



Antitrust Policy, Procedures and Guidelines

(rev. Sept. 2020)

Policy

It is the unqualified policy of MEMA and each of its divisions to conduct operations in strict compliance with the antitrust laws of the United States. This antitrust policy prohibits any discussions which constitute or imply an agreement or understanding that restricts competition, including about:

1. Price-related terms (including discounts, payment terms, and warranty terms), bidding strategy;
2. Material terms or conditions of contracts;
3. Profits or profit margins;
4. Input costs (including labor and supplies);
5. Allocation of geographic or industry market shares or territories;
6. Selection, rejection, or termination of customers or suppliers; and
7. Employment costs or hiring.

To be clear, reporting and general discussion of non-confidential, publicly available information about the above topics is permitted, as long as the reporting or subsequent discussion does not suggest a common response. For example, a public announcement that Supplier X is no longer supplying Customer Y could be reported, but not in a way that signals or otherwise implies agreement on what conduct should occur as a result of the public information.

All meetings and other activities will comply with this policy.

Legal counsel should be consulted in all cases involving specific situations, interpretations, or advice. When meetings or communications may relate to matters with antitrust implications, counsel will be consulted and typically will be present during meetings to advise on compliance.

The following procedures will be used to foster compliance with this policy.

Procedures

A. Meetings

Meetings affiliated with the association must be regularly scheduled, subject to a prepared agenda and with minutes kept for board and council meetings. Agendas and minutes are reviewed by legal counsel.

A copy of the antitrust policy should be shared with participants on a regular basis, and the agenda and opening remarks should refer to the antitrust policy by including the “Antitrust Policy” information in Appendix A to this document.

The Antitrust Compliance Guidelines, below, should be regularly shared with meeting participants and followed during meetings and discussions.

B. Programs

Legal counsel must approve new association programs, or changes in existing programs, which have potential antitrust implications.

All surveys to collect information about members’ business practices are reviewed in advance by legal counsel, and the results are reviewed by legal counsel before distribution outside of the association.

C. Reporting

If you think there may be an antitrust issue with a program or discussion, you should not participate in the activity, and you should immediately notify the association President and/or association legal counsel.



Antitrust Compliance Guidelines

Trade associations and their members are subject to federal and state antitrust laws. Associations are particularly vulnerable to antitrust enforcement, because an association is, by its nature, a group of competitors joined together for a common business purpose. Therefore, associations must proceed with particular caution in certain areas of activity to avoid violations of the antitrust laws.

Summary of Applicable U.S. Antitrust Law

The Sherman Act and the Federal Trade Commission Act generally prohibit agreements that reduce competition. Section 1 of the Sherman Act prohibits “contracts, combinations, or conspiracies...in restraint of trade.” Among other things, the Sherman Act prohibits any understanding affecting the price of a product regardless of the purpose of the understanding. For example, even a demonstrable benefit to consumers will not justify an understanding or agreement among trade association members concerning price. The same is true regarding the allocation of markets or customers.

Violations of the Sherman Act are a felony. An individual may be imprisoned up to ten years and fined up to \$1 million. A corporation may be fined up to \$100 million, in addition to double or triple damages.

Guidance for Association Meetings

As a general matter, dialogue should be avoided if it facilitates participants coming away with the impression that they can avoid or reduce competition by taking a common course or seeking a common outcome.

From a practical standpoint, antitrust concerns for associations are focused on four principal problem areas, and the following provides illustrative examples of topics to avoid in general:

A. Price-Fixing

Discussion of price-related terms (including price, discounts, warranties, payment terms) is fraught with antitrust risk. A price-fixing violation may be inferred from similar price behavior by members, even in the absence of a written or oral agreement.

Reporting on non-confidential information about a common supplier or customer is permitted. Discussion about that information, however, must be managed carefully to avoid any implication of a

common response. While discussion of price-related terms in that context may refer to the specific company’s non-confidential practices, it is less risky if hypotheticals are instead used to set the context for discussion. See discussion below under **Other Communications**. Discussion of how to respond to this information should generally be avoided because it may signal concerted conduct.

Discussion of price-related terms that address “best practices” for responding, or that otherwise suggest a common course or outcome, should be avoided because they may signal concerted conduct.

Topics to be avoided include:

- Standardization or stabilization of prices;
- Current or future prices, or increases or decreases in prices;
- Disclosure of a participating company’s plans for responding to price-related issues;
- Suggestions for tactics that would reach a common price-related outcome;
- What constitutes a “fair” profit level;
- Establishing uniform or similar discounts or to eliminate discounts;
- Establishing standard credit, warranty or return policies;
- Use of a common formula or method of calculation to determine prices;
- Pricing procedures, such as use of a common asking price or starting figure in negotiations with customers, even though downward revisions are likely to take place;
- Bid rigging, which may take the form of agreements to rotate jobs among potential bidders or to submit complementary bids;
- Limiting prices at which supplies or raw materials will be purchased;
- Rates of payment for employees;
- Timing or announcement of price changes;
- Limitation of production;
- Avoiding product innovation.

