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A. Antitrust Guide for National Fisheries Institute Members

Introduction

This Antitrust Guide is designed to be a general guide for members on how the antitrust laws apply to trade association activities, with particular reference to the activities and programs of the National Fisheries Institute (NFI). It is written for both the guidance of those members who have no particular knowledge of this complicated subject, and to provide a useful reminder or "refresher course" for those who have had the benefit of antitrust advice from their own counsel.

The NFI is a non-profit industry association representing seafood companies. Like other industry associations, NFI is composed of member companies (many of whom are competitors of one another) whose representatives serve as Officers, on its Board of Directors, and on its various committees.

Whenever competitors meet together, legal issues can arise under the antitrust laws. Involvement of a trade association in particular conduct does not serve to shield either the association or the members in question from liability. That is, if the meeting or other activities among competitors is conducted by or through a trade association, it is just as vulnerable to antitrust attack as if the same companies were meeting or acting together without the medium of an association. Trade associations generally seek, quite properly, to promote understanding and cooperation among their members. But if this "cooperation" restrains competition, both the association and its members invite liability under the antitrust laws.

Antitrust enforcement is being emphasized. Congress has greatly increased both criminal and civil antitrust penalties from earlier and has substantially increased the budgets for the Antitrust Division of the Department of Justice and the Federal Trade Commission, the two agencies charged with antitrust enforcement. Associations are more frequently becoming the objects of FTC and Antitrust Division inquiries and reviews. In view of these developments, increased awareness of the applications of the antitrust laws to association activities is essential.

NFI makes every effort to prevent possible antitrust abuses from arising. But a large responsibility also rests upon its member companies -- and particularly upon their individual representatives who work with NFI. This means that members should know enough about this subject to be able, in their NFI work, to avoid actions or discussions that might raise antitrust questions. The main purpose of this guide is to help all committee members to recognize what is, or might become, an "antitrust question."

Some actions or discussions by members of a trade association are clearly improper; many others are wholly legal and proper; and there is a sizable "gray area" in between. This gray area between legal and illegal association activity is often vague and uncertain, and NFI's policy has always been to keep away from the doubtful zones.

NFI's aim is not only to avoid actual violations of the law but also to prevent even any appearance of violation which might invite suspicion or investigation on the part of the enforcement authorities. To protect itself and its members in this respect, NFI has adopted and observes several basic policies:

1. It has well-defined, constructive objectives and programs which are designed to promote the overall interest of the industry and the public.
2. Its organizational structure consists primarily of committees and work groups with specific and limited functional purposes; and activities concerned with pricing seafood products are

- scrupulously avoided. 3. It maintains various procedural safeguards in the conduct of its meetings.
4. It retains counsel to help ensure full observance of the above policies and procedures, and to provide guidance and protective advice as to all NFI operations from an antitrust standpoint.
 5. It has approved the issuance of this "Antitrust Guide" to help member company representatives working with NFI or attending NFI meetings avoid problems under the antitrust laws.

Federal Antitrust Laws

Beginning in 1890, Congress has enacted a series of statutes which are known collectively as the federal antitrust laws. These laws are designed to promote and preserve our competitive private enterprise system by encouraging free and open competition in open markets. The federal antitrust laws give the force of law to the philosophy underlying our economic system, namely, that a free market in which supply and demand operate to determine the conditions and terms of production, distribution and sale, and where each seller and a buyer deals independently, serves to achieve the most equitable allocation of high quality goods and services at the lowest possible prices.

The central core of federal antitrust legislation is formed by the Sherman Act (1890) and the Clayton and Federal Trade Commission Acts (1914). Most states have also enacted antitrust laws similar to the federal statutes but no attempt is made to discuss them here. Similarly, there is no discussion herein of other areas of federal antitrust law (such as the Robinson-Patman Act and many parts of the Clayton Act) which may bear directly on the activities of individual companies but are usually not involved in association activities. The primary focus here is on horizontal conduct i.e., conduct involving relationships between competitors, rather than vertical relationships such as those between a company and its customers.

