ANTITRUST COMPLIANCE GUIDE

OFFICE OF GENERAL COUNSEL

Prepared for the use of API Staff and Committees

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FOREWORD

It is the policy of the American Petroleum Institute to comply strictly with the antitrust laws. Responsibility for such compliance rests with every committee member, officer and employee of the API.

To assist in identifying situations that may have antitrust implications, the Office of General Counsel has prepared this ANTITRUST COMPLIANCE GUIDE. This Guide is intended to provide a general understanding of antitrust law, but is not a substitute for the advice of counsel. The API Office of General Counsel should be immediately contacted whenever a situation is encountered that might have antitrust implications for API.

Every officer and employee of API is charged with the following responsibilities:

- to read and study the ANTITRUST COMPLIANCE GUIDE;
- to be constantly vigilant to ensure antitrust compliance;
- to consult with the Office of General Counsel with respect to activities that may have antitrust implications; and
- to attend antitrust compliance sessions as presented by the Office of General Counsel.

The support and cooperation of every committee member, officer, and employee of API in maintaining compliance with the antitrust laws are essential to the continuing success of API.

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Antitrust Compliance Guide

INTRODUCTION

The American Petroleum Institute is a trade association founded in 1919 as an outgrowth of cooperation between the American petroleum industry and the Allied Governments during World War I. The purposes of the API are described in the API's corporate charter as follows:

1. To afford a means of cooperation with the government in all matters of national concern;
2. To foster foreign and domestic trade in American petroleum products;
3. To promote in general the interests of the petroleum industry in all of its branches; and
4. To promote the mutual improvement of its members and the study of the arts and sciences connected with the petroleum industry.

It has long been recognized by the government, the courts, and business that trade associations perform legitimate and useful functions in our economic system, and the lawfulness of normal trade association activities is recognized both in and out of the antitrust context. Because trade associations are usually composed of competitors, such associations are sometimes the focus of investigations and litigation under the antitrust laws. Consequently, trade association personnel and their member organizations must recognize that their activities may be closely scrutinized for antitrust compliance.

Because of this scrutiny, officials, staff, and members of the API must be constantly aware of the antitrust implications of association activities. This booklet has been prepared as an aid to assist you in identifying and complying with U.S. antitrust requirements. It is not, however, a substitute for legal advice and is not intended to substitute for the legal advice member companies may receive from their own antitrust counsel. Nor is it intended to be a comprehensive survey of all the types of antitrust-related issues that may arise. Questions concerning the contents of this booklet or the application of the various antitrust laws to specific API activities should be referred to the API Office of General Counsel.

PURPOSE OF ANTITRUST LAWS

The chief purpose of the antitrust laws is to protect and foster the efficient operation of our free enterprise system by assuring the preservation of competition among business firms at all levels of trade. These laws are primarily based on the theory that the consumer benefits by getting the best product at the lowest price through competition and that society's productive resources are best allocated and utilized by subjecting business firms to the rigors of a competitive market.

If one company through improper means dominates a market with resultant power to fix or control prices and exclude competition, consumers and society generally suffer.

The same is true if competitors agree among themselves to fix prices, limit production, divide markets, or allocate customers. In both cases consumers and society lose the benefits of competition in the affected markets. The antitrust laws are aimed at conduct that threatens to deprive consumers of the benefits of competition.

PRINCIPAL FEDERAL ANTITRUST LAWS

The principal federal antitrust statutes are the Sherman Act and the Clayton Act. An important and closely related statute is the Federal Trade Commission Act, which is in part concerned with anticompetitive conduct and in part concerned with unfair trade practices and misrepresentations. A fourth statute that is usually associated with antitrust law, though somewhat different in purpose, is the Robinson-Patman Act, a 1936 amendment to the Clayton Act.