Some topics that should not be covered in meeting discussions may be addressed through a confidential survey. Surveys are carefully drafted with review by legal counsel, and the results also are reviewed by legal counsel. While the results may provide anonymized information about important issues confronting members, they may not then serve as the



basis for discussions among competitors about price-related terms.

B. Agreement to Divide Customers

The antitrust laws expressly prohibit any understanding or agreement between competitors involving division or allocation of customers. Even an informal agreement whereby one member agrees to stay out of another’s territory will constitute a violation of the antitrust laws.

Topics to be avoided include:

- Allocation of customer classes;
- Allocation of regions;
- Limitations on advertising.

C. Boycotts

Arrangements by which two or more competitors refuse or threaten to refuse to do business with competitors, customers, or suppliers may violate the antitrust laws.

Topics to be avoided include:

- Complaints about a competitor’s sales or business practices that suggest not dealing with them;
- Sales to price-cutting distributors;
- Purchases from a particular supplier that is setting prices high;
- Sales to a customer that is buying from competitors;
- Denying membership in the association to limit the ability of the applicant to compete.

D. Standardization and Certification

Development of voluntary industry standards may face antitrust problems if it favors some competitors and discriminates against others without adequate technical justification.

Similarly, association certification activities which further the interests of certain groups of members, to the exclusion of others, may result in antitrust concerns.

Discussion of standardized quality, input, or marketing practices should be reviewed by legal counsel.

Other Communications

The language used in meetings, emails, and other communications can be misconstrued to wrongly imply an improper or illegal motive. To avoid this, keep in mind the following suggestions:

- Avoid using phrases that imply impropriety (“please destroy after reading” or “this may violate antitrust but...”).
- Avoid exaggeration (“this program will destroy the competition”).
- Avoid speculating about the legal propriety or consequences of conduct.
- Do not disparage price-cutting, such as by referring to it as “unethical.”
- Avoid phrases like “if we all just...” which may give the false impression that a company is not competing vigorously or that its prices or conduct are based on anything other than its own business judgment.
- Avoid using words that may falsely imply that there is an “industry agreement,” “industry policy,” or “best practice” that concern price-related terms (discussed above).

On the other hand, topics that may be discussed include:

- Reporting of public, non-confidential information and general discussions regarding that information
- General discussion of negotiating strategies, but only based on hypotheticals and not resulting in actual or implied agreement as to collective action (e.g., “If a company made a change in the timing of its warranty appeal process, are there any options available to challenge that change?”; “Assume that the following term of sale by a company has been made publicly available. . . . Without revealing any specific discussions with any specific company, what negotiating strategies may be used with respect to such a term (understanding that each company will make its own business decision on which negotiating strategy(ies) it will use)?”
- Inquiries about the existence of publicly available information regarding a specific company (e.g., “Does anyone know if Company X has publicly posted its standard contract terms?”)
- Lobbying the government to impact government policy as long as marketplace effects are not agreed upon (e.g., agreeing to lobby the government on tariffs is generally protected conduct, but how to handle any added costs resulting from tariffs are individual company decisions)
- Suggestions for association member surveys (conducted as described above)



Appendix A – For Inclusion in Meeting Presentations

Antitrust Policy

- It is the unqualified policy of MEMA and each of its Divisions to conduct operations in strict compliance with the antitrust laws of the United States.
- All meetings and other activities will comply with this policy.
- Please review the full version of the Antitrust Policy, Procedures and Guidelines in the meeting materials.
- This meeting uses a prepared agenda reviewed by legal counsel. Please stick to the agenda.
- **Discussions Not Permitted**
 - Any discussion that constitutes or implies an agreement on: prices and/or price-related terms (including discounts, payment and warranty terms); profits or margins; labor costs; allocation of markets; and selection/rejection/termination of customers or suppliers
 - Discussion about “best practices” for responding to terms or issues like those listed above which may signal or otherwise suggest a common approach or outcome
 - Confidential company information should not be shared, especially in a way that is suggestive of how other companies should act.
- **Permitted Discussions**
 - Reporting *non-confidential* information about a common supplier or customer and general discussion about that information (but not in a way to suggest a common response)
 - Hypotheticals that do not refer to specific negotiations or urge specific outcomes
 - Lobbying the government to impact government policy (as long as there are no agreed upon marketplace effects)
- There are no stupid questions, so ask first.
- If you are concerned that there may be an antitrust issue with any activity or discussion, please immediately notify the MEMA/Division President and/or MEMA legal counsel.