

## **AEMCA Antitrust Guidelines** **November 2000**

### **Introduction**

**Potentially Severe Penalties.** It is essential for trade association members and staff to comply with all aspects of federal and state antitrust laws. Violation of these laws can result in severe penalties and huge litigation expenses for organizations and individuals. For example:

- An antitrust investigation by the government can result in fines per violation of up to \$10,000,000 for a corporation and \$350,000 for individuals.
- Individual employees who are involved in activity that violates the antitrust laws can also be sentenced to jail for up to three years, and possibly more if mail or wire fraud are involved.
- The government can seek other relief for violations including cease and desist orders and dissolution of a trade association.
- Private companies and individuals who are injured by an antitrust violation can sue the association, its member companies, or individuals for three times their damages, plus reasonable attorneys' fees and injunctive relief.

Even if a government or private suit is successfully defended, the cost and disruption of the litigation can be overwhelming. Thus, taking antitrust precautions is not only advisable, but also imperative.

The purpose of the *AEMCA Antitrust Guidelines* is to alert members and staff to the kinds of activities most likely to raise antitrust concerns and to the precautions that must be taken to avoid antitrust problems.

**The Antitrust Laws.** The antitrust laws are intended to ensure free and open competition. These laws, the Sherman Act, the Clayton Act, and the Federal Trade Commission Act at the federal level and similar laws in many states, prohibit contracts, combinations, conspiracies, and other agreements in restraint of trade, as well as monopolization and attempted monopolization.

An "agreement" among trade association members in antitrust terms is a very broad concept: it may be oral or written, formal or informal, expressed or implied.

The Supreme Court, however, has said that not every agreement in restraint of trade constitutes a violation; only those that "unreasonably" restrain trade are unlawful. Thus, in most situations, the courts will look at all of the factors and circumstances surrounding the conduct in question to determine whether it unreasonably restrains trade and, therefore, violates the antitrust laws.

**Joint Conduct That Is Automatically Unlawful.** Certain kinds of joint conduct are presumed to be unreasonable and therefore unlawful. These so-called "per se" unlawful practices are joint

activities that the courts have long found clearly restrain competition and lack redeeming pro-competitive benefits. Examples include:

- **Setting Prices.** Agreements with the purpose or effect of setting or maintaining either prices or factors relating to prices, such as credit, discounts, profit levels, or volume of production;
- **Allocating Markets.** Agreements with the purpose or effect of allocating markets, such as an agreement not to provide service to a particular geographic area, industry, or group of customers in return for a reciprocal pledge from a competitor. These types of agreements among competitors are never lawful, regardless of the context of the agreement. For example, settlements of legal disputes between competitors must comply with the antitrust laws in all respects, and must not contain any agreement between the competitors with respect to prices or allocation of customers or territories; and
- **Tying.** Agreements with the purpose or effect of refusing to deal with competitors, customers, suppliers, or other third parties (often called “group boycotts”) also have often been declared per se unlawful, and should be avoided.

**Trade Associations and Antitrust Agreements.** Trade associations by their very nature must be particularly sensitive to avoiding antitrust violations. One reason is that in bringing competitors together into an association, one element of a possible antitrust violation may already be present – a combination of competitors. Thus, all that may be needed to prove a violation is the action to restrain trade.

Another special antitrust issue for a trade association is that many of its valuable programs deal with subjects sensitive from an antitrust viewpoint – statistical reporting, product standards, certification, best-practices discussions, and customer relations.

**Trade association members and staff should refrain from any discussion that could provide the basis for an inference that the members agreed to take any action that might restrain trade.** Remember that 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. The “agreement” can also be inferred by the parallel actions of trade association members that happen to follow the discussion of the topic at an association gathering.

The basic principle to be followed in avoiding antitrust violations in connection with association activity is to see that no illegal agreements, express or implied, are reached or carried out through the association. Members and staff should also avoid engaging in conduct which may give the appearance of an unlawful agreement between themselves at association functions.

These guidelines are not designed to provide definitive answers to specific legal questions. Rather, their purpose is to make readers sensitive to the practices and situations that can give rise to antitrust issues.

## **Meeting Guidelines**

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

### **Procedures for Meetings**

1. Meetings should be held only when there are proper items of substance to be discussed which justify a meeting.
2. 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.
3. Participants at the meeting should adhere strictly to the agenda. In general, subjects not included on the agenda should not be considered at the meeting.
4. If a member brings up a subject of doubtful legality for discussion at a meeting, he or she should be told immediately the subject is not a proper one for discussion. The AEMCA 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 are raised by others at the meeting, the AEMCA 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.
5. Minutes of all meetings should be kept by AEMCA. 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.
6. An AEMCA 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.
7. Members should not be coerced in any way into taking part in AEMCA activities.
8. It is essential that members cooperate with AEMCA’s leadership and staff, particularly when they have ruled adversely about a particular activity or topic of discussion.