1. Sherman Act

The Sherman Act, adopted in 1890, contains two substantive prohibitions:

- Section 1, as interpreted by the courts, prohibits agreements, contracts, combinations, or conspiracies between two or more companies or persons that unreasonably restrain trade. It is Section 1 of the Sherman Act that prohibits, among other things, agreements among competitors to fix prices, allocate customers, limit production, or eliminate a competitor.
- Section 2 prohibits monopolizing conduct, attempts to monopolize, and conspiracies or combinations between two or more companies or persons to monopolize a market. It is Section 2 of the Sherman Act that prohibits, for example, predatory sales below cost for the purpose and with the likely effect of achieving a monopoly in a market. Unlike Section 1, single firm conduct can result in a violation.

Violation of the Sherman Act is a felony. The Act itself provides for criminal penalties, including fines up to $100,000,000 against corporations, fines for individuals up to $1,000,000, and prison terms up to ten years. As an alternative to the statutory fine, corporations or individuals may be fined amounts computed on the basis of a maximum of twice the gain or twice the injury resulting from violation even if these fines exceed the sums specifically prescribed.

Enforcement of the Sherman Act

- *Criminal.* Enforcement of the criminal provisions of the Sherman Act is exclusively in the hands of the Justice Department's Antitrust Division. The corporate and individual fines, described above, as well as up to ten years incarceration provide very serious sanctions. Criminal enforcement is reserved for so-called *per se* violations of the Sherman Act, usually price-fixing. These violations are described on pages 6 – 7. Be sure you know what they are.

Justice Department action looking toward a criminal indictment is ordinarily preceded by a grand jury investigation. The grand jury, which is impaneled by a United States District Court, has very broad investigative powers, including the power to sub-

poena witnesses and documents. Government attorneys appear before the grand jury but attorneys for the investigated parties do not. If the Justice Department decides to seek an indictment and if the grand jury decides that there probably has been a violation, the grand jury returns an indictment naming the parties and spelling out the charges.

The Justice Department has a formal amnesty program that may allow the first corporation that provides information on an illegal conspiracy to avoid criminal prosecution. The amnesty program has played a key role in recent government prosecutions of several international price-fixing conspiracies.

- *Civil*. If the suspected violation is not of the clear-cut variety that is considered *per se* unlawful, the Justice Department will usually choose to investigate it through civil processes. The Justice Department can conduct its investigation through use of a Civil Investigative Demand (CID), which could include requests for document production, interrogatories, and investigative interviews.

Civil suits brought by the Justice Department seek to enjoin conduct that violates the Sherman Act or the Clayton Act. In addition, as described below, the Clayton Act enables private plaintiffs to get injunctive relief and to recover treble damages for violations of the antitrust laws. Treble damages may also be recovered in suits brought by state attorneys general suing in a *parens patriae* capacity on behalf of injured state citizens or by the federal government.

A significant consequence of a Justice Department lawsuit, criminal or civil, is that it will frequently precipitate private treble damage actions based on the violations alleged by the Justice Department. Such lawsuits frequently are brought on behalf of a class of similarly situated plaintiffs and often seek recovery of damages going into many millions of dollars. Moreover, a guilty plea or an adverse judgment against a defendant in a government suit is *prima facie* evidence of a violation in a subsequent private suit.

2. Clayton Act

The Clayton Act, adopted in 1914, provides that civil actions may be brought by the U.S. Government or by private parties to enforce the federal antitrust laws, including the Sherman Act. Such civil actions to enforce the Sherman Act are the most frequent type of antitrust litigation. In civil actions, the standard of proof required to establish a violation is lower than in criminal cases—in the latter the government must prove its case beyond a reasonable doubt, but in a civil case a plaintiff is only required to establish a violation by a preponderance of the evidence.

Civil actions under the Clayton Act may seek injunctive relief as well as damages for injuries caused by an antitrust violation. The Clayton Act provides that damages awarded to private parties by reason of antitrust violations will be automatically trebled and that, in addition, a successful antitrust plaintiff will recover its reasonable attorneys' fees and costs.