Section 1 of the Sherman Act prohibits "contracts", "combinations" or "conspiracies" in restraint of trade or commerce. These are terms of collective action or conduct by two or more persons, and they include agreements and understandings of all kinds, whether written or oral, formal or informal, which unduly restrain competition. Because of the collective nature of most trade association activities, this section is the principal weapon used by the Department of Justice in antitrust suits either against trade associations or against individual members for activities in some way connected to trade associations. Such suits are usually based upon an alleged conspiracy or agreement among competitors to restrain trade. The Federal Trade Commission also can, and does, challenge trade association activity which is alleged to lessen competition under Section 5 of the Federal Trade Commission Act which prohibits "unfair methods of competition."

Although the language of the antitrust statutes is deliberately general in its coverage, prohibiting "(every) contract, combination or conspiracy in restraint of trade" and "unfair methods of competition," the courts have defined a number of specific activities as inherently unlawful, the so-called "per se" offenses (see "Prohibited Activities," *infra*). The legality of other activities is determined by the "rule of reason," i.e., whether the activity is ancillary to the achievement of a legitimate business objective and is no more restrictive of competition than necessary to achieve that objective. Although this necessarily involves difficult questions of interpretation, useful guidelines can be gleaned from court decisions and DOJ and FTC policy guidance. The importance of obtaining legal counsel in any area of uncertainty cannot be overemphasized, as the sanctions imposed for violations of the antitrust laws are severe.

Antitrust Enforcement

The federal antitrust laws are enforced by the Department of Justice (Antitrust Division) and the Federal Trade Commission and frequently provide the basis for suits by private parties.

All of the following penalties can be imposed for violations of antitrust laws.

1. Imprisonment. Violations which are criminal offenses, including most prohibited collusive activities, are felonies. The Federal Sentencing Guidelines establish a minimum jail term of 6 to 12 months for first offenders. Prison sentences are increasingly common, and convicted felons may be denied citizenship, voting and other privileges.
2. Fines. The maximum fines under the antitrust laws are \$1,000,000 for an individual and \$100,000,000 for a corporation. An individual may not be reimbursed by his corporation for fines paid by him, and fines are not deductible for income tax purposes.
3. Court and Federal Trade Commission Orders. Orders (injunctions) which prohibit future violations or activities can be imposed as a result of civil action brought by the Department of Justice, the Federal Trade Commission, or private parties, with far-reaching consequences. Such injunctions may contain sweeping prohibitions which go well beyond the scope of the violations charged and prohibit conduct which itself does not violate the antitrust laws. Such orders can seriously limit freedom of corporate or association action, require burdensome and time consuming reporting obligations, cause day-to-day activities to be supervised by a court or agency, and even require dissolution of a trade association. Violation of an injunctive order issued by a court can result in contempt proceedings with attendant fines, while failure to comply with an injunction ("cease and desist order") issued by the Federal Trade Commission carries penalties of up to \$10,000 for each day the non-compliance continues.
4. Treble Damages. As private antitrust suits have increased in recent years, the "treble damage" provision of the antitrust laws has been applied more frequently. This provision allows persons or businesses injured by an antitrust violation to recover three times the amount of actual damages sustained. Such cases have resulted in hundreds of millions of dollars of damages being paid to private litigants.

Prohibited Activities

Convictions for collusive activities can be based on a series of seemingly isolated facts which have been linked to present a chain of circumstantial evidence from which an agreement or conspiracy – a meeting of the minds – can be inferred. For example, identical price increases by competitors following shortly after a trade association meeting at which "business conditions" and the need of the industry for higher prices were discussed. For this reason it is important when participating in NFI work or other association activities, which involve contact with other members of the industry, to avoid doing or saying anything, including in emails and text messages, which might even give an appearance of agreement with others in areas which may involve a lessening of competition. To the extent that an association implements certification programs or collects and disseminates information about industry production, pricing or sales, such activities must be undertaken only after careful review and under guidelines established by legal counsel.