### **Topics to Avoid at Meetings**

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

1. Current or future prices of competitors.
2. Matters related to prices, such as discounts, credit terms, profit levels, or volume of service.
3. Wage and salary rates, equipment prices, or other actual costs of individual companies, since these costs are an element of price.

4. Dividing up, allocating, or rationalizing markets, bids, geographic areas, types of business, or customers among competitors.
5. Refusals to deal with suppliers, customers, or other competitors. For example, if a group of motor carriers were to agree to boycott a supplier of diesel fuel 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 legal counsel. Such discussions may be permissible where efficiencies will be achieved through the exchange of ideas and where 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 should be applied to any “best practices” discussion:

1. 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.
2. As in other areas of AEMCA 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. Nor should specific customer information or specific companies’ costs.
3. 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 a member or other competitor for using a different practice.
4. To the extent possible, technical personnel of member companies, rather than marketing personnel, should be used to conduct “best practices” discussions.
5. Prior to a “best practices” discussion, an agenda or program outline should be prepared and reviewed by staff and/or the Board of Directors. 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 staff and/or the Board of Directors 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 Constitution, even where 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 just 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 AEMCA and its members, therefore, should be undertaken with caution and should be limited to good-faith efforts to influence legislative or regulatory

action. Counsel should be consulted if there are any questions involving lobbying activities that might affect competitors.

## **Surveys and Other Exchanges of Information**

AEMCA 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.

**Survey Guidelines.** 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:

- A. The exchange of information must be one whose goal is to reduce information or transaction costs and increase the efficiency of a market's operations and the competitiveness of the surveyed companies. In addition, the exchange needs to be limited to what is reasonably necessary to achieving this legitimate efficiency goal; and
- B. The following procedural safeguards should be adopted to prevent the exchange of data from reducing competition:
  1. 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;
  2. The information provided by competing companies should be based on data more than three (3) months old;
  3. 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;
  4. No individual company's data should represent more than 25 percent on a weighted basis of each statistic disseminated in any survey or report;
  5. 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

6. Association 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. To the extent feasible, technical rather than marketing personnel from member companies should staff such meetings. Association staff should generally be present at member meeting necessary to design and implement the program. Once the program is up and running, association (or other independent data-gathering organization) staff alone should handle its administration.

## **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.

The courts have recognized 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 the per se rule.

Nevertheless, exclusion or denial of access may be found illegal where 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, AEMCA members and staff should consider the following factors in setting restrictions on membership or on access to association benefits:

1. *What is the industry market share represented by AEMCA 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. While an AEMCA entity operates in a market separate from motor carrier services, such as a publications market, the share of the AEMCA entity in that market should be determined.
2. *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, are generally acceptable.
3. *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.

4. *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, AEMCA members and staff involved in setting or reviewing membership and access requirements should consult with 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. But standard-setting can prompt antitrust concern where 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, AEMCA members and staff should ask the following questions:

- 1. 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.

- 2. 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.

**3. Are the standards voluntary, leaving individual parties free to disregard the standard and strike their own deal if they so choose?**

If so, the federal enforcers 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.

**4. 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.

**5. Are the procedures that 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 the government and the courts where 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.

**6. 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 the committee is developing technical standards, for example, it should have 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 committee, since it 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 – often a per se violation of the antitrust laws.

**Guidelines.** Therefore, in endorsing or certifying a product or service, AEMCA should adhere to the following principles:

1. Before a response is made to any request for an AEMCA endorsement of a product or service, legal counsel should be consulted. Special care should be taken concerning any endorsement application from a competitor of AEMCA.
2. Criteria for endorsement decisions should be objective, in writing, and applied evenly and with attention paid to whether an AEMCA 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.
3. 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 AEMCA's decision.
4. AEMCA members should not be required to purchase only AEMCA-endorsed products or services.
5. AEMCA members should not agree among themselves not to do business with a company whose offers AEMCA has not endorsed.
6. AEMCA 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 AEMCA 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. Some specific “don'ts” are:

1. Don't speculate about the legal propriety or consequences of conduct. For example, don't write “This program may not be lawful – we'll have to check with counsel.”

Instead, check with counsel about the lawfulness of the program before going forward with it.

2. Avoid using guilt-complex works (for example, “Please destroy after reading” or “Don’t put anything in writing”).
3. Don’t give the false impression that companies in the industry are excluded from some organization or activity for competitive reasons.
4. Don’t falsely or deceptively criticize the products or competitors.
5. Be especially careful when describing AEMCA activities to avoid any implication that AEMCA or its members are following a particular course relating to prices or costs.

## **Conclusion**

While a failure to comply with all of these provisions does not mean the antitrust laws have necessarily been violated, following them will give AEMCA 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 legal counsel.

Approved unanimously by the AEMCA Board of Directors on November 2, 2000

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James W. Burleson, President