# ANTITRUST POLICY & GUIDE

## I. Introduction

The antitrust laws are intended to preserve competition by, among other things, prohibiting agreements, combinations and conspiracies in restraint of trade. As groups of competitors working together, trade associations are subject to particular antitrust scrutiny. This Policy and Guide (collectively referred to as Policy) will provide some helpful background on the antitrust laws, focusing on antitrust issues of particular interest to Big I New York and its subsidiary, IAAC, Inc., collectively referred to as Big I New York Entities.

Big I New York Entities have a policy of strict compliance with federal and state antitrust laws. Big I New York Entities and members of Big I New York Entities should avoid discussing certain subjects when they are together -- both at formal meetings and in informal contacts with other industry members -- and should otherwise adhere strictly to the guidelines that follow. If you are confronted with a sensitive antitrust issue, you should review this Policy and consult with Big I New York President & CEO and/or General Counsel, as needed, to assure compliance with the antitrust laws and this Policy.

## II. Antitrust Laws

### A. Principal Federal Antitrust Statutes

There are four principal federal antitrust laws:

1. The Sherman Act -- This Act prohibits agreements (such as contracts, and conspiracies) that unreasonably restrain trade. It also prohibits monopolization and attempted monopolization, which requires proof of monopoly power (the ability to control prices or exclude competition) and anticompetitive conduct that contributes to the acquisition or preservation of such power.

2. The Clayton Act -- This Act prohibits specific types of conduct, such as certain exclusive dealing and "tying" arrangements, mergers that harm competition, and certain interlocking corporate director positions.

3. The Federal Trade Commission Act -- This Act generally prohibits the same practices barred by the Sherman Act and Clayton Act, as well as practices that are unfair and deceptive, such as making false or misleading claims about a product or service.

4. The Robinson-Patman Act -- This Act prohibits price discrimination under certain circumstances and other kinds of discriminatory practices, such as discriminatory promotional allowances.

B. Principal New York Antitrust Laws

The New York antitrust law is set forth in sections 340-347 of the New York General Business Law. The New York antitrust law is known as the Donnelly Act and it was enacted in 1899. Over the years the Donnelly Act has been changed and amended so that it now is very similar to the federal Sherman Act.

C. Penalties for Antitrust Law Violations

The consequences for violating the federal and state antitrust laws can be severe, including fines (as high as $1 million per violation for an individual and $100 million per violation for a corporation and alternative fines of up to twice the gain to the wrongdoer or twice the loss to the victim), up to 10 year jail sentences for individuals who participate in the violation, and/or a court order dissolving an association or seriously curtailing its activities. The antitrust laws can be enforced by both government agencies and private parties, such as competitors and consumers.

The New York antitrust laws permit the New York Attorney General to bring an action for civil fines of up to $1 million against corporations and $100,000 for individuals. Private parties may also bring lawsuits to enjoin improper practices and obtain treble (triple) damages if they are successful. Violation of the Donnelly Act is also a felony and punishable by a criminal fine of up to $1 million for corporations and up to $100,000 and up to 4 years imprisonment for individuals.

## III. Types of Antitrust Law Violations

There is a range of conduct and arrangements that may be illegal under the antitrust laws. Note that many of the antitrust laws apply only to "concerted" actions or agreements. However, an illegal concerted action or agreement can be demonstrated even without a handshake, express words, or a written contract or writings documenting an agreement. No written contract or express agreement is required to violate the antitrust laws. Tacit or implied understandings, including responding to pressure, exerting pressure, a "knowing wink", or doing "what is expected", can be evidence of an unlawful agreement. Agreements that violate the antitrust laws can be proven to have been made in numerous ways, including by informal conversations, discussions in meetings or groups of any size, whether or not in person, and through email or other communications vehicles.

The antitrust laws apply to trade associations just as they apply to any individual company or group of competitors. You should always avoid conduct and activities which violate the antitrust laws.

A. *Per Se* Violations

Some activities of competitors are deemed by law to be so harmful or anticompetitive, that they are considered *per se* or automatically illegal. This is true even if there is a possible business justification for the activity.

