



Antitrust Compliance Manual
for the
American Wood Protection
Association, Inc.

Last Revised August 14, 2019

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Antitrust Compliance Statement of Policy

The American Wood Protection Association, Inc.'s ("AWPA") policy is to comply fully and strictly with both federal and state antitrust laws. Broadly stated, the basic objective of the antitrust laws is to preserve and promote competition. These laws are premised on the assumption that private enterprise and free competition are the most efficient ways to allocate resources, produce goods at the lowest possible price, and assure the production of high quality products.

AWPA's aim is to conduct its affairs in such a way as to avoid any potential for antitrust exposure in the first instance. Full compliance with the antitrust laws is a requirement for AWPA membership or service as a director, officer, committee member, staff member, or employee of AWPA, and responsibility for compliance rests with each director, officer, committee member, staff member, employee, and AWPA member. To comply with the antitrust laws, competitors should not discuss certain subjects when they are together — either at formal meetings or during informal contacts with other industry members. Agreement with this policy is a condition of AWPA membership.

Topics to avoid discussing with competitors include: prices, price trends, timing of price changes, costs of common inputs, margins, terms of sale, discounts and rebates, advertised prices, promotional programs, and the like. Further, AWPA and its directors, officers, committee members, staff members, employees, and members are prohibited from collectively:

- Fixing or setting prices for selling products or services;
- Allocating geographic markets or customers between or among competitors;
- Bid rigging, bid rotation, or otherwise distorting the bid process;
- Boycotting customers, suppliers, or vendors;
- Agreeing upon levels of output;
- Conspiring to exclude competitors or customers from the market;
- Using the AWPA standard setting process for anticompetitive purposes, including, for example, manipulating the standard setting process to benefit members or industry by increasing prices, limiting output, or disadvantaging rivals; and
- Discussing specific R&D, sales or marketing plans, or any company's confidential product, development, or production strategies.

AWPA Standards shall be developed in accordance with applicable antitrust and competition laws.

Participants in AWPA Executive Committee, Technical Committee, Special Committee, task group, and/or any other AWPA meetings have an obligation to terminate any discussion, seek legal counsel's advice, or, if necessary, terminate any meeting if the discussion might be construed to raise antitrust risks. All AWPA meetings and activities are held for the purpose of transacting the appropriate business of AWPA and to further its goals. All meetings and activities of AWPA must be conducted in a manner consistent with this policy. Violations of this policy may result in disciplinary action.

Summary of Critical Antitrust DOs and DON'Ts for AWWA Activities:

DON'Ts

- DON'T** discuss prices, fees, or features that can affect (raise, lower, or stabilize) prices – *e.g.*, discounts, costs, salaries, terms and conditions of sale, warranties, rebates, or profit margins. Although members may discuss general costs to assess the impact of standards or proposals, the discussions should not address company-specific or industry-wide pricing, suppliers, customers, or future production plans.
- DON'T** discuss what is a fair, appropriate, or reasonable price, profit margin, or market share for members or the industry at large or otherwise attempt to manipulate the standard setting process to achieve significant or uniform industry-wide increases in prices. The standard setting process should be focused on legitimate, objective justifications related to safety, quality, and performance. Standards should be reasonably related to the goals they are intended to achieve and no more extensive than necessary to accomplish those goals.
- DON'T** share data on prices, production, sales, bids, costs, salaries, or other business practices.
- DON'T** discuss price advertising or cooperative advertising practices with competitors.
- DON'T** coerce or tell customers, suppliers, competitors, or anyone else how they should vote.
- DON'T** accept things of value, payments, or reimbursements from those who want or expect you to vote a certain way.
- DON'T** vote a certain way because someone asked, told, paid, or intimidated you into doing so.
- DON'T** attempt to manipulate the standard setting process to achieve uniform industry-wide increases in prices.
- DON'T** agree to uniform terms of sale, warranties, or contracts.
- DON'T** agree to restrictions on output, which has been interpreted as a form of price-fixing by causing demand to exceed supply.
- DON'T** agree to divide customers, markets, or territories, or agree not to deal with certain suppliers, customers, or others.
- DON'T** discuss proprietary details about your customers.
- DON'T** try to prevent a supplier from selling to your competitor(s).
- DON'T** manipulate the AWWA standard setting process for anticompetitive purposes, such as developing standards that would give you an advantage over your competitors or that would place one or more of your competitors at a disadvantage. Specific commercial or economic considerations should play no role in the setting or application of the standards.