The Clayton Act also supplements the Sherman Act by identifying several specific types of conduct or transactions that can be illegal. Among these are the following:

- *Exclusive Dealing, Requirements Contracts, and Tying*—selling goods to a customer on the condition that the customer refrain from dealing in the goods of a

competitor, e.g., by committing the customer to take its requirements from the seller or by requiring the customer also to purchase a second product from the seller, where the effect of the practice might substantially lessen competition (Section 3).

- *Mergers and Acquisitions*—acquiring the stock or assets of another entity where the effect of the acquisition may be to substantially lessen competition in a market or to tend to create a monopoly (Section 7). (This provision has been supplemented by the so-called Hart-Scott-Rodino premerger notification requirements. With certain exceptions, transactions that result in one entity holding more than $50 million in either voting securities or assets of another entity must be reported in advance to the antitrust agencies. This gives the agencies an assured opportunity to attempt to enjoin a transaction before consummation.)
- *Interlocking Directorates*—the same person serving as officer or director of two competing corporations, subject to certain exceptions based on overall size or the volume of sales made in competition with each other (Section 8).

Enforcement of the Clayton Act

The substantive provisions of the Clayton Act may be enforced by the Justice Department, the Federal Trade Commission, or private plaintiffs in civil suits. Since the FTC shares with the Justice Department the important statutory responsibility for enforcement of Section 7 of the Clayton Act, dealing with mergers and acquisitions, the two agencies coordinate closely with one another to avoid duplication of effort.

3. Federal Trade Commission Act

The Federal Trade Commission Act, adopted in 1914, prohibits “unfair methods of competition” and “unfair or deceptive acts or practices.” The Federal Trade Commission was established to enforce the statute. “Unfair methods of competition” may include conduct that violates the Sherman or Clayton Acts as well as some restrictive conduct that does not violate the literal terms of those Acts. The Act also authorizes the FTC to halt various unfair trade practices of a nonantitrust variety, such as false advertising. In addition, the Federal Trade Commission Act empowers the FTC to collect data and business information in order to provide reports to Congress and executive agencies.

Enforcement of the FTC Act

Unlike the Sherman Act, the FTC Act provides no criminal penalties. The FTC’s primary enforcement tool is entering orders requiring that a respondent in an FTC proceeding cease and desist unlawful activities and take remedial action (such as “corrective advertising” or “restitution”) to alleviate harm caused by past violations. However, once a company becomes subject to an FTC enforcement order, any violation of that order may give rise to penalties, including fines of $11,000 per violation, with each day of noncompliance considered a separate violation. As noted above, the Federal Trade Commission Act reaches practices that would also violate the Sherman Act. If the

violation in question is of a kind that typically would result in the employment of criminal sanctions, such as price-fixing, the FTC would ordinarily leave enforcement to the Justice Department since it has the sole power to bring criminal cases.

4. Robinson-Patman Act

The Robinson-Patman Act, enacted in 1936, is an amendment to Section 2 of the Clayton Act that was primarily intended to protect small businesses from price discrimination. Under the Robinson-Patman Act, it is unlawful to sell commodities of "like grade and quality" to different customers at different prices where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly. In suits under the Act, such an unlawful effect may be alleged to occur to a seller's competitors (so-called primary line injury) or, more commonly, may be alleged to occur to customers adversely affected by a lower price given to their competitors (secondary line injury). A primary line case must establish sales below some appropriate measure of costs plus a reasonable prospect of recouping via monopoly profits the losses of the below-cost pricing. The Robinson-Patman Act also seeks to prevent indirect discrimination by outlawing payments, in any form, for services not actually rendered, and by requiring that promotional allowances and services be made available to competing customers on proportionally equal terms. The Act also makes it unlawful for a buyer knowingly to receive or induce a discrimination in price.

The Robinson-Patman Act provides several affirmative defenses, the most important of which are the "meeting-competition" and "cost-justification" defenses. The statute provides for a meeting-competition defense that the lower price or the furnishing of services was made in good faith to meet an equally low price of a competitor or services furnished by a competitor. Under the cost justification defense, a price discrimination can be cost-justified by the seller and thereby saved from illegality to the extent that the price differential reflects cost savings to the seller in the manufacture, sale, or delivery of the goods. The seller must be able to substantiate any such cost savings.