1. Agreements Involving Prices. Pricing is the most sensitive subject under the antitrust laws. "Price-fixing" encompasses not only agreements with competitors on a selling price. It may also include, for example, agreement to buy up surplus goods, to adhere to a formula for determining prices, to standardize discounts, to control raw material prices, and any other agreement which has the net result of affecting the price structure of a given product. Moreover, it is just as unlawful for competitors to agree on the prices at which they will offer to buy from their suppliers, as on those at which they sell. As previously noted, an agreement can be shown in a number of ways. Thus, even the mere exchange of current or future price lists between competitors serves as evidence of an illegal price-fixing agreement.

The essential rule is that each seller must determine on its own the prices at which it purchases and sells. To avoid inferences of agreement or collusion, NFI members must not

- engage in discussions with any competitors regarding current or future prices, pricing policies, or any other marketing policy which may affect pricing.
2. Agreements to Control Production or Sales. Competitors may not agree to limit or control production or sales. Any limitations on output by direct or indirect agreement are illegal per se and cannot be justified, even where the purpose is to preserve the industry or conserve natural resources.
 3. Division of Territories and Allocation of Customers. Any agreement between competitors to divide or allocate either sales territories or customers is unlawful per se. Exchanges of information with competitors relating to customers or territories can create the appearance of such collusion or agreement and must be strictly avoided.
 4. Refusals to Deal. Any agreement among competitors which results in a refusal to deal with suppliers or other competitors - for example, a blacklist or boycott - is illegal per se. For this reason exchanges of information (e.g. credit information) concerning particular customers which might lead to a parallel decision not to deal should be avoided.

Application of Antitrust Laws to Trade Association Activities

The valuable and proper activities of NFI can be accomplished effectively if participating members are alert to the prohibited types of behavior described above and react quickly when danger signals appear.

Obviously, NFI activities should be conducted in such a way as to avoid any possible inference of agreement among its members with respect to current and future prices, controlling production or sales, division of territories, or refusals to deal in any form whatsoever. Further guidelines are given here to highlight potential danger zones to be avoided. When a danger zone appears, counsel should be consulted for specific guidance.

In reviewing the following guidelines there are a few general points you should bear in mind:

1. As indicated above, an otherwise lawful act may become unlawful if done for an improper purpose, or if it is part of a larger standardization program might be justifiable considered by itself, but not if it is combined with other activities to facilitate the fixing of uniform prices. In other words, the courts may look at the cumulative effect of several activities - not at each one separately.
2. Good motives are not an excuse for doing things that are otherwise unlawful, either because they fall within one of the "per se" categories discussed previously or because they are more restrictive of competition than necessary to accomplish their legitimate objectives. Thus, even though a product standardization program may be intended to increase competition by providing consumers with important information, it may nevertheless be found unlawful if conducted in a manner more restrictive than necessary to achieve its legitimate purpose.
3. An ostensibly lawful program or activity runs a greater risk of getting into vulnerable areas if conducted by a group of competitors making the same product.
4. As a member of NFI, you and your company can be held responsible for any improper acts that may occur which you know about (or should know about), and if you fail to protest or disassociate yourself from them.

Participation in NFI Meetings

All meetings of NFI committees must be conducted in strict compliance with the following procedures. These procedures provide for agendas, attendance of staff representatives, and for the keeping of accurate and complete minutes -- all of which are designed to avoid antitrust risks.

1. Staff Executive.

Each committee or work group shall have as its staff executive and secretary an NFI staff employee who shall function as the administrative representative for such committee and as its chief administrative officer. It shall be the staff executive's duty and responsibility to

see that all operations and proceedings of the committee, and of all its task groups, are conducted in full conformity with their purposes and the Antitrust Guide for NFI Committee Members, consulting with NFI counsel as necessary. On all procedural questions arising within any committee, including matters related to established committee policy, the staff executive's decision shall be accepted, pending appropriate review.

