



## **ACP ANTITRUST COMPLIANCE GUIDELINES**

*Adopted by ACP Board Vote 12/17/2020*

One of the major goals of the American Clean Power Association (ACP) is to create an environment where industry members can meet and discuss policies and issues relevant to the industry with the understanding that ACP activities will be conducted in accordance with the antitrust laws. ACP recognizes the importance of the antitrust laws to preserve and foster competition and is committed to strict compliance with these laws. The ACP Board of Directors has adopted the following Antitrust Compliance Guidelines to be used by members and staff in conducting ACP activities.

### **Application of the Antitrust Laws to Association Activities**

ACP understands that trade association activities provide opportunities for competitors to gather, discuss issues, and share business and industry information. Therefore associations must conduct their activities carefully and cautiously to ensure that they do not create situations that could result in actual or perceived violations of the antitrust laws. Antitrust compliance is important, among other reasons, because antitrust violations can result in felony convictions leading to multi-year jail sentences and civil fines and penalties in the hundreds of millions of dollars. Association members and staff may be subjected to costly and time-consuming investigations and litigation, even where no antitrust violation ultimately is found. Even thoughtless or inadvertent violations can ruin industry associations, bankrupt companies, and cause great harm to individuals' professional and personal lives. It is ACP's goal to make members aware of these laws and be proactive in ensuring compliance. Members and staff are encouraged to consult with ACP or company legal counsel if they have any questions about whether a particular action raises antitrust concerns.

### **Relevant Antitrust Statutes**

The two antitrust laws that most affect trade association activities are the Sherman Act<sup>1</sup> and the Federal Trade Commission Act.<sup>2</sup> Section 1 of the Sherman Act prohibits all contracts, combinations or conspiracies that unreasonably restrain trade. For antitrust law purposes, an "agreement" need not be a formal written agreement or even an oral understanding. Unlawful agreements can be inferred from circumstances and events where there is no direct evidence of a formal agreement. Trade association activities among competitors can present a venue and opportunity to reach an anticompetitive agreement.

ACP members should understand that the nature of conspiracy law might render liable those who merely sit at a meeting while others engage in an illegal discussion, even though they did not actively participate in the discussion. Mere attendance at these discussions may be enough to imply acquiescence in the scheme and make the passive person as liable as those who actively engaged in the discussion.

The Sherman Act can be enforced by the Department of Justice ("DOJ"), State Attorneys General, and under certain circumstances by private plaintiffs harmed by the alleged violation. Section 5 of the Federal Trade Commission Act prohibits "unfair methods of competition in or affecting commerce." This statute deals with illegal actions committed by individuals and/or companies and, unlike the Sherman Act, does not require the existence of a conspiracy. This statute is enforced by the Federal Trade Commission (FTC), which has broad powers to determine what constitutes unfair methods of competition.<sup>1</sup> FTC investigations tend to focus on industry practices and association activities that the FTC considers to be unfair trade practices. Associations are frequent targets of such investigations. If the FTC finds the existence of an unfair trade practice, it will impose fines and consent decrees upon participants.

<sup>1</sup> FN 2 15 United States Code § 1. (15 USC §1). <sup>2</sup>15 USC §45.

## **Activities Strictly Forbidden by the Antitrust laws (“Per-se Violations”):**

As mentioned above, the Sherman Act forbids combinations and conspiracies that unreasonably restrain trade. Court cases interpreting the Act have identified several types of agreement as “per-se illegal.” Per-se illegal violations are those that have been deemed so plainly anti-competitive that they are conclusively presumed illegal and cannot under any circumstances be determined to be reasonable. Per-se violations are the most dangerous type, and may be prosecuted criminally. They must be avoided in all circumstances. The kinds of per-se violations that are most relevant to association activities are as follows:

**1. Price Fixing.** Agreements among two or more competitors affecting price are per se unlawful. Price fixing may exist even if there is no specific agreement regarding the price to be charged, and price fixing agreements have been inferred where competitors simply exchange price lists or other competitive information. Any agreement among competitors that will affect the price to be charged can be a violation. For example, agreements among competitors regarding credit terms, discounts, or shipping charges will affect the price charged to customers and fit into the price fixing, per-se violation category. Competitors should scrupulously avoid discussing prices, the components of pricing, or related terms of sale.