DOs

- DO** consider all relevant information and base your comments and votes on sound, scientific principles based on legitimate objective justifications. Care should be taken to ensure that valid, objective bases support each standard. Standards should never be arbitrary or capricious, or vague or ambiguous, and the objective bases for proposals and standards should be clearly documented.
- DO** insist that all AWWA meetings have agendas that are circulated in advance, and that minutes of all meetings properly reflect the actions taken at the meeting.
- DO** insist that the AWWA Antitrust Compliance Statement of Policy is reviewed by all participants and that an antitrust statement is recited at each meeting.
- DO** request that AWWA's counsel be present at any AWWA discussion involving potentially competitively sensitive information.
- DO** leave any meeting where improper subjects are being or will be discussed.
- DO** seek legal advice from your own counsel if you have questions about the antitrust laws or your responsibilities under these laws. AWWA's Executive Committee members and Officers are advised to consult with AWWA's legal counsel.

Antitrust Compliance Statement for Use at Start of Meetings

AWPA has a policy of strict compliance with federal and state antitrust laws. The antitrust laws prohibit competitors from engaging in actions that could result in an unreasonable restraint of trade. Consequently, AWPA directors, officers, staff, and/or members must avoid discussing certain topics when they are together – both at formal association membership, board, committee, and other meetings and in informal contacts with other industry members. These subjects include:

- Agreeing to fix or regulate prices or the conditions or terms for the sale of products.
- Agreeing to establish geographic trading areas, allocate markets or customers, or classify certain customers as being entitled to preferential treatment.
- Participating in any plan to induce any manufacturer or distributor to sell or refrain from selling, or discriminate in favor of or against any particular customer or class of customer.

In addition, all AWPA Standards shall be developed in accordance with applicable antitrust laws. Competitive concerns arise when competitors abuse or distort the standard setting process for the purpose of self-dealing or restricting competition, such as by using the process to exclude rivals from a market, restrict output, or limit consumer choice.

To minimize these risks, the AWPA Bylaws and Technical Committee Regulations require that AWPA Standards for the performance of wood products be based on sound scientific principles.

- Standards should seek to assure at least that minimum product performance which would reasonably be expected by those considering the product use envisioned by the Standard. Standards must be based on relevant and adequate supporting data or on non-controversial laws, facts, or principles.
- Commercial interests must not interfere with these requirements as part of the standardization process. In addition, each member must act in good faith and not on behalf of or at the request of any other person or entity.
- Members should not engage in lobbying efforts outside of the standard setting process to push for its preferred standard. Further, each Member that has a conflict of interest with a particular issue should either disclose the conflict or withdraw from involvement in the issue.

Violations of the antitrust laws can pose serious consequences for AWPA and its officers, directors, staff, and members. Be sure to read the AWPA Antitrust Compliance Statement contained in your board or membership books. Participants in AWPA Board and/or membership meetings have an obligation to terminate any discussion, seek legal counsel's advice, or, if necessary, terminate any meeting if the discussion might be construed to raise antitrust risks. Violations of this policy may result in disciplinary action.

Introduction

Trade associations are recognized as valuable tools of American business. Nevertheless, since AWPA is, by its nature, a combination of competitors and other market participants, AWPA and its members must ensure that their activities do not constitute an illegal restraint of trade or even create the appearance of such an anticompetitive restraint.

All AWPA members, directors, officers, and employees must be aware of the ever-present threat of antitrust liability – at formal and informal meetings, trade shows, educational events, cocktail parties, dinners, and social events, and in telephone and on-line conversations and correspondence.

AWPA believes that competitive markets are necessary for the continuing success of its members and the industry. The nation's antitrust laws are designed to promote competition by prohibiting certain kinds of behavior. All AWPA members, directors, officers, and employees are required to comply with federal and state antitrust laws.

