

ANTITRUST GUIDELINES

The Chlorine Institute
1300 Wilson Boulevard, Suite 525, Arlington, VA 22209

Antitrust Guidelines for Activities Taken in Connection with Membership in The Chlorine Institute, Inc.

The following has been developed to inform member companies and their representatives of how the federal antitrust laws apply to activities taken in connection with membership in The Chlorine Institute, Inc. This information is designed to offer a general overview of the antitrust laws and their relationship to trade association activities. To the extent that further questions arise, members are urged to contact Institute counsel or their own company counsel.

The Chlorine Institute, Inc. is a non-profit trade association of chlorine producers, packagers and distributors, and associated industries. The Institute's efforts are directed towards promoting safety and security in the manufacture, transportation, and use of chlorine and related products. The Institute serves as the technical information center of the chlor-alkali industry, and it has developed guidelines for occupational and environmental safety and health. In addition to its professional staff, the Institute relies to a significant degree upon its members to help achieve the association's health, safety and security goals.

The Institute conducts its business through the activities of several Issue Teams and Task Groups which are comprised of member representatives and which meet on a regular basis to promote the safe and secure manufacture, packaging, transportation or use of chlorine. These Issue Teams and Task Groups have operating procedures which set forth the Institute's Strategic Plan outlining the Institute's substantive goals. However, because the Institute's members necessarily are competitors, suppliers and/or customers of each other, whenever these members gather at meetings to discuss Institute business there is a possibility that conduct could occur that could be suspect under the antitrust laws. It is for this reason that the following guidelines have been made available.

1. The Antitrust Laws and Unlawful Activity

2.1 THE STATUTES

The basic antitrust legislation is the Sherman Antitrust Act of 1890. Most substantive antitrust law has been derived from court actions decided under Sections one and two of the Act. Activities of trade associations ordinarily would be reviewed pursuant to Section one of the Sherman Act which prohibits contracts, combinations and conspiracies in restraint of trade, and necessarily involves at least two actors. Section one has been applied both to illegal activities undertaken between competitors ("horizontal" restraints) and to conduct by those at different levels of the distribution chain, for example, a wholesaler and his customers ("vertical" restraints). Section two of the Sherman Act forbids monopolization, combinations or conspiracies to monopolize and attempts to monopolize.

There are also other antitrust laws in addition to the Sherman Act. For example, Section 5 of the Federal Trade Commission Act prohibits unfair methods for competition. Section 5 of the FTC Act may be used to challenge actions which violate the Sherman Act, but the FTC also has power under Section 5 to challenge incipient anticompetitive activity that does not rise to the level of a Sherman Act violation.

In addition to the Sherman Act and the Federal Trade Commission Act, there are other antitrust laws such as the Clayton Act and the Robinson Patman Act; however, these laws have greater relevance with respect to activities taken outside the context of a trade association.

To be unlawful under Section one of the Sherman Act, courts have held that the restraint of trade must be unreasonable. In determining whether restraints of trade are unreasonable, two methods of examining the challenged activity have been developed: the per se rule, which applies to certain particularly serious violations, and the rule-of-reason. Under the per se rule, if a court determines that the defendants have engaged in a form of per se conduct, such activity is conclusively presumed to be unreasonable and thereby a violation of the antitrust laws. In contrast, in applying the rule of reason, a court examines all of the surrounding circumstances to determine the conduct's competitive impact and considers any possible business justifications to determine whether the conduct violates the antitrust laws.

2.2 PROHIBITED ACTIVITIES

The following are types of conduct which could occur in a trade association context and which could be challenged as per se under the antitrust laws. this conduct must be avoided at all times.