**2. Bid Rigging.** Bid-rigging refers to agreements among two or more competitors regarding how they will or will not compete for a particular sales opportunity. Bid rigging may include agreeing with a competitor not to bid on a specific project, sharing information with a competitor about confidential bids or bid strategies, bidding with the understanding that one party will be the low bidder, and submitting “complementary bids” at the request of a competitor.

**3. Customer Allocation.** Agreements to divide and allocate markets among various competitors are also a per-se violation. Agreements not to pursue a competitor’s customers, or an agreement not to pursue a category of customer commonly served by a competitor, also fit into the category of customer allocation schemes.

**4. Territorial Market Allocation.** Agreements to allocate customers on the basis of the geographic location of the customer or the market are a per-se violation. Agreements among competitors not to enter markets based on geographical boundaries also fit into this per se unlawful category.

**5. Agreements on Hiring or Compensation.** Agreements between competitors to fix the compensation or benefits paid to employees are per se unlawful. The DOJ has also announced that, under certain circumstances, it will prosecute as a per se violation agreements among companies not to hire, or not to solicit for employment, each other’s employees. Note that companies that do not compete to sell the same goods and services, may nonetheless compete in hiring employees.

**6. Group Boycotts.** A classic Group Boycott exists when competitors agree not to do business with, or agree to take some kind of joint action such as deny credit, against a competitor or a customer. Such actions are considered to be naked restraints of trade and are per-se violations. In the trade association context, Group Boycotts can include agreements to deny certain competitors access to resources they need to compete effectively.

## Activities Subject to “Rule of Reason” Antitrust Analysis:

The so-called antitrust “rule of reason” analysis applies to all alleged restraints that have not been labeled as per-se violations. This means that the alleged restraint may or may not be illegal depending on the circumstances. The rule of reason analysis requires that a court must consider the purpose for a restraint and its effect on competition in the relevant market in determining if the restraint is reasonable and therefore lawful.<sup>4</sup> It is important for ACP members to recognize the kinds of conduct that are subject to the rule of reason analysis and ensure that programs that may be subject to this rule are conducted properly, with the assistance of counsel, as needed. Some activities which are subject to the rule of reason analysis are as follows:

**1. Standards Setting.** Product standard setting and development refers to the process of identifying and agreeing upon a specific set of criteria to which a product should conform. Standard setting can be pro-competitive in many ways, including ensuring product quality and safety, and fostering interoperability of products. However, standards can create antitrust violations if the criteria have the effect of limiting or eliminating certain products or competitors from the marketplace. A trade association can lawfully participate in standard setting, provided that it is done in a way that provides interested parties with the opportunity to participate in the development and implementation of the standard. Consult with counsel before engaging in standard-setting activity.

**2. Certification.** If an association engages in the practice of certifying products or the expertise and qualifications of members, it must be aware that such certification activities must be conducted properly to avoid antitrust violations. Such activities will meet the rule of reason analysis if it can be shown that granting or denying certification is based upon legitimate, preferably measurable and objective, criteria and does not have the effect of limiting or restraining competition.

**3. Information Exchanges.** Sharing non-public information -- such as statistics, pricing information, marketing reports, raw material costs and employee compensation – with fellow members can cause antitrust problems if not structured properly. Information-sharing programs must be structured in ways that do not disclose pricing strategies, market share or other areas that could create or provide the inference of unlawful agreements or coordination. Consult with legal counsel in advance regarding the design and implementation of any program to share competitively sensitive information, such as prices, costs, or compensation.

