and other terms of sale, volume of production, marketing and sales territories, sources of supply, and channels of distribution.

The United States' antitrust laws are contained primarily in the Sherman Act, the Clayton Act, the Robinson-Patman Act, and the Federal Trade Commission Act. In addition, each of the 50 states has enacted antitrust legislation. The Sherman Act prohibits conduct that restrains trade, including certain joint activity by two or more companies or individuals, as well as unilateral conduct that involves the exercise of monopoly power. The Clayton Act prohibits certain mergers and acquisitions, and the sale of goods on the condition that the purchaser not use or deal in the goods of the competitor(s) of the seller where the effect may be to lessen competition.

The Robinson-Patman Act makes it unlawful for a seller to discriminate or differentiate in price between purchasers of commodities of like grade and quality, where the effect may be to lessen or injure competition. The Federal Trade Commission Act prohibits "unfair methods of competition . . . and unfair or deceptive acts or practices," and empowers the government to attack trade practices that conflict with the basic policies of the Sherman or Clayton Acts, even though such trade practices do not actually violate those laws.

The U.S. antitrust laws are designed to protect and promote competition in markets affecting consumers in the United States, and thus govern the activities of U.S. or foreign companies competing for domestic or import sales in the U.S. market, regardless of whether the offensive conduct occurs in the United States or elsewhere. Further, in certain circumstances, the antitrust laws govern the export sales of U.S. companies and foreign sales of foreign companies.

Please note that this Guide does not address state or foreign antitrust laws. These laws, however, are often similar to the federal antitrust laws, and acts that violate the federal laws may likewise violate state and/or foreign laws. Therefore, you should consider the principles discussed below in all transactions, even those occurring outside the United States.

PENALTIES FOR VIOLATING THE ANTITRUST LAWS

Penalties for violating the antitrust laws are severe and can be imposed on both corporations and individual employees. Criminal violations of the Sherman Act are felonies. A corporation convicted under the Sherman Act may be fined up to $ 10 million; an individual may be sentenced to serve up to three years in jail, and fined as much as $350,000. Even larger fines may be imposed pursuant to the Comprehensive Crime Control Act and the Criminal Fine Improvements Act, which provide that the fine may be increased to twice the gain from the illegal conduct or twice the loss to the victims. The current Federal Sentencing Guidelines recommend mandatory jail terms for individuals convicted on certain antitrust violations.

Violations of the Sherman Act also may result in civil liability in cases which may be brought by either the government or a private party. If a private party proves that a defendant has violated the antitrust laws, the defendant may be liable for up to three times the damages actually caused by the violation, plus all of the plaintiff s legal expenses. Antitrust law violations can render contracts containing the illegal provisions wholly unenforceable. Even the successful defense of an antitrust suit can be extremely expensive and time-consuming. Further, an injunction or cease and desist order can be imposed that requires dissolution of a trade association and that prohibits otherwise lawful business practices, thus creating trade disadvantages for the defendant entity. In short, the potential consequences of violating or appearing to violate the antitrust laws are severe to trade associations, corporations, and their employees.

APPLICATION OF THE ANTITRUST LAWS TO TRADE ASSOCIATION ACTIVITIES

One portion of the antitrust laws with special relevance to SWFC’s operations is Section One of the Sherman Act, which prohibits two or more parties from acting together or "conspiring" to unreasonably restrain trade. For example, two competitors may not enter into agreements to fix prices, allocate or divide customers or territories among competitors, or engage in group boycotts (i.e., agreeing with others not to purchase from or sell to a particular party) that have an anticompetitive effect. From a practical standpoint, trade associations should focus their concern on five principal antitrust problem areas: price-fixing, allocation of customers, membership, standardization and certification, and industry self-regulation.

Price Fixing

Perhaps the greatest antitrust risk facing associations and association members, and the risk about which the government has evinced its great concern, involves agreements to fix prices. Indeed, the predominant antitrust issue arising in the fertilizer industry over the years, creating potential civil and criminal liability, has been price fixing among competitors. Price fixing can be a criminal violation under the Sherman Act. Such an unlawful agreement does not have to be formal or in writing. In fact, the agreement does not even have to be expressed, but can be implied (and proved in court by "circumstantial" or indirect evidence that tends to indicate that such an agreement was made). For example, a pattern of concurrent or nearly simultaneous matching price changes among competitors may tend to prove that those competitors agreed to raise or lower prices. In addition, where competitors simultaneously announce changes in prices, terms, or strategies, an agreement arguably may be inferred, with the outcome turning on what a judge or jury ultimately determines. The goal of a price fixing agreement need not be realized for the antitrust laws to be violated, and if prices are fixed, it is no defense that the prices set are reasonable or that the ends sought are worthy.

Allocation of Customers or Markets

Like price fixing agreements, an agreement among members of an association to allocate customers or territories (i.e., agreeing with a competitor that you will not solicit business from customer A or in market X) can be a criminal violation of the Sherman Act. The antitrust laws prohibit any understandings or agreements between competitors or members of an association that involve the division or allocation of customers, bid-rigging, agreements not to compete, etc.

Even informal agreements by which one member agrees to stay out of another member’s territory will constitute a violation of the antitrust laws.

Some SWFC members also are members of organizations founded in accordance with the provisions of the Webb-Pomerene Act, such as the PhosChem and Canpotex. As such, the joint marketing activities of those export marketing associations are accorded certain limited antitrust exemptions (even when concerning particular actions described in this Guide as strictly unlawful). SWFC enjoys no such exemptions, and all SWFC members, regardless of whether they also are members of an export marketing association, must take care when engaging in SWFC business to ensure they remain in full compliance with the antitrust laws.