- A. Price Fixing. The most common yet most serious accusation in any civil or criminal antitrust action is that the defendant has engaged with its competitor(s) in a price-fixing conspiracy. A party alleging an unlawful price-fixing conspiracy need not prove the existence of an explicit agreement. Rather, the existence of an agreement may also be inferred from circumstantial evidence. Courts over the years have established a number of activities which are considered to be price fixing and thus per se unlawful. These activities -- all of which could occur during any trade association gathering and, therefore must be avoided -- include:
- Direct price-fixing among competitors. This type of conduct would include agreements among competitors:
 1. to sell products at a particular price;
 2. setting minimum or maximum prices;
 3. to use a particular method of quoting prices;
 4. establishing uniform costs and markups and specifying price differentials between grades of a product; and
 5. to submit collusive, noncompetitive rigged bids.
 - Arrangements indirectly affecting price. Whether an arrangement indirectly affects prices is a question that can be answered only on the basis of the particular facts of a case; however, once a court determines that the activity does in fact affect prices, a finding of per se illegality could be made. Types of activity which have been found to fall within this category include agreements among competitors to:

1. restrict price advertising;
2. use specified accounting methods;
3. limit production or set quotas;
4. discontinue a product or set uniform standards or specifications;
5. fix the minimum quantity of a product sold;
6. fix the amount of basic ingredients; and
7. exchange price information.

B. Arrangements among competitors to divide markets or allocate customers. Any arrangement between or among competitors to divide the marketplace is per se unlawful under Section one of the Sherman Act. The per se rule will be applied regardless of whether the market allocation was accompanied by a price-fixing agreement.

C. Concerted refusals to deal. Horizontal agreements among suppliers refusing to deal with particular customers or classes of customers (or customers refusing to deal with particular suppliers), otherwise known as group boycotts, will be regarded as per se unlawful. Boycott cases have also encompassed (1) the refusal by trade associations to admit new members or the expulsion of existing members and (2) refusals by trade associations to approve or certify products or services.

In many trade association cases, a rule of reason analysis is undertaken whereby the purpose behind the restriction is examined and the collective action reviewed to determine if it is reasonably related to the goal of the association, but no more exclusionary than necessary. Even with this rule of reason approach, care must be taken to ensure that the purpose behind the program is not anticompetitive and that there are sufficient procedural safeguards so that the action cannot be regarded as arbitrary.

Member companies and their representatives are urged to avoid engaging in any of the activities outlined above and should avoid even the appearance of engaging in any of these activities. The rules for complying with the antitrust laws should be followed not only at the meetings but also during any surrounding social activities or events.

2.3 **PENALTIES FOR ANTITRUST VIOLATIONS**

Persons and/or corporations who are found to be in violation of the antitrust laws are subject to substantial penalties. These penalties include:

1. Imprisonment and Fines. Individuals convicted of violating the Sherman Act may be fined up to \$1,000,000 per offense and/or imprisoned for up to ten years. Corporations which have violated the antitrust laws may be fined up to \$100,000,000 or twice the gain or loss from the conduct. The Justice Department has repeatedly advocated stiffer penalties, including jail sentences, for individuals found guilty of violating the antitrust statutes.

2. Treble Damages. Both the Department of Justice in civil actions and individuals in private actions may obtain treble damages (triple the actual damages) against persons and corporations who have violated the antitrust laws. Obviously, any defendant could suffer severe financial difficulties where a treble damage award has been made.

3. Injunctive Relief. The Department of Justice, Federal Trade Commission and private persons may all seek equitable relief proscribing particular conduct. The possible ramifications of such relief are very broad. For example, a company found to have violated the antitrust laws could be prohibited from engaging in any contact with its competitors, including activities that do not in and of themselves violate or have any connection with the antitrust laws. Such relief could cause significant hardship and interruptions in the day-to-day operations of an entity and is incentive enough to avoid behavior that may be challenged pursuant to the laws.

3. Conclusion

Institute members must avoid discussions and/or agreements concerning matters that could constitute violations of the antitrust laws. The rules for complying with the antitrust laws should be followed not only at the meetings but also during any surrounding social activities or events. Specifically, actions involving price fixing (direct or indirect), market division or allocation of customers, and refusals to deal must be avoided. Even the appearance of such conduct could be highly problematic. The Institute's by-laws, and particularly its operating procedures for its Standing Committees and Support Groups have been established with the prohibitions of the antitrust laws in mind, and they should be followed. To the extent questions arise concerning matters to be discussed at a committee meeting, these discussions should be delayed until counsel has had an opportunity to review the matter. In any event, all Standing Committee meetings involving potentially sensitive issues should have an advance agenda reviewed by Institute counsel, and member representatives should not attend meetings for which there is no agenda or which concern issues outside that committee's operation procedures.