

NEBB ANTITRUST GUIDELINES

It is and always has been the firm policy of the National Environmental Balancing Bureau, Inc. ("NEBB") to scrupulously comply with the antitrust laws. These guidelines are designed to serve as a reminder of NEBB's long-standing commitment to antitrust compliance and as an aid to members and certified professionals and certified firms in understanding their obligations under the antitrust laws.

I. NEBB ORGANIZATION AND PURPOSE.

NEBB is a non-profit organization committed to its mission of serving as the premier international certification association for professionals and firms that deliver high performance building systems and promoting the business purposes and objectives of its certificants. NEBB has a strict policy of compliance with federal and state antitrust laws. The antitrust laws prohibit agreements among competitors that restrain trade, and NEBB certified professionals and certified firms can be considered to be competitors for purposes of antitrust challenges, even if their businesses are not in the same geographic areas or in the same service lines. The penalties for violations of the antitrust laws are severe for associations and their certificants.

In all NEBB activities, each certified professional and certified firm, as well as NEBB staff, shall be responsible for following the NEBB's policy of strict compliance with the antitrust laws. NEBB officers, directors, committee chairs, and executive staff shall ensure that these guidelines are known and adhered to in the course of activities pursued under their leadership. Antitrust compliance is the responsibility of every NEBB certified professional and certified firm and NEBB staff.

II. WHAT ARE THE ANTITRUST LAWS?

A. Generally. The Sherman Act, Clayton Act, Federal Trade Commission Act and Robinson-Patman Act are the basic federal antitrust and trade regulation laws.

The Sherman Act and the FTC Act are of most concern to trade associations, since they principally deal with the activities of competitors working together. Section 1 of the Sherman Act prohibits contracts, combinations and conspiracies in restraint of trade, and the FTC Act prohibits "unfair methods of competition." These are obviously very broad concepts, but they have been refined by extensive case law.

Historically, antitrust problems have fallen into one of two categories: (1) "*per se*" violations - activities which are considered illegal in and of themselves, regardless of the actual effect on competition, and (2) activities which are judged under the "rule of reason," where all facts and circumstances are weighed to determine if there is an unreasonable restraint on trade.

The following are some examples of the types of activities of interest to trade associations that have been held to violate the antitrust laws under various cases. This is obviously not an exhaustive list.

B. *Per Se* Violations.

1. **Price Fixing.** An agreement among sellers or purchasers (of products or services) with respect to prices is the most serious violation of both the Sherman Act and the FTC Act. An agreement need not be formal, but can be inferred from a common course of conduct, even if there is no intent or motive to fix prices. To avoid even the slightest inference of price fixing, prices are not to be discussed or referred to at NEBB meetings and functions. Additionally, cost

information must be avoided or very carefully handled because it can have the effect of increasing, maintaining or stabilizing prices; or reducing competition in the marketplace with respect to the range or quality of products or services offered.

2. Other Terms of Sale. Other terms of sale such as discounts, credit terms, transportation rates, warranties, and guaranties can be as important as price, and competitors may not agree on such terms.

3. Limiting Production. Agreements among competitors to limit production or capacity are generally illegal.

4. Refusals to Deal. Group boycotts against suppliers, customers or competitors are generally illegal restraints of trade.

5. Bid Rigging. Collusion on bidding projects, especially government projects, is illegal.

C. Activities Judged Under "Rule of Reason."

1. Membership. Because association membership can be, in some cases, deemed a valuable asset that should not be unreasonably denied to a competitor, it is important that membership criteria and procedures be fair, consistently applied, and not arbitrary.

2. Data Collection and Dissemination. The prohibition against price fixing and other concerted activity mean that special care must be taken in any association data collection and dissemination program, to avoid any actual or apparent violations of the antitrust laws. This is why all information collected by NEBB management is kept confidential, is reported on a consolidated basis, and is not discussed at NEBB meetings.

3. Standards and Certification. Standard setting and certification activities can be extremely beneficial association programs, but must be conducted with care because of the potential for misuse. A certification program cannot serve as a vehicle for price fixing or improper exclusionary activities. This is why NEBB conducts all certification activities in a carefully controlled environment, with carefully considered objectives and procedures.

III. GENERAL GUIDELINES FOR NEBB ACTIVITIES.

The following rules are applicable to all NEBB activities:

A. Neither NEBB nor any of its committees or activities shall be used for the purpose of bringing about or attempting to bring about any understanding or agreement among the members with regard to prices, terms or conditions of sale, distribution, volume of production, territories or customers.

B. No NEBB activity or communication shall include any discussion of pricing methods, production levels or other limitations on either the timing, costs or volume of production or sale, or allocation of territories or customers. No individual certificant or firm's statistics or future production or sale plans will be revealed nor should they be discussed.

C. No NEBB activity or communication shall include any discussion which might be construed as an attempt to (i) prevent any business entity from gaining access to any market or customer for goods or services, (ii) prevent any business entity from obtaining goods or services freely in the market.

- D. No NEBB activity or communication shall include any discussion that might be construed as an agreement or understanding to refrain from purchasing any raw materials, equipment, services or other supplies from any supplier.
- E. All membership, director and committee meetings shall be conducted in accordance with an agenda, and minutes shall be taken and distributed to all members.
- F. All members are expected to observe the foregoing rules both at formal meetings and in informal discussions.

IV. **BASIC "DO'S" AND "DON'TS."**

The following simple "dos" and "don'ts" may help in following the above general rules:

- A. Don't at any time discuss prices; pricing systems; production levels; sales, profits, discounts or other terms and conditions of sale, including credit terms; market share; geographical allocation of markets; boycotts or restrictions on dealing with suppliers or customers.
- B. Don't discuss material or component costs that represent a significant part of total costs, or which could be interpreted as being a discussion relating to prices.
- C. Don't discuss specific company production, product or marketing plans or the selection of suppliers or customers.
- D. Do check with NEBB staff and legal counsel if there is a doubt about the legality of any NEBB program or any topic of discussion.
- E. Do cooperate with NEBB counsel on all matters, particularly when counsel has given an adverse opinion about a particular activity.
- F. Do at all times be aware of the importance of both (1) actual compliance with the antitrust laws, and (2) avoiding any appearance of non-compliance, including creating any situation which could be misinterpreted as non-compliance or conducive to non-compliance.