This Manual builds on AWPA's Antitrust Compliance Policy Statement by providing members, directors, officers, and employees with guidance on complying with the antitrust laws and association best practices. While this Manual focuses on the laws of the United States, other jurisdictions have similar antitrust and anti-competition laws and regulations that should be kept in mind. As this Manual does not address every situation with antitrust consequences that may arise, AWPA advises those confronted with sensitive antitrust issues to consult with their own company counsel. AWPA's Executive Committee members and Officers are advised to consult with AWPA's legal counsel. Additionally, this Manual is subject to change and may be amended, supplemented or superseded. All Members are responsible for continuous review of AWPA's antitrust compliance guidelines and policies.

Overview of the Antitrust Laws

Broadly stated, the basic objective of the antitrust laws is to preserve and promote competition and the free enterprise system. These laws are premised on the assumption that private enterprise and free competition are the most efficient ways to allocate resources, produce goods at the lowest possible price, and assure the production of high quality products.

The U.S. antitrust statutes of principal concern to companies and individuals that participate in trade association activities are Sections 1 and 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act. These laws prohibit all contracts, combinations, and conspiracies that unreasonably restrain trade.

In addition, all U.S. states have adopted laws that address antitrust and fair trade matters. State laws usually are interpreted and applied in a similar fashion to the federal laws. In general, strict compliance with the federal antitrust laws will result in compliance with the state laws.

Some activities are regarded as unreasonable by their very nature and are, therefore, considered illegal “*per se*,” which means that they are conclusively presumed to be unlawful. Practices in the “*per se*” category include naked agreements between competitors to fix prices; agreements to agree not to deal with or pressure others not to deal with competitors, suppliers, or customers (group boycott); and agreements to allocate markets or limit production.

Conduct that does not unambiguously injure competition is not “*per se*” unlawful, but rather is analyzed under the “rule of reason.” Under the “rule of reason,” courts will analyze agreements or conduct by examining all of the facts and circumstances that surround the conduct in question to determine whether the actions unreasonably restrain trade.

Key Points

Risks of

Noncompliance with the Antitrust Laws

- Civil and criminal penalties.
- Limitations on association activities.
- Private lawsuits.
- Imprisonment.

Why Is Compliance with the Antitrust Laws Important?

Aside from the fact that AWPA is committed to abiding by the laws of all jurisdictions in which it operates, the penalties for violation of the antitrust laws can be very severe – both for AWPA members and for individuals.

For Members:

- Under U.S. antitrust laws, corporations can be fined up to \$100 million per violation. Courts can also impose an “alternate fine” of up to twice the gain to the perpetrator or twice the loss to the victim as a result of illegal behavior.
- Courts or government antitrust agencies can impose permanent restrictions limiting corporate activity.
- Private actions by customers or competitors who can show they were harmed by the perpetrator’s actions can result in damages many times the size of a government fine.

For Individuals:

- Violations of the Sherman Antitrust Act are felonies. Individuals can be imprisoned for up to ten years, fined up to \$1 million, or both, per violation.

For AWPA:

- Injunctions or other orders issued by the courts may prevent AWPA from pursuing association business.
- On occasion, courts have ordered trade associations to disband.

Disruption and Expense of Antitrust Proceedings

Dealing with a government antitrust investigation or a private antitrust lawsuit is expensive, time-consuming, and distracting. An investigation or lawsuit can seriously damage the reputation of AWPA, its members, and individuals. It is important to emphasize that the risk of these penalties, damages, and distractions can be minimized by understanding in very basic terms what the antitrust laws require and by consulting with legal counsel whenever you are in doubt.

For example, the process of discovery, which includes the identification and production of documents sought in litigation, can involve countless hours of work by AWPA's staff, attorneys, and otherwise outside consultants. If a matter proceeds to trial, the disruption and expense to AWPA is compounded. The cost of the investigation alone, even if it does not proceed to trial, can be beyond the resources of the entity involved.

Key Points

Interaction with Competitors

- Competition requires independent business decisions.
- **NEVER** discuss prices, pricing methods, pricing strategies, margins, costs, price increases, credit terms, or terms and conditions of sale with a competitor.
- **DON'T** agree with a competitor to divide territories or customers.
- **DON'T** agree with a competitor on a method for dividing up bids/jobs.
- **DON'T** enter into an agreement with a competitor, supplier, or customer not to deal with others.