Private plaintiffs may seek to enforce the Act and to recover treble damages. The FTC has statutory authority to enforce the Robinson-Patman Act, but has largely left enforcement to private plaintiffs in the last 20 years.

STATE TRADE REGULATION STATUTES

In addition to the federal laws reviewed above, many states have enacted antitrust and trade regulation statutes relating to activities within their borders. These laws must also be considered, along with federal laws, in evaluating the antitrust status of a proposed transaction or course of conduct. Like the federal laws, many state statutes provide for treble damages and criminal penalties. While state antitrust and trade regulation laws vary from state to state, most frequently they fall into the following categories:

1. General Antitrust Acts

The great majority of states have legislation containing provisions similar to those in the Sherman Act applicable to intrastate commerce within their boundaries.

2. Price Discrimination

Over half the states have price discrimination laws. Many of these laws apply to discriminations between regions or communities in addition to discriminations between different purchasers in the same community.

3. Selling Below Cost

Legislation has been adopted in about half the states that generally prohibits selling below certain levels of cost. Often such legislation prohibits loss leaders. Some states have passed statutes that specifically prohibit selling motor fuel or petroleum products below cost.

4. Little FTC Acts

Many states have passed statutes providing private actions for damages and injunctive relief for types of unfair trade practices that would violate the Federal Trade Commission Act. In a number of instances treble damage recovery is possible.

SHERMAN ACT VIOLATIONS

Criminal federal antitrust cases typically involve alleged *per se* violations-usually price fixing-of Section 1 of the Sherman Act, which prohibits contracts, combinations, or conspiracies in restraint of trade. *Per se* offenses also account for the preponderance of private actions for treble damages. Even though a trade association may not itself be a profit-making business organization, its officers and employees can be convicted of criminal antitrust violations and the association can be assessed with treble damages if officers or employees are found to have participated in illegal activities with association members.

A contract or agreement does not violate Section 1 of the Sherman Act unless it unreasonably restrains commerce. Ordinarily, the determination whether a restraint is unreasonable requires analysis of the effect on competition of a given practice, including a consideration of its procompetitive and anticompetitive consequences. This is referred to as “rule of reason” analysis. However, over the course of time courts have, on the basis of experience, concluded that some types of arrangements or agreements are so inherently injurious to competition that they can be conclusively presumed “unreasonable” without inquiry as to the precise economic harm they may cause or as to the business justification for their use. Such agreements are deemed illegal *per se* under the Sherman Act. They are especially important to know about and avoid, because they are the types of activities upon which the government concentrates in selecting cases for criminal prosecution and because the courts will listen to no justification excusing their commission.

Per se violations of Section 1 the Sherman Act include the following:

1. Price Fixing

- *With Competitors (horizontal price fixing)*—an agreement with a competitor as to prices either company will charge is illegal *per se*. This includes not only agreements on the final prices themselves but on matters relating to them. Therefore,

per se unlawful horizontal price fixing may include agreements with competitors concerning prices, terms of sale, levels of output, price changes, discounts, rebates, credit terms, pricing methods, sales periods, and other matters relating to or affecting price or an element of price. The concept of "agreement" is similarly broad: whether formal or informal, written or oral, contained in a document or established by a course of dealing, resulting from direct communications or through communications of a common third party, if a court finds a meeting of the minds, it may conclude that an agreement exists. In some circumstances, the practice of a mutual exchange of price information among competitors concerning current or prospective prices or concerning the current or prospective prices on specific sales to identified customers may be regarded as evidence from which an illegal price-fixing agreement may be inferred. For this reason, the association should generally avoid sponsoring programs that involve exchange of current or prospective price information among competitors, and should obtain legal counsel concerning any such program before implementation.

- *With Customers (vertical price fixing)*—an agreement with a customer on the minimum price at which the customer will resell a product or commodity is also illegal *per se*. Although some economists and academic authorities have been critical of *per se* treatment of vertical price fixing, so far the courts have been firm in holding to *per se* treatment for minimum resale prices.