Examples of *per se* antitrust law violations include:

1. Price Fixing -- Price fixing arises when competitors agree with each other on prices they will charge for products and/or services. This can include any discussion among competitors of prices or the elements of price, such as costs (i.e., labor, salaries, equipment, overhead, etc.), discounts, commission levels, incentives, rebates or credit terms.

2. Group Boycotts -- Boycotts are joint refusals to do business with others or to only do business with them on certain terms and conditions. This can include agreements not to do business with entities because of their marketing methods or distribution practices/channels. The basic premise of the antitrust laws is to foster competition, which entails each company making its own business decisions *unilaterally and independently of others.* An unlawful group boycott occurs when competitors, suppliers, or customers agree with each other (or pressure another) not to deal with others.

3. Allocation of Customers, Markets or Territories -- Unlawful agreements to allocate 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 different geographic market or to a different group of customers.

4. Tying and Bundling -- Unlawful "tying" (or "bundling") occurs when a company uses its strong market position in one product or service as leverage to force or induce a customer to purchase another of the company's products or services. Tying also can arise in connection with selling several products or services as a package. In come cases, it is entirely lawful for a company to "bundle" several products and services into a package for a customer. However, if the company has a particularly strong market position in one product, its ability to "bundle" may be limited, and should only be done on the advice of legal counsel.

B. Rule of Reason Violations

Conduct that is not a per se or automatic violation of the antitrust laws is analyzed under the rule of reason to determine whether the conduct is unlawful. The rule of reason test means that pro-competitive justifications for the activities will be weighed against the anti-competitive harm. These areas should be approached with caution.

Examples of conduct that is analyzed under the rule of reason to determine whether it violates the antitrust laws include:

1. Price Discrimination—Price discrimination can be unlawful when a seller charges competing customers different prices for the same or similar products in approximately contemporaneous transactions;

2. Monopolization and Attempts to Monopolize—Companies with "monopoly power" or a "dominant position" can violate the antitrust laws if they abuse their dominant positions through certain anticompetitive conduct; and

3. Exclusive Dealing Agreements—Exclusive dealing arises when a buyer is required to obtain its full requirements in a product or service from a single source, or a seller is required to commit its full output of a particular product or service to a single buyer. Such agreements can be unlawful if the seller or buyer has a strong market position.

## IV. Application of the Antitrust Laws to Association Activities

Although associations are recognized as valuable tools of American business, they are exposed to accusations of antitrust violations because, by definition, an association is a combination of competitors and/or customers. You must ensure that the association activities that you undertake do not constitute or even create an appearance of an illegal restraint of trade. In this context, consider:

A. Information Exchange, Data Collection, and Dissemination

Because of the risk that information collected as part of a legitimate information exchange program could be used for unlawful purposes, a number of precautions must be taken:

1. Clearly articulate the purpose and precompetitive benefits of the information exchange program, and keep it closely focused on those criteria.

2. Member participation in any statistical reporting program must be voluntary.
3. Participation 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.
4. The data should be collected by Big I New York Entities staff or other independent third-party collectors selected by Big I New York Entities. Participating companies should not be involved in the collection or compilation of the raw data.
5. The specific information provided by participating companies is treated confidentially and is not disclosed in its raw form to any other participant or a third party.
6. Published data are reported in any aggregated form so that information relating to individual transactions is not disclosed and cannot be figured out. Surveys that include data from fewer than five companies may be risky because it may be difficult to conceal the source of the information and should not be undertaken without prior approval of Big I New York Entity counsel.
7. The survey does not include information about current or future prices.
8. Each member should separately analyze the data and make its own independent business decisions based on the data.

Participation in a data collection program and distribution of data collected should not be refused to non-members, although the Big I New York Entities may charge them a reasonable fee.

B. Educational Presentations

Discussions at educational presentations should be limited to objectives that promote overall industry or consumer welfare. Written outlines and handout materials for presentations involving antitrust-sensitive topics should be reviewed by Big I New York Entities' President & CEO or general counsel prior to distribution and use.