Interaction with Competitors

The basic premise of the antitrust laws is that competition entails every company making its business decisions **independently of others**. Each of the offenses highlighted below, as well as other antitrust law violations, have at their core some form of "agreement" among otherwise independent companies. It is important to understand that an "agreement" in antitrust terms rarely means a written agreement signed by all of the "parties" to the agreement. More often than not, agreements are inferred, by judges or juries, from facts and circumstances that suggest the existence of an understanding. Agreements can be direct or indirect, explicit or tacit, and even unwritten. Plaintiffs can prove an agreement with all sorts of evidence, including, most typically, circumstantial evidence.

In the discussion that follows, bear in mind that an "agreement" is a very flexible concept under the antitrust laws. For this reason, it is important that your statements, actions, and writings be as clear and unambiguous as possible, so as to avoid misinterpretation or misconstruction after the fact. Never give the impression that any illegal agreement has been reached with a competitor or that inappropriate information has been exchanged.

Of particular relevance to standards setting associations, the antitrust laws prohibit any activity the intention or effect of which is to fix prices or terms and conditions of sale, allocate markets or products or otherwise discriminate against competitors, suppliers or customers geographically or product-wise, and restrict or deny access to any portion or mechanism of the industry or the development of new products or processes.

Price Fixing

Under the U.S. antitrust laws, any agreement with a competitor establishing, altering, or relating to prices, or terms and conditions of sale, is *per se* unlawful, regardless of the circumstances. You should not communicate with a competitor to obtain their prices or have any discussions with competitors on pricing methods, pricing strategies, margins, costs, price increases, credit terms, or terms and conditions of sale under any circumstances.

Efforts by members of a standard setting body to agree or coordinate actions that have the effect of raising, lowering, or stabilizing prices with some range; other competitive terms that affect conditions of sale, such as shipping fees, warranties, discount programs, or financing rates; restricting production, sales, or output; or even an invitation to consider the foregoing is strictly prohibited. Even absent an explicit agreement, the adoption of similar prices or bid behavior can suggest an inference of a price-fixing or bid-rigging violation. Further, price-fixing and bid-rigging behavior is not justifiable even if the prices are reasonable to consumers, stimulate competition, or avoid competition.

Allocating Markets

Unlawful agreements allocating markets occur when competitors divide territories or customers among themselves. Customer or market allocation is *per se* unlawful in the United States. For example, two competitors cannot agree that one will sell into one geographic market or to a group of customers and the other will sell in a different geographic market or to a different group of customers.

Bid Rigging

Any agreement with a competitor on any method by which prices or bids will be determined is *per se* unlawful. Illegal bid rigging also includes agreements or understandings among competitors to: (1) rotate bids or contracts; (2) determine who will bid and who will not bid, or who will bid to which customers, or who will bid high and who will bid low; (3) fix the prices that individual competitors will bid; or (4) exchange information about the value or terms of bids between competitors in advance of submitting bids.

Group Boycotts

An unlawful group boycott occurs when competitors, suppliers, or customers agree with each other (or pressure another person) not to deal with others. This should be distinguished from a unilateral refusal to deal, where a company decides on its own, and without consulting any other company, that it does not want to buy from or sell to another company, which is usually lawful (except, for example, in certain cases where the supplier has a dominant market position).

Key Points

Monopolization

- **DON'T** use market position to prevent effective competition.
- **DO** compete fairly.

Monopolization

An entity has “monopoly power” or a “dominant position” if it has the power to control market prices or exclude competition. Relevant factors in determining whether an entity has a dominant market position include: its market share; the entity’s position relative to that of its competitors; the existence of barriers to entry into the market; and the dependence of customers on a particular product or service. Note that, for purposes of antitrust analysis, an entity may be either a single company or an association of competitors such as AWWA.

An attempt to monopolize also may be unlawful. This is the case, for example, when an entity engages in anticompetitive practices (1) with the specific intent to eliminate competition and (2) where the entity has a dangerous probability of achieving monopoly power.

Even entities with monopoly power or a dominant market position may continue to compete fairly to increase the size of their business. It is not an offense to be dominant; problems arise with the abuse of such dominance. Entities cannot use their market position to further entrench their monopoly power or abuse their dominant position. Determining whether these restrictions apply to particular markets, and whether particular business practices may create problems in this regard, are complex issues that must be discussed with legal counsel.