2. Horizontal Agreements to Allocate Customers or Territories

It is illegal *per se* to agree with a competitor to divide territories in which you sell or to allocate customers with whom either of you will deal.

3. Horizontal Boycotts

Agreements between competitors not to buy from a given supplier or not to sell to a particular customer are in many circumstances illegal *per se*. Horizontal agreements between companies to induce a supplier not to deal with a competitor are also illegal *per se*. While in certain situations agreements between competitors, or between others, not to deal with a third party may not receive strict *per se* treatment, no such activity should be undertaken without prior advice of counsel.

4. Tying Arrangements

A tying arrangement, or a tie-in sale, is one in which a customer is required to purchase an unwanted product or service in order to obtain a desired product or service. A tie-in sale is ordinarily illegal *per se* once the court is satisfied that separate products are involved, that the seller has sufficient economic power with respect to one product to enable him to force his customers to purchase the other product, and that more than an insubstantial amount of commerce is affected. While a court may not always make such findings and while use of the criminal process is unlikely, all such arrangements should be avoided unless prior advice of counsel has been received stating that in the particular circumstances an arrangement is permissible.

Competitors should not only avoid *per se* illegal agreements, they should also avoid any discussion of the matters on which they could not lawfully agree. This is so because if such discussions were followed by parallel business action, a court or jury might find that there was an illegal agreement between the parties to such a discussion even if they actually intended no agreement. Accordingly, there should be no discussion between competitors concerning matters on which each must act unilaterally. These include prices to be charged others (including discounts, credit terms and other things affecting price), the quantity or quality of products or services to be produced or sold to others, the areas within which or the persons to whom such sales will be made, or in many instances the persons from whom or the terms on which products or services will be purchased. Members and employees of a trade association must be vigilant to avoid such discussions and any conduct that might inadvertently encourage them.

EXCLUSIONARY OR PREDATORY PRACTICES

Antitrust proceedings alleging violation of Section 2 of the Sherman Act are often brought when a company with a large share of a market engages in questionable business practices intended to have the effect of driving smaller competitors out of business or of crippling them severely. In addition to government prosecution against such conduct, quite frequently a company forced out of business or on the brink of bankruptcy will strike back at its more successful competitors by bringing an action for treble damages alleging that either acting together or individually the competitors engaged in exclusionary or predatory practices in order to attempt to achieve a monopoly.

Often such an action will include an allegation of so-called predatory pricing. Pricing may be found to be unlawful, or predatory, where sales are made below cost and where there is a reasonable prospect of recouping through monopoly profits the losses due to the below-cost pricing. Courts disagree on what definition of cost should be used in determining whether a price is "below cost." Sales at prices bringing no incremental profit to the seller (*i.e.*, below incremental or variable cost) should ordinarily be avoided since such sales run the risk of being regarded as predatory if recoupment is a reasonable prospect.

ANTITRUST IMPLICATIONS OF SPECIFIC TRADE ASSOCIATION ACTIVITIES

Trade associations engage in many industry activities that have procompetitive effects and are clearly permissible under the antitrust laws. Several types of trade association activities, however, may raise antitrust problems under certain circumstances:

1. Statistical Reporting

The reporting of statistical data is one of the primary functions of a trade association. Such programs are conducted to aid members in operating their businesses more effectively and are also often useful to the government and the general public. Competition works best when both buyers and sellers are well-informed about market conditions.

Statistical programs can involve numerical data of many types, including data on production, inventories, sales, and shipments. The purpose of collecting and disseminating

data of this type is to indicate trends in the industry that reflect upon supply and demand. Association members receiving such statistical data can then make their future business decisions more rationally. Such decision-making, however, must be on an individual basis, without consultation with competitors.

The degree of antitrust risk in conducting statistical programs varies depending on the type of information that is being collected, its specificity, its current nature, and its dissemination. Broadly speaking, the further removed such data is from prices and costs, the less company-specific it is, the more historical it is, and the wider the public dissemination, the less likely it will be that antitrust problems will be raised by the program.