**4. Government Relations Activities.** A very important role for most associations is to act as the liaison between the industry and legislatures and government regulators. Joint action by competitors to influence government action is immune from antitrust liability under the provisions of the Noerr-Pennington doctrine.<sup>3</sup> There are certain kinds of lobbying activities by competitors that are exceptions to the Noerr-Pennington doctrine, however, and legal advice should be obtained to properly structure lobbying campaigns to ensure compliance.

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<sup>2</sup> See, National Society of Professional Engineers v. US, *ibid*.

<sup>3</sup> See E RR President's Conference v. Noerr Motor Freight, 365 US 127 (1961); United Mine Workers of America v. Pennington, 381 US 657 (1965).

### **ACP Antitrust Compliance Operating Procedures:**

1. The ACP board will adopt a formal antitrust compliance policy that shall detail its intention to fully comply with the antitrust laws and indicate that it is pro-actively taking steps to ensure compliance.
2. The ACP Antitrust Guidelines will be included as part of the “new member packet” that is mailed to new business members. Each ACP business member will also be provided with a copy of the Antitrust Guidelines in conjunction with their annual membership renewal.
3. The ACP Antitrust Guidelines will be posted on the ACP web site in the same area as the ACP Code of Ethics.
4. Each ACP board meeting and standing committee meeting will begin with a reminder to all attendees about the Association’s antitrust compliance policy.
5. Agendas will be prepared in advance for all meetings. Agendas will be reviewed by staff and where appropriate by legal counsel.
6. Minutes will be kept at all meetings and will note that attendees were reminded at the beginning of the meeting of the Antitrust Guidelines. If appropriate, a copy of the guidelines should be included in the minutes.
7. Meeting minutes shall be reviewed by staff, and if appropriate by legal counsel, prior to distribution to ensure that antitrust sensitive discussions are properly documented.
8. The Board and staff will seek legal advice when needed to ensure that ACP projects and programs are compliant with relevant antitrust laws.
9. ACP staff will receive periodic briefings by legal counsel concerning antitrust compliance and will seek legal advice when necessary.
10. ACP will adopt a formal record retention program.
11. Any action by ACP or its Board of Directors that has the effect of rejecting a membership application, or removing a party from membership, shall be sent to legal counsel for review before becoming final.

*The following Guidelines for Discussions at American Clean Power Association Meetings should be provided to all ACP members:*

## **Antitrust Guidelines for Discussions at the American Clean Power Association Meetings**

It is extremely important that association members, meeting attendees, and speakers understand that the antitrust laws regulate their conduct at association meetings. An inadvertent violation of the antitrust laws by a few members, or even the perception of such a violation, could result in an expensive protracted investigation or litigation that could destroy the association and/or result in the criminal prosecution of individual members. The most powerful Federal statute, the Sherman Act, provides substantial penalties. Individuals can be fined up to \$1 million and imprisoned for up to ten years for violations. Corporations can be, and often are, fined hundreds of millions of dollars. In addition, defendants found guilty of violating the Sherman Act are subject to treble damages in civil litigation.

### **What You Can't Do:**

1. Do not enter into any agreements with competitors regarding or affecting prices.
2. Do not discuss your company's prices or terms of sale with competitors.
3. Do not agree with competitors:
  - on pricing or profit levels.
  - to give or deny cash discounts or promotional allowances.
  - to give or deny credit to a specific customer, or to establish uniform credit terms.
  - to deal or not to deal with any customer or agree on prices to be charged to any customer.
4. Do not discuss allocation of markets or customers.
5. Do not enter into agreements with competitors' price quotations or bids.

### **What You *Can* Do:**

1. Discuss better ways to educate and provide meaningful information to Association members about the industry.
2. Discuss industry trends, economic forecasts, and materials availability, emphasizing that each company is free to use this information as it sees fit and should make its own business decisions.
3. Discuss Federal and State governmental actions and develop industry-wide lobbying efforts.
4. Discuss technological advances and better ways to utilize them.
5. Discuss ways to improve the public image of the industry

These guidelines have been prepared for the American Clean Power Association by the Association's antitrust counsel as part of the ACP Antitrust Compliance Program.