The following is a non-exhaustive list of the kinds of activities that can cause problems if an entity has a dominant market position:

- *Refusal to supply* – there must be objective reasons for refusing to sell to customers/resellers.
- *Imposing unfair purchase or selling prices, or other unfair trading conditions* – for example, imposing excessively high prices or onerous contract terms that the entity only can obtain as a result of holding a dominant position.
- *Predatory pricing* – pricing below a specified measure of costs with the intention of driving a competitor out of the market.

Monopsony Power

Joint purchasing, by definition, means greater purchasing power by the group than each of the buyers might have individually. This generally is procompetitive because it results in lower prices. If a buying group can reduce purchase prices below competitive levels by reducing the total quantity purchased in the entire market, however, it may raise antitrust concerns. Where prices are set through the artificial manipulation of powerful buyers rather than by competitive forces, suppliers may leave the market and consumers may be harmed by the resulting loss of choice. This power to eliminate suppliers is known as monopsony power.

Key Points

Membership

- Membership must be based on clearly articulated, objective, and reasonable criteria.

Key Points

Information Exchanges

- Articulate a rationale for exchange.
- Limit information shared to that information that is reasonably necessary to achieve procompetitive goals.
- Information should be collected by AWPA or a third party.
- Company-specific information should be masked and data should be aggregated.

Antitrust Issues Specific to Trade Associations

Membership

Trade associations are permitted to adopt objective and reasonable standards for membership. Exclusionary membership practices that affect a market participant's ability to compete, however, may raise antitrust issues. Similarly, denial of membership or discrimination in membership terms may place competitors at a disadvantage if membership is necessary to compete in the industry on equal terms. A trade association that does not have market power generally is free to limit its membership in any way consistent with achieving the efficiency goals of the group. However, even a trade association without market power should be aware that antitrust concerns may arise from excluding or expelling a firm that competes with members if the purpose is to raise the excluded firm's costs or cause other competitive harm.

Thus, membership criteria must be clearly articulated and based on neutral, objective factors calculated to promote efficiency-enhancing and pro-competitive goals. This is a particular concern in those markets where the trade association has a significant share and membership may be necessary to be an effective competitor. It is permissible to require members to fund a share of the trade association's capital requirements to prevent "free riders."

Information Exchanges, Data Collection, and Dissemination of Market Research Data (this does not apply to technical information or performance data supporting the standards-setting process)

Under the Sherman Act and Federal Trade Commission Act, information exchanges are analyzed under the rule of reason, which balances the procompetitive benefits of the conduct against the potential anticompetitive harm to determine the likely overall effect on competition. Structured properly, an information exchange program is a legitimate and necessary function of a trade association. Compilations of reasonably-available public information and other data collection and statistical reporting, conducted under reasonable guidelines satisfying certain criteria, will not run afoul of the antitrust laws. The main competitive concern with information exchanges is the potential for participating members to use the information exchanged to further a price-fixing or other anticompetitive conspiracy. In this regard, information exchanges that involve prices or price inputs (*e.g.*, salaries) present a higher potential for antitrust risk, particularly if the information is forward looking.

Recognizing that most trade association information exchanges are procompetitive, and to help limit antitrust risk, the Federal Trade Commission and the Department of Justice have created an antitrust safety zone for information exchanges and benchmarking programs that meet the following criteria:

- Do not share future pricing or forecasts.

1. The survey is managed by a third party (such as a consultant or trade association);
2. The shared data is more than three months old;
3. There are at least five members reporting data, no individual member's data represents more than 25% of the data collected; and
4. Any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the data provided by a particular member.

A program that does not qualify for the information-exchange safe harbor is not *per se* unlawful. Rather, the program would be reviewed under a rule of reason test to determine the likely overall effect on competition.