C. Public Policy Advocacy

Legislative activity, litigation in the courts, and proceedings before administrative bodies intended to influence government policy do not generally violate the antitrust laws. However, "sham" lobbying or litigation intended to exclude competitors do not qualify for exceptions under the antitrust law.

## V. Compliance with the Antitrust Laws

Big I New York Entities expect each member, director, officer, committee member, subcommittee member, work group participant, task force member, board member, and employee to recognize antitrust risks and conduct themselves in compliance with the antitrust laws. What follows are some techniques that will help to safeguard against individual, corporate and association antitrust liability.

A. Big I New York Entities Communications

Think carefully about how your communications with competitors and others may be perceived, and not just how they are intended. All letters, memoranda, and electronic media written in connection with Big I New York Entities' business and activities should be written clearly to minimize the risk that they will be misinterpreted.

Note that only Big I New York Entities' employees and officers may send out correspondence on Big I New York Entities' behalf. Members and others should not hold themselves out as having authority to bind a Big I New York Entity.

B. Conduct of Meetings

In order to avoid potential problems in this area, Big I New York Entities require adherence to the following guidelines:

1. Notice and Agenda

Each Big I New York Entities' Board of Directors, committees, subcommittees, work groups, and task force meetings should be preceded by a notice to the members of the group, with a draft agenda when possible. Private "off the record" meetings should not be held in connection with any Big I New York Entity meeting, program or activity.

2. Antitrust Compliance Adherence

Meetings of Big I New York Entities' Boards of Directors, committees, subcommittees, work groups, and task forces generally should include an Big I New York Entity staff member.

3. Minutes

After each Board of Directors meeting sponsored by Big I New York Entities, written minutes should be prepared by Big I New York Entities' staff and reviewed by Big I New York Entities' counsel when possible prior to circulation.

4. Social Functions

Conduct at social events or informal settings in conjunction with Big I New York Entities' meetings or otherwise should follow the same guidelines as other meetings.

5. Meetings

At meetings, all participants should be afforded an opportunity to present their views. ***There should never be discussion of the following topics at any Big I New York Entities' meetings:***

a. Any company's or member's individual prices or pricing policies;

b. Terms of a sale, warranties or contract provisions of particular companies;

c. Division of customers, territories or locations;

d. Specific company or member's research and development, sales or marketing plans;

e. Any company's or member's confidential product, development or production strategies;

f. Whether to purchase from or do business with certain suppliers/vendors or sell to certain customers;

g. Prices paid to sources;

h. Complaints about individual firms or other actions that might tend to hinder a competitor from competing fully in any market (with some exceptions in the public policy context); or

i. Data concerning fees, prices, production, sales, bids, costs, salaries, credit, or other practices, unless the data in question is exchanged and disclosed pursuant to a plan that has been approved in advance by Big I New York Entities' President & CEO or general counsel, per the guidelines above for information exchanges.

Big I New York Entities' meeting participants have an obligation to terminate any discussion, seek advice from Big I New York Entities' President & CEO or general counsel, or, if necessary, terminate any meeting if the discussion might be construed to raise any antitrust issues.

C. Concern

1. Program Access

Reasonable requests from non-members to attend Big I New York Entities' programs, or to purchase or participate in certain other products, services or activities offered by Big I New York Entities generally should be granted, subject to reasonable fees or charges. If unusual or unreasonable requests are made, or if guidance on any request is needed, Big I New York's Entities' President & CEO should be consulted.

2. Requests for Information/Investigations

If you receive a request for information about Big I New York Entities or for any documentation or information under Big I New York Entities' control from a government agency, private attorney, or other non-member, whether the request is formal or informal, written or oral, you should not make any substantive response before consulting with Big I New York Entities' President & CEO or general counsel.

3. "When in Doubt…"

Big I New York Entities' President & CEO should be consulted prior to any discussion of actions which could raise antitrust risks, or which seem in any way to be questionable or out of the ordinary. It is always better to ask first.

## VI. Conclusion

Big I New York Entities are committed to complying fully with the antitrust laws. If you have any questions or concerns about any of the issues raised in this Policy or by the conduct of I Big I New York Entities and its members, please contact the Big I New York Entities President & CEO.