Membership

A basic assumption about any trade association is that its members derive an economic benefit from membership. Denial of membership to an applicant, therefore, may constitute a restraint of trade if that denial of an economic benefit limits the ability of the applicant to compete. Thus, to avoid antitrust problems, membership criteria must be drafted carefully, and those criteria must be applied consistently in the evaluation of member applications.

Standardization and Certification

An association that develops voluntary industry standards may face antitrust problems if the standards unjustifiably favor some and discriminate against others. Similarly, association certification activities that further the interests of certain groups to the exclusion of others may result in antitrust problems. SWFC members' participation in certification activities or in the promulgation of industry standards must be guided by their professional expertise — exercised in the best interests of the industry — and must not be seen as an opportunity to disadvantage or otherwise harm a competitor.

On a related note, benchmarking, and then emulating the "best practices" used by other successful companies, is an increasingly popular method for companies to improve their operations. Benchmarking typically involves collecting information from companies in the industry, as well as outside companies, either directly or through the use of third parties. Because benchmarking can involve information sharing with competitors, antitrust risks may be raised, especially if the information exchanged relates to costs, prices, or output levels, The rules governing information exchange and how that exchange may occur are complex, and require that you seek the advice of legal counsel when considering any benchmarking process or program.

Industry Self-Regulation

Associations commonly establish codes of ethics or other self-imposed regulations or procedures for enforcing them. It is laudable for an association to wish to promote high ethical standards, but antitrust problems may arise if an association's attempt to police its constituents causes economic injury. SWFC members must ensure that they do not use any ethical or industry rules to disadvantage or otherwise harm a competitor.

CONDUCT FOR MEMBERS TO FOLLOW AT SWFC MEETINGS

The Sherman Act is a criminal conspiracy statute. If you, as an association member, sit in a room while other members engage in an illegal discussion, such as price-fixing, you and/or your company may be held criminally liable even though you say nothing during the discussion. Your attendance at such a meeting may be sufficient to find that you acquiesced in the discussion and are equally as liable as those who vocally agree to violate the antitrust laws. Although within certain sectors of the industry, employees and officers from competing firms know each other as friends and peers, in the eyes of antitrust enforcers, they are viewed simply as competitors with the ability to collude in an anticompetitive manner. SWFC members should adhere to the following general guidelines when participating in SWFC activities:

Do not discuss current or future prices or costs.

Do not discuss what is a fair profit level.

Do not discuss an increase or a decrease in price.

Do not discuss standardizing or stabilizing prices.

Do not discuss pricing procedures.

Do not discuss cash discounts.

Do not discuss credit terms.

Do not discuss controlling sales.

Do not ban or otherwise restrict legitimate advertising by competitors.

Do not discuss allocating customers or markets to or among competitors.

Do not complain to a competitor that its prices constitute unfair trade practices.

Do not ask competitors why a past bid was so low, or to describe the basis for a past bid.

Do not discuss refusing to deal with a company because of its pricing or distribution practices.

Do not attend informal sessions in which industry problems or issues are discussed.

Do not vote or act in your capacity as a SWFC member with the intention to harm a competitor.

It is important to bring questionable conduct or potential issues to the immediate attention of legal counsel.

Even if members avoid the types of conduct described above, careless or poorly worded language in written or oral communications by SWFC members can be interpreted as signifying wrongful conduct, even when no wrongful conduct has occurred. For example, statements such as "SWFC membership gives us a competitive advantage over our competitors," "SWFC's planned actions in this area should restore order to the out of control competition that exists in this market," or "This action by SWFC pleases us because Company X has had it coming to them for a long while" are simply inappropriate. Members should be especially careful when commenting on competitors or on SWFC activities that may have a competitive impact on a competitor's business, such as standard setting. SWFC is designed to bring together the industry's experts to address issues and problems that promote the success of the industry as a whole. Accordingly, SWFC activities are not and must not be seen as opportunities for members to advance their respective companies' competitive interests.

Without being an alarmist, SWFC members should bear in mind that trade associations and their members are targets for government antitrust enforcers and private treble damage suits. By avoiding activities — and even the appearance that they are engaging in activities that might be seen to have an effect on prices or competition — members can protect themselves from charges of antitrust violations.

SUMMARY AND CONCLUSION

Trade association meetings provide a unique opportunity for competitors to meet and to discuss items of concern to the industry. At the same time, however, trade association meetings provide a fertile breeding ground for formal or informal discussions that could lead to conduct or agreements which violate the antitrust laws. When attending such meetings, discussion of areas upon which agreements would be illegal, such as any of the specific areas enumerated above, should be avoided.

In general, participation in trade associations should be guided by the awareness that such participation is potentially suspect in the eyes of antitrust enforcement agencies. Even mere attendance at a meeting at which illegal activity occurs or is discussed may result in antitrust liability. Remember always that those people who are your "friends" at such meetings are your to competitors" in the eyes of the law.

Antitrust issues that arise in the context of a trade association meeting are not limited to the trade association itself, but can create liability in each of the individual members and their companies. This underscores the need for members to educate themselves on basic antitrust principles and to take proper precautions and action when participating in trade association activity. As noted above, this Guide is an introductory summary of a very complex area of the law. Legal counsel should be contacted when potential issues arise.

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