Because, as previously noted on page 6, exchanges of price data by competitors may be regarded as constituting a price-fixing agreement under certain circumstances, a statistical program involving exchange of current price or cost information may pose an antitrust risk. Similarly, exchange of information on future production plans can result in antitrust difficulties. Price, cost and production information, if part of a statistical program, should deal only with clearly past events and should be composite so as not to disclose the source of the data, the identity of data pertinent to particular companies, or the details of particular transactions. To be on the safe side, the trade association should avoid statistical programs involving current prices and costs or future production or marketing decisions. In any event, any program involving price, cost, or production data should be submitted to counsel for prior review. Whenever competitively sensitive data of any kind is collected from members of the trade association, it is desirable to treat the data as confidential and ensure against interchange among competing members. This can also be done by employing a neutral third party, such as an accounting firm, to collect the data, collate it, and aggregate it for publication in a manner that conceals company-specific competitive information.

It is also usually desirable that trade association data be made available on a reasonable basis to all interested parties and that participation in information programs be voluntary. If the information exchange is unique, hard to duplicate, and of substantial commercial importance, limiting participation may be interpreted as an attempt to gain an unfair advantage over competitors. Use of coercive measures to force members to participate in statistical programs might also be used as evidence of anticompetitive purpose.

Reports summarizing collected data should also be disseminated unaccompanied by recommended courses of action: how data is put to use and the business decisions that may flow from the data should be left to the individual companies without trade association direction. In general, statistical reporting programs should only be undertaken for a valid, lawful purpose and with the express, prior approval of counsel.

2. Product Standardization

The development of uniform standards or specifications that may be used by industry members form an important and legitimate function of trade associations. Standards can be based on product performance or on product composition, construction, and dimension. They can also incorporate product safety and environmental considerations. Performance specifications ordinarily pose fewer antitrust problems than other types of specifications since they do not necessarily confine producers to a particular method of

construction or composition. Standardization can eliminate unnecessary product incompatibility and thus can benefit manufacturers, distributors, and consumers. But since standardization programs can, in some instances, impose costs on some producers or appear to reduce consumer choice, great care must be exercised in the manner in which standards are formulated and used lest they give rise to charges of antitrust violation.

Generally, all interested parties (whether or not they are members of a trade association) should have the right to comment on proposed standards that may affect their business. Comments and suggestions from all interested individuals should be given consideration. Standardization that involves a patent, rare materials, or unusual capital investment may be unduly restrictive and creates increased antitrust risks. Even if the trade association promulgates standards, there should be no agreement to adhere to association standards-each company should be free to decide on its own whether to accept or reject a standard.

3. Certification

Standards create the possibility of designating products with a certification seal. Such certification is a legitimate practice in that it assures the buyer that a product meets certain set criteria of either performance, construction, or quality.

Care should be taken to avoid providing any basis for the allegation that certification is used wrongfully to deny a competitor access to a market. Certification must be based upon reasonable standards; be available to nonmembers as well as members of the certifying organization; and should involve testing by neutral parties when appropriate. Care must be taken not to disparage noncertified competitive products.

Note also that care must be taken to assure that officers or employees of the association act only in an authorized manner in dealing with sensitive certification issues. The Supreme Court held an association liable for the damage caused by an unauthorized letter issued in the name of the association stating that a product did not meet the association's safety standards. Although the letter was unauthorized, the fact that the individual responsible for its issuance appeared to have authority to issue it sufficed to implicate the association.

4. Research

A trade association may in some circumstances sponsor research, particularly as to health and safety matters that may otherwise not be a subject of competitive striving, provided there is no understanding on the part of association members that the association would be the exclusive locus of such research. The association would ordinarily not act as a clearinghouse for the exchange by competitor members of their commercially oriented research: the antitrust laws are concerned with preserving competition in research and innovation against unreasonable restraints. But in certain cases the association may, with the assistance of neutral third parties, receive the input of members for the purpose of advancing research in designated areas. The fruits of the research should not be used to improve the competitive stance of only a few association members. The National Cooperative Research and Production Act describes the balancing process for determining what joint research satisfies the rule of reason and provides a method for

avoiding exposure to treble damages. Because of antitrust risks, each research program sponsored by the API must receive prior review and approval of counsel.

