



# Antitrust Guidelines

## Background

- Antitrust laws in general prohibit combinations, conspiracies, and agreements (written or oral) in restraint of trade.
- Apart from federal antitrust laws, many states have unfair competition laws. Companies and trade associations' activities may be challenged by the federal government, state attorneys general, or private parties. Civil investigative demands frequently seek extensive document production with respect to potential anticompetitive activities.
- Antitrust enforcement can be draconian with fines up to \$10 million for a corporation and \$350,000 for an individual. Attorneys' fees, disruption and reputational damages can be substantial.
- Single-sector trade association whose members have substantial market share are especially vulnerable.
- Under the "Noerr-Pennington" doctrine, collective petitioning activities directed to federal and state activity are not immune from antitrust prosecution when the petitioning activity is a sham.
- Certain types of association activity (e.g. standard-setting) receive heightened antitrust scrutiny. ELCON does not engage in standard setting.
- Certain activities are per se illegal under the antitrust laws (setting prices, allocating markets, tying and group boycotts/concerted refusals to deal). Other alleged restraints of trade are subject to "Rule of Reason" analysis.
- Membership restrictions should be reasonably tailored to meet association objectives.
- Surveys which seek confidential information on competing companies prices, costs, sales volumes or commercially sensitive matters should not be undertaken except in consultation with Counsel and in accordance with FTC "Safe Harbor Survey Guidance."<sup>1</sup> Information in the public domain can be freely collected. Restriction on surveys apply to informal and email surveys.

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<sup>1</sup> The safe harbor criteria are:

(i) confidential data collected by a third party provider; (ii) data more than three months old; (iii) data may only be reported for data sets as to which there are at least five responders for data set with no responder having more than 25% on weighted average basis; (iv) data must be at least three months old; (v) data reported on a disaggregated basis which does not reveal individual responders' identity.

### **Meeting Procedures**

- Meeting procedures apply to all meetings -- whether “live”, telephone or by internet.
- Meetings should be preceded by a notice of meeting, along with a typical agenda.
- Participants at the meeting should adhere to the agenda. Rump meetings should be avoided.
- Minutes of all meeting should be kept by staff. Minutes should summarize accurately the actions taken at meetings, if any.
- An ELCON staff member should attend all meetings. Counsel should be available to consult with staff or members on antitrust issues.
- If a member brings up a subject of doubtful legality for discussion at a meeting, he or she should be told immediately the subject is not a proper one for discussion. If necessary, staff, officers and members must leave or halt the meeting. Counsel should be consulted.

### **Topics To Be Avoided At Meetings**

- Current or future prices of competitors.
- Matters related to prices, such as discounts, credit terms, profit levels, or volume of service.
- Wage and salary rates, equipment prices, or other actual costs of production of individual companies, since these costs are an element of price.
- Confidential business plans.
- Dividing up, allocating, or rationalizing markets, geographic areas, types of business, or customers among competitors.
- Refusal to deal with suppliers, customers, or other competitors.
- Initiatives that could be considered to restrain trade or act as a barrier to commerce.
- No exchange of confidential information about *confidential* marketing plans, sales plans, bidding plans or business strategies.
- Disparaging remarks about other industry participants, vendors, suppliers, other competitors.
- No agreements except with respect to logistics and internal administration of association.

## **Antitrust Do's And Don'ts**

Overriding Principle: ELCON adheres to the antitrust laws. Members must comply with the foregoing Do's and Don'ts in all association activities.

### **DO NOT**

At any meeting or ELCON activity, DO NOT discuss or exchange information regarding the following subjects:

1. A member company's prices (present or future), or pricing policy or other terms and conditions of sale (including *e.g.*, credit, delivery or transportation terms).
2. A member company's costs of production or costs of good sold (including compensation, equipment or input costs).
3. Confidential business plans or business strategies.
4. Territorial restrictions or allocations of customers.
5. Boycott or concerted refusal to deal with customers or suppliers.
6. Interference or attempt coerce the independent business decisions of member companies.
7. Disparage need of competitors, suppliers, or customers.

### **DO**

1. Prepare an agenda for each meeting and distribute it to all members prior to each meeting.
2. To the extent possible, limit discussion at meeting to the agenda items and only deviate therefrom with the approval of the committee chairperson or staff.
3. Have staff keep minutes of each meeting.
4. Have staff present at committee meetings.
5. Avoid "rump sessions." Conduct association business at scheduled meetings rather than social events.
6. When in doubt, consult with ELCON counsel on all antitrust questions and/or consult with your company counsel.
7. Disassociate yourself from any discussions or activities that appear to violate ELCON's antitrust do's and don't'. Report any such instances immediately.
8. Adhere to these guidelines in all ELCON activities -- formal meetings, conference calls, emails, etc.