2. Meetings.

The business of each meeting shall be conducted in executive sessions attended by its members and by others who have a leading role in matters to be considered at the particular meeting. Each task group meeting shall be an executive session of assigned members of the task group plus any members of the parent committee who wish to be present.

- a. Frequency. Each committee and task group will meet only as necessary to perform authorized committee business as determined by the chairman in consultation with the NFI staff. Meetings should not be held where subject matter can be adequately and practicably handled by correspondence or telephone between the appropriate staff executive and individual members.
- b. Location. To the extent practicable and in the absence of cogent reasons for being elsewhere, all committee and task group meetings should be held during NFI conferences. Other locations, such as major city airports, may be considered in instances when they would afford greater convenience and cost savings to attendees.
- c. Agenda. Following consultation with the committee chairman, the staff executive assigned to each committee shall prepare a written agenda prior to each of its meetings, which agenda shall be cleared in advance with NFI counsel.
- d. Attendance of Staff Executive. No NFI committee meeting shall be held without the attendance of the staff executive assigned to it or other NFI staff employees. The General Counsel or his designate should also attend any meeting whenever in his opinion the nature of any subject on the agenda makes his presence desirable.
- e. Minutes. The staff executive assigned as secretary to the committee shall keep accurate and complete minutes of all business transacted at each meeting, which are to be subject to review and approval by NFI counsel.
- f. Discussions Limited to Agenda. All substantive discussions at any NFI meeting are to be limited to authorized aspects of subjects on the agenda, except where additions to the agenda are specifically approved by the staff executive assigned to the committee. The staff executive's decision as to the propriety of any subject matter raised for discussion at any meetings shall be accepted, pending appropriate review. Any discussions or occurrences on the occasion of any meeting which are contrary to NFI's policies or rules and which have come to the staff executive's attention shall be reported promptly by him to his supervisor and to NFI counsel.
- g. Task Groups. The foregoing rules on meetings are applicable to all committees, task groups, and any other working groups, and any other working groups meeting under NFI auspices, except that subparagraphs (c), (d), and (e) may be modified as indicated below in those cases where the group must meet in order to carry out a limited and specific written assignment from the parent committee and it is impractical for a staff executive to be present. In each such case, (i) the specific assignment must be set forth in the parent committee's minutes; (ii) the NFI staff executive assigned as secretary to the parent committee must be satisfied that the meeting in question is necessary and that the subject matter is not such as to require staff presence, (iii) the chairman of the group is to be responsible for carrying out the duties of the NFI staff executive, including particularly those specified in subparagraph (f) above; and (iv) the chairman must promptly make an accurate and complete written report to the parent committee and to the NFI staff executive as to everything occurring at such meeting.

It is important to note that these practices have value only if they are consistently observed. DOJ and FTC enforcement officials and private sector attorneys will assess the propriety of NFI

committee and task group actions by reviewing what those groups actually do, not by accepting at face value what is said in reports or minutes that may be incomplete or inaccurate.

Political advocacy should be conducted in lawful ways and directed solely at efforts to influence that policy. It should not be used as a sham or as a means to affect competition indirectly and independently of what would be the effect of the given government policy.

While committee agendas will have been cleared in advance with NFI counsel, it is the obligation of all committee members to make sure that their own participation in committee meetings will not give rise to even an inference of antitrust wrongdoing. Thus, even when carrying out approved and legitimate activities, members must be careful to avoid discussions or exchanges of information with their competitors on any subject relating to the "per se" restraints listed above, since such discussions or information exchanges may give rise to inferences of agreement.

Regardless of subject matter, NFI members should not attend or tolerate any meeting with your competitors, in connection with NFI business, that has no agenda, that is concerned with matters outside the relevant committee's terms of reference, or that otherwise fails to conform to these Guidelines.