Further, the antitrust risk associated with association-sponsored information exchanges can be minimized by implementing the following safeguards:

- Don't share competitively sensitive information (such as data concerning prices, fees, or rates) unless the exchange is made pursuant to a well-considered plan that has been approved by legal counsel.
- The association should clearly articulate the purpose and procompetitive benefits of the information exchange and keep it closely focused on those criteria.
- Member participation in the survey should be voluntary. Participation in the survey should not be a condition of membership and a member's decision not to participate should not result in a loss of membership or limitation of membership rights.
- The data should be collected by association staff or an independent third-party. Members should not be involved in the collection or compilation of the data.
- Any information provided by members should be based on data at least three months old (no current or future information). There should always be at least five participants providing data, with no individual participant's data representing more than 25% on a weighted basis.
- The association staff or third party should treat specific information provided by participating members as confidential and not disclose it in its raw form to any other participant or third party. The survey should not identify the individual members who participated in the survey.
- Published data should be reported in aggregate so that information relating to individual transactions is not disclosed and cannot be figured out.

- Joint discussion and analysis of the data by association members should be avoided. Each participant should separately analyze the data and make independent business decisions.
- Meetings related to an information exchange should have agendas that are circulated in advance. Association staff or legal counsel should participate to ensure that each meeting follows its agenda. Topics to avoid discussing with competitors include: prices, fees, or rates, or features that can impact (raise, lower, or stabilize) prices, fees, or rates, such as discounts, costs, salaries, terms and conditions of sale, warranties, or profit margins. Any meeting where improper subjects are discussed should be stopped immediately.

Key Points

Standard Setting

- Consider all relevant opinions.
- Articulate sound technical basis.
- Reasonably related to goals.
- No more extensive than necessary.
- Revise positions as necessary.
- Voluntarily disclose proprietary interests.

Standard Setting

The process of developing industry standards, if properly executed, can be a beneficial function of an industry group. The formulation, implementation, enforcement, and advocacy of industry standards, including design specifications, can bring efficiencies of production and real benefit to manufacturers, specifiers, distributors, users, and consumers.

In standardization it is especially necessary to avoid limitations and restrictions which unreasonably restrain trade rather than facilitate it. This is particularly important where industry standards and design specifications become the national practice, are enforced, or where they are adopted by regulatory bodies such as regional or national code authorities. The main competitive concerns with such activities are that: (a) the participants will exchange competitively sensitive information such as current or future prices and output or business plans; (b) the participants will use the process to exclude rivals from a market, fix prices, restrict industry output, or limit consumer choice; and (c) a participant may conceal or fail to disclose the existence of patents essential to the standard or misrepresent the terms on which it will license those patents, thereby allowing the participant to benefit unfairly once the standard is adopted and implemented.

Certain precautions should be taken in evaluating and adopting a standard to ensure that it accurately reflects member interests and does not implicate any antitrust concerns such as price fixing or group boycott issues. Adoption of a standard with anticompetitive intent to limit or prevent certain competitors from competing effectively could lead to antitrust liability. Therefore, these guidelines should be followed in articulating an AWWPA position on any standard:

- Consider all relevant opinions.
- Standards should be clear and unambiguous, reasonable, fair, and objectively grounded — care should be taken to ensure that valid, objective bases support each standard. Standards should never be arbitrary or capricious, or vague or ambiguous, and procedures should be developed that

document the development and reasonableness of, and the objective basis for, proposed standards.

- Specific commercial or economic considerations should play no role in the setting or application of the standards. In addition, standards should never be created or used for the purpose of raising, lowering or stabilizing prices or fees, excluding competitors from the market, or limiting the supply of products or services.
- Articulate a sound technical basis for the position based on legitimate, objective justifications.
- The standard must be reasonably related to the legitimate, procompetitive goals it is intended to achieve.
- The standard must be no more extensive than necessary to accomplish those goals.
- All decisions should be based completely and exclusively on the record of the review and not on extraneous, anecdotal, subjective, or other outside sources of information.
- Revise positions over time as necessary to reflect the beliefs of the membership and the current state of the technology.
- Members must disclose voluntarily any proprietary interest (*e.g.*, a patent) they may have in a particular standard that the trade association adopts; failure to disclose intellectual property and other interests in a specific standard may lead to antitrust liability.
- Prior to finalizing standards, associations should provide interested parties with notice of the proposed provisions and an opportunity to comment, and then fairly and objectively consider such comments in finalizing the standards.

Key Points

Certification and Self-regulation

- Based on sound objective justifications.
- Reasonably related to goals.
- No more extensive than necessary.
- Reasonable procedural safeguards.