5. Lobbying

Concerted efforts to influence legislative or executive action are protected by the First Amendment to the U.S. Constitution and are generally exempt from the antitrust laws although such exemption is not absolute. This Constitutional protection also extends to efforts to secure administrative or judicial action through litigation or other petitioning. Joint lobbying constitutes one of the primary functions served by this association.

However, not all attempts to influence governmental actions are protected. Some courts have held that combinations to influence the government in its commercial capacity (for example, as a buyer), as distinguished from its regulatory role, can violate the antitrust laws. A combination purporting to have been formed to influence government action that is a mere sham to disguise conduct actually designed to interfere directly with business relationships of a competitor can also violate the antitrust laws. Petitioning is not protected if it has no reasonable chance of success on the merits and its purpose is to diminish competition by its mere assertions or pendency rather than by the sought-after action. Government antitrust agencies have indicated they will be particularly alert to litigation efforts that in fact are primarily designed to harass or coerce by their very pendency.

Legitimate lobbying activities, even if exempt from the antitrust laws, are regulated by other federal laws, should only be undertaken with the express, prior approval of counsel.

We stress again that all the trade association activities just reviewed-statistical reporting, standardization, certification, research, and lobbying-can, if not pursued carefully, pose antitrust risks and should not be undertaken without the prior review and approval of counsel.

INTERNAL PROCEDURES AND MEMORANDA

Careful language will not avoid antitrust liability when the conduct involved is illegal. On the other hand, conduct that is perfectly legal may become suspect because of a poor choice of words or a misleading manner of expression. Careless and inappropriate language can have an extremely adverse effect on the outcome of an antitrust investigation or lawsuit.

Under current investigative procedures, no documents, other than privileged communications with counsel, are exempt from disclosure. All other documents may be subject to production, including drafts, telephone logs, expense account reports, and “personal” handwritten and computer messages of individual employees made in the course of their work. Internal correspondence should be carefully written so as to avoid misstatements of fact or inferences or conclusions that may be misinterpreted or taken out of context by a third person.

Sensible procedures will also help avoid unnecessary problems. Committee and other meetings of members of the association should be structured rather than informal or free-flowing-there should be an agenda, a chairperson, observance of rules of procedure, the presence of association employees as well as those of member companies, the taking of minutes, and the participation by counsel in reviewing the agenda prior to the meeting and in attending a meeting if a topic of possible antitrust sensitivity is to be considered.

So far as use of language is concerned, please remember:

1. Do not give the false impression that the API is a party to any anticompetitive agreement. Do not even allow discussion among competitors of such matters as need for changes in price levels, prospective production plans, allocation of markets, action aimed at hindering the prospects of competitors, or the like.

2. Wherever possible, be sure to identify clearly the specific legitimate purpose of each API activity.

3. Do not give the false impression that participation in API activities is not available to all members on equal terms or that companies in the industry are excluded from membership for competitive reasons.

4. Be particularly careful when describing any activity of the API to avoid any misleading implication that specific courses of conduct regarding prices or costs are being proposed.

5. Do not give the impression that one or more members are being singled out for special treatment.

6. Be careful to avoid the use of suspicion-arousing phrases such as "Please destroy after reading."

7. Do not describe non-API members as dishonorable and do not disparage their products.

8. Be careful not to speculate as to the legal propriety or consequences of specific conduct.

CONCLUSION

The foregoing guidelines are not to be regarded as covering all antitrust issues that can arise. Rather, they are intended to alert the API officer or employee to *some* of the more common situations in which antitrust counsel should be consulted. Other situations may arise that may have competitive implications. It will be desirable to err on the side of over-consultation with API counsel. Failure to consult with counsel on specific courses of action can have serious consequences for the API, its members, officers, and employees.

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