

## **ADVANCED BIOFUELS ASSOCIATION ANTITRUST COMPLIANCE POLICY**

One of the major goals of the Advanced Biofuels Association (“ABFA”) is to create an environment where industry members can meet and share information with the understanding that ABFA activities will be conducted in accordance with the principles of the antitrust laws. ABFA recognizes the importance of the antitrust laws to preserve and foster competition and is committed to a policy that requires strict compliance with these laws. The ABFA Board of Directors has adopted the following Antitrust Compliance Policy to be used by association members, officers, directors, and staff in conducting ABFA activities.

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

ABFA is firmly committed to the principle of competition served by the antitrust laws, and good business judgment demands that every effort be made to assure compliance with all applicable federal and state antitrust laws and trade regulations.

ABFA recognizes that trade associations are subject to scrutiny under the antitrust laws because they are venues where competitors gather and share information relevant to the industry. Therefore associations must act carefully and cautiously in the way that they conduct their activities to ensure that they do not create situations that could be construed as violations of the antitrust laws.

Antitrust compliance is important for ABFA members, officers, directors, and staff because violations of the law could result in felony convictions leading to jail sentences and substantial monetary fines, penalties and damages. Thoughtless violations of the antitrust laws can result in innocent members and staff being subjected to costly investigations and litigation involving a great loss of time and payment of legal fees. Violations of the antitrust laws have been known to ruin industry associations and cause great harm to individuals’ professional and personal lives. It is ABFA’s goal to make members aware of these laws and be proactive in ensuring compliance.

### **General Antitrust Compliance Principles**

The fundamental principle guiding ABFA’s activities is that there will be no agreements entered into which restrict each member’s freedom to make independent decisions in matters that affect competition. Each member will act in a completely independent manner to set its own prices, establish production levels, develop sales and marketing strategies, choose the markets in which it will operate, and select its customers and suppliers. ABFA will not become involved in the competitive business decisions of its members.

The antitrust laws are complicated and often unclear. If any ABFA member, officer, director, or staff is concerned about being in a “gray area,” or is unsure of how

the antitrust laws apply to particular conduct, that individual should immediately consult with counsel. If the conversation at an ABFA meeting turns to antitrust-sensitive issues, participants should discontinue the conversation until legal advice is obtained or leave the meeting immediately. Discussions of pricing, costs, customers or other competitively sensitive information at ABFA-sponsored meetings or as part of ABFA-related activities could implicate and involve the ABFA in extensive and expensive antitrust challenges and litigation. The fact that ABFA is a non-profit association does not insulate it or its officers, directors, staff, or members from antitrust challenges.

### **Relevant Antitrust Statutes**

The two antitrust laws that most affect trade association activities are the Sherman Act and the Federal Trade Commission Act.

Section 1 of the Sherman Act prohibits all contracts, combinations or conspiracies that unreasonably restrain trade. Note that the Sherman Act may be violated merely by an agreement (a “contract, combination or conspiracy”). Thus, for example, an agreement to fix prices is a criminal violation, even if the parties to the agreement are ultimately unsuccessful in their efforts to fix prices or, indeed, take no further action. Note also that the nature of conspiracy law might render those who merely sit at a meeting while others engage in an illegal discussion liable 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.

Section 2 of the Sherman Act prohibits monopolization and attempted monopolization by a single firm, as well as monopolization by a combination or conspiracy of firms. Monopoly power under Section 2 has traditionally been defined as the power to control prices or to exclude competition in a relevant market. Having a monopoly does not by itself violate Section 2. Rather, the offense of monopolization requires the willful acquisition or maintenance of monopoly power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Section 5 of the Federal Trade Commission Act prohibits “unfair methods of competition in or affecting commerce.” This statute is enforced by the Federal Trade Commission (FTC), which has broad powers to determine what constitutes unfair methods of competition. Unlike the Section 1 of the Sherman Act, Section 5 of the Federal Trade Commission Act may not require the existence of an agreement. The FTC has challenged conduct in which a company has invited its competitors to raise prices (an “invitation to collude”), even though no actual agreement was reached. FTC investigations tend to focus on industry practices and association activities that it 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 may seek to impose civil remedies, including an injunction and civil penalties.

States have their own antitrust laws which generally prohibit the same sort of conduct that is prohibited at the federal level.