Certification and Self-Regulation

While trade association-run certification and self-regulation can serve valuable procompetitive purposes, programs that unreasonably further the interests of certain members to the exclusion of others may be illegal. Even if an association's intent is to improve members' ethical conduct and provide the public with better products and services, it still may violate the antitrust laws. In particular, attempts by trade associations to self-regulate may, to the extent they exclude some that seek to participate, be subjected to antitrust scrutiny as illegal group boycotts or refusals to deal.

Any industry certification program or attempt at self-regulation must be based on sound, objective justifications; must be reasonably related to the goals it is intended to achieve; must be no more extensive than is necessary to accomplish those goals;

and must incorporate reasonable procedural safeguards to ensure that participants are not arbitrarily discriminated against.

Key Points

Educational Presentations

- **DON'T** promote one company over another.
- Counsel should review educational materials.

Educational Presentations

Many trade associations provide a valuable forum for industry education. Nonetheless, discussions of this type should be limited to objectives that promote overall industry or consumer welfare – they should not promote one particular company, product, or service over others. A member or non-member that can provide useful information on specific concerns may be invited to make a presentation to or otherwise address issues at an AWPA meeting if the purpose is not to give the non-member favored status or treatment in doing so. However, outside presenters may not be as cognizant of antitrust issues as AWPA members may be.

Because of the risk implicated by educational presentations, written outlines and handout materials for presentations involving antitrust-sensitive topics should be reviewed by counsel prior to distribution and use. The same principles and antitrust risks can apply to printed or electronic material published by AWPA.

Key Points

Public Policy Advocacy/Lobbying

- Generally protected under the First Amendment.
- **DON'T** engage in “sham” lobbying.

Public Policy Advocacy/Lobbying

In the U.S., activity by a single company or group of companies to petition lawmakers, regulatory agencies, the courts, or other government bodies to adopt or change laws or regulations in ways that favor AWPA’s business interests may be exempt from the antitrust laws, even if others may be disadvantaged if the efforts are successful.

Under the *Noerr-Pennington* doctrine of antitrust immunity, joint action by trade associations or groups of competitors such as AWPA to influence government policy generally does not violate the antitrust laws. This doctrine generally includes legislative activity, litigation in the courts, and proceedings before administrative bodies, which are protected under the First Amendment to the Constitution.

However, seeking government action in order to injure a competitor *directly* – rather than as a result of the government action – is not protected by this immunity. For example, filing a baseless lawsuit against a competitor might be an antitrust violation if the motivation is to injure the competitor directly by hurting its reputation; in contrast, if the competitor is injured because it loses the lawsuit, there is no antitrust violation. In addition, under certain circumstances, there is no immunity if a company makes false or misleading statements when it petitions the government.

Further, the failure of individual members to disclose a proprietary interest in a standard being advocated to a governmental body for adoption may raise significant risk as well. Additionally, if the government is acting in the role of a business entity,

such as a consumer or contracting entity, rather than as a policymaker or regulator, the *Noerr-Pennington* doctrine does not apply.

While discussion of any public policy (*e.g.*, bill, law, or regulation) is permitted under the law, AWWA members should refrain from any discussion that could be interpreted as an agreement to take common action on prices, discounts, refusals to deal, production, or allocation of customers or markets. AWWA counsel should be kept informed of the nature of all AWWA public policy activities in order to identify possible antitrust risks.

Disciplinary Action for Violations of AWWA's Antitrust Policy

Each Member and individual participating in AWWA activities is obligated to comply with the AWWA antitrust compliance policy and guidelines set forth in this Manual. In addition to individual liability for criminal and civil penalties for violations of applicable law, violations of the antitrust laws by AWWA members may affect the name and reputation of AWWA and subject AWWA to litigation, investigation, and other consequences. Accordingly, the AWWA Executive Committee may, in its discretion, impose disciplinary action for violations of AWWA's Antitrust Policy, including, but not limited to, a warning, censure, period of probation, suspension of participation in or membership on a Committee or task group, temporary suspension of the Member's membership in AWWA for a period of up to one year, or permanent expulsion of the Member from AWWA.

Conclusion

This Manual is intended as an aid to assist you in understanding and fulfilling your responsibility to comply with AWWA's antitrust policies. It is not intended to make you an expert, but rather to help you identify antitrust issues that could arise in the course of your job responsibilities. Always contact legal counsel for further guidance.