Informal Gatherings

It is important to avoid discussions and emails and text messages about the above subjects, not only at formal NFI meetings, but also in connection with social or other gatherings on those occasions. An NFI member privy to an improper discussion should protest and then, if the discussion continues, leave and protest to the appropriate NFI staff executive. Individuals who participate in such improper discussions, whether deliberately or innocently, are doing their companies, and NFI, a real disservice, and subjecting themselves to possible liability. In case of doubt as to whether a particular subject may properly be discussed with your competitors, company counsel should be consulted.

Documents

Care must be taken to avoid wording any written documents including reports or notes from committee meetings, in a way that might be interpreted as indicating, contrary to fact, the existence of an antitrust violation. Every memorandum, letter or other document dealing with prices, competition, or the other danger areas specified in this guide should be written with the assumption that it will one day be examined for antitrust implications. An antitrust case may be based on documents which are in reality innocent or innocuous but have been written in such a way as to create suspicion and require explanation. Such documents may include personal notes based on recollection, or taken at committee or other meetings, which record personal impressions rather than the facts of what transpired.

In addition, a well-designed and consistently implemented document retention policy is part of NFI's compliance program. Proper document management can demonstrate that records are destroyed in the normal course of business in a rational and systematic manner and are not being destroyed to obscure inappropriate activity or to avoid liability.

Conclusion

It is hoped that this guide will provide an understanding of how the antitrust laws bear upon trade association activities, and how NFI work can be carried out in full compliance with these laws and with NFI policies. Again, please remember that this is a limited outline and is not intended to be a complete description of the application of the antitrust laws. For answers to specific problems, please consult NFI counsel and company counsel.

B. Antitrust Checklist for NFI Meetings

This antitrust checklist is for use by NFI staff and member representatives in the conduct of NFI-sponsored meetings. Prohibited discussion topics apply equally to social gatherings incidental to NFI-sponsored meetings. The checklist is not exhaustive and does not address antitrust issues relating to activities other than NFI meetings. Participants in NFI meetings should be thoroughly familiar with the Antitrust Guide for NFI Committee Members.

Do ensure strict performance in areas of:

Oversight/supervision:

1. Have an NFI staff representative at each NFI-sponsored meeting;
2. Consult with NFI counsel on all antitrust questions relating to NFI-sponsored meetings;
3. Limit meeting discussions to agenda topics (unless additional topics have been approved by the appropriate NFI staff representative); and,
4. Provide each member company representative and NFI staff representative attending a NFI-sponsored meeting with a copy of this checklist, and have a copy available for reference at all NFI-sponsored meetings.

Recordkeeping:

1. Have an agenda and minutes which accurately reflect the matters which occur;
2. Provide agendas and minutes to NFI counsel for review and approval in advance of distribution;
3. Fully describe the purposes and authorities of all task groups, work groups, ad hoc or other standing committee subgroups in the minutes of the appropriate parent committee; and
4. Maintain documents in accordance with NFI's document retention policy.

Vigilance:

Protest against any discussion or meeting activities which appear to violate this checklist; disassociate from any such discussion or activities and leave any meeting in which such discussions or activities continue.

Do not, in fact or appearance, discuss or exchange information on:

Current or future prices, including:

1. Individual company prices, price changes, price differentials, markups, discounts, allowances, credit terms, etc.;
2. Individual company data on costs, production, capacity, inventories, sales, etc.; and
3. Industry pricing policies, price levels, price changes, differentials, etc.

Production, including:

Plans of individual companies concerning the design, production, distribution or marketing of particular products, including proposed territories or customers; and changes in industry production, capacity or inventories.

Transportation rates:

Rates or rate policies for individual shipments, including basing point systems, zone prices, freight equalization, etc.

Market procedures, including:

1. Company bids on contracts for particular products; company procedures for responding to bid invitations; and
2. Matters relating to actual or potential individual suppliers or customers that might have the effect of excluding them from any market or influencing the business conduct of firms toward them.