### **Association Activities Forbidden by the Antitrust Laws**

#### **Per-Se Violations:**

As mentioned above, the Sherman Act forbids contracts, combinations and conspiracies that unreasonably restrain trade. The Sherman Act was enacted into law in 1890 and over the years the courts have labeled certain restraints of trade as “per-se illegal.” Per-se illegal violations have been determined by the courts to be so plainly anti-competitive that they are conclusively presumed illegal and cannot under any circumstances be determined to be reasonable. Thus, if the court determines the restraint is a per-se violation a defendant cannot claim that the restraint was reasonable under the circumstances. Per-se violations are the most dangerous and must be avoided in all circumstances. In particular, price fixing, bid rigging and horizontal market allocation are criminally prosecuted by the Department of Justice. The following are per-se violations of the Sherman Act:

1. **Price Fixing.** An agreement among competitors about the price or the elements of pricing that they will charge customers is price fixing. Price fixing may exist even if there is no agreement regarding the specific price to be charged. Any agreement among competitors that will directly affect the price to be charged can be price fixing. For example, agreements among competitors regarding credit terms, discounts, or surcharges will directly affect the price charged to customers and fit into the price fixing, per-se violation, category. Competitors should scrupulously avoid discussing prices or the components of pricing and need to be aware that because any agreement affecting pricing is a per-se violation those charged will not be permitted to justify the agreement by showing that it benefited customers.

Likewise, an agreement among competitors that fixes the prices they will pay to suppliers is a form of price fixing and is per-se illegal.

2. **Bid Rigging.** Bid rigging is a form of price fixing by which firms coordinate their bids to eliminate price competition. The kind of activities that constitute bid-rigging are: sharing information with the understanding that one party will be the low bidder; submitting “complementary” (fake) bids at the request of a competitor with the understanding that this bid will be higher; agreeing with a competitor not to bid on a specific project; and rotating bids such that each firm wins a certain number of contracts.

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 category and are strictly illegal.

5. Group Boycotts. A group boycott exists when competitors agree not to do business with, or agree to take some kind of joint action such as deny credit to, a competitor, supplier, or customer. Such actions are considered to be naked restraints of trade and are per-se violations.

### **Rule of Reason Analysis:**

The 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.<sup>1</sup> It is important for ABFA 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. 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 is often procompetitive: it can make new products or services available, improve product or service quality, promote interoperability, and give rise to other efficiencies. However, standard setting can create antitrust violations if it is used as a means of excluding products or competitors from the marketplace. Standard setting is a legal activity that can be engaged in by an association provided that it is done for a proper purpose and in a way that provides interested parties with the opportunity to participate in the development and implementation of the standard.

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 criteria and does not have the purpose and effect of eliminating or restraining competition.

3. Information Exchanges. The sharing of knowledge and information serves many desirable goals. It can help spur innovation and better equip an industry to understand and respond to marketplace realities. However, the sharing of non-public-domain information – such as pricing information, marketing plans, raw material costs and employee compensation – with fellow members can cause antitrust problems.

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<sup>1</sup> See *National Society of Professional Engineers v. United States*, 457 US 332 (1982).

Information-sharing programs must be structured in ways that do not disclose a member's current pricing, pricing strategies, marketing plans or other competitively sensitive information that could facilitate a price fixing agreement or otherwise be used to restrain competition.

4. Government Relations Activities. An 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>2</sup> There are limits to the scope of the Noerr-Pennington doctrine and legal advice should be obtained to properly structure lobbying campaigns to ensure compliance.

### **ABFA Antitrust Compliance Operating Procedures**

1. All ABFA members, officers, directors, and staff are expected to be familiar with, and to follow, the ABFA Antitrust Compliance Policy at all times.
2. The ABFA Antitrust Compliance Policy will be distributed to all officers, directors, staff, and members of the association.
3. The ABFA Antitrust Compliance Policy will be posted on the ABFA web site.
4. Each ABFA board meeting and committee meeting will begin with a reminder to all attendees about the association's Antitrust Compliance Policy.
5. ABFA staff will receive periodic briefings by legal counsel concerning antitrust compliance.
6. In general, ABFA members and staff should consult with legal counsel if there is any doubt about how the antitrust laws apply in a particular situation.

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<sup>2</sup> See *Eastern Railroad Presidents Conference. v. Noerr Motor Freight, Inc.*, 365 US 127 (1961); *United Mine Workers of America v. Pennington*, 381 US 657 (1965).