



Pipeline Open Data Standard

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## **Antitrust Compliance Guidelines**

Approved by the PODS Board of Directors April 21, 2011

## **PODS Antitrust Compliance Guidelines**

One of the major goals of the Pipeline Open Data Standard Association (PODS) is to create an environment where industry members can meet and share information, with the intent and understanding that PODS activities will be conducted in accordance with applicable state laws and the laws of the United States, including antitrust laws. PODS recognizes the importance of the antitrust laws to preserve and foster competition and is committed to a policy that requires strict compliance with these laws. The PODS' Board of Directors has adopted the following Antitrust Compliance Guidelines to be used by members and staff in conducting PODS activities.

### **Application of the Antitrust Laws to Association Activities:**

PODS understands that industry associations are subject to strict scrutiny under the antitrust laws because they are venues where competitors gather and share information about the way they conduct their business. PODS, like other associations, must act carefully and cautiously in the way that it conducts its activities to ensure that it does not create situations that could be construed as violations of the antitrust laws.

Antitrust compliance is important for PODS' members because violations of the law could result in felony convictions leading to jail sentences and civil fines and penalties. Thoughtless violations of the antitrust laws can result in innocent members and staff being subjected to costly investigations and litigation involving a great loss of time and payment of legal fees. Such thoughtless violations have been known to ruin industry associations and cause great harm to individuals' professional and personal lives. It is PODS' goal to make members aware of these laws and be proactive in ensuring compliance.

### **Antitrust Guidelines for Discussions at PODS Meetings**

It is extremely important that PODS' members, meeting attendees, and speakers understand that the provisions of the antitrust laws regulate their conduct at association meetings. A thoughtless violation of the antitrust laws by a few members could result in expensive protracted litigation that could destroy PODS and/or result in the prosecution of individual members. The most powerful Federal statute, the Sherman Act, provides substantial penalties for violation of the antitrust laws. Individuals can be fined up to \$350,000 and imprisoned up to three years for violations. Corporations can be fined up to \$10 million. In addition, defendants found guilty of violating the Sherman Act are subject to treble civil damages.

### **Guidelines for Discussions Between Competitors at Industry Association Meetings**

#### **What You Can't Do**

1. Do not enter into any agreements with competitors regarding or affecting prices.
2. Do not discuss your company's current price with competitors.
3. Do not agree with competitors on pricing or profit levels.
4. Do not agree with competitors to give or deny cash discounts or promotional allowances.
5. Do not agree with competitors to give or deny credit to a specific customer, or to establish uniform credit terms.
6. Do not agree with competitors to deal or not to deal with any customer or agree on the prices to be charged to a specific customer.

7. Do not discuss allocation of markets.
8. Do not enter into agreements with competitors' price quotations or bids.

### **What You Can Do**

1. Discuss better ways to educate and provide meaningful information to Association members about the industry.
2. Discuss economic trends, business forecasts, and materials availability, emphasizing that each company is free to use this information in the way it sees fit and should make its own business decisions.
3. Provide a properly structured environment for the exchanging of credit.
4. Discuss Federal and State governmental actions and develop industry-wide lobbying efforts.
5. Discuss technological advances and better ways to utilize them.
6. Discuss ways to improve the public image of the industry.

### **Relevant Antitrust Statutes:**

The two antitrust laws that most affect industry association activities are the Sherman Act and the Federal Trade Commission Act. Section 1 of the Sherman Act prohibits all contracts, combinations or conspiracies that unreasonably restrain trade. Note that it is not the action, but the contract, combination, or conspiracy that is the violation of this law. One of the legal elements of a conspiracy is evidence of a relationship between the perpetrators, and the fact that an association is a combination of competitors makes it a possible venue for an antitrust violation.

PODS members should understand that the nature of conspiracy law might render those who merely sit at a meeting while others engage in an illegal discussion liable even though they did not actively participate in the discussion. Mere attendance at these discussions may be enough to imply acquiescence in the scheme and make the passive person as liable as those who actively engaged in the discussion.

Section 5 of the Federal Trade Commission Act prohibits "unfair methods of competition in or affecting commerce." This statute deals with illegal actions committed by individuals and/or companies and, unlike the Sherman Act, does not require the existence of a conspiracy. This statute is enforced by the Federal Trade Commission (FTC), which has broad powers to determine what constitutes unfair methods of competition.

FTC investigations tend to focus on industry practices and association activities that it considers to be unfair trade practices. Associations are frequent targets of such investigations. If the FTC finds the existence of an unfair trade practice it will impose fines and consent decrees upon participants.

### **Association Activities Forbidden by Antitrust laws**

#### **Per-se Violations:**

As mentioned above, the Sherman Act forbids combinations and conspiracies that unreasonably restrain trade. The Sherman Act was enacted into law in 1896 and over the years the courts have labeled certain restraints of trade as "per-se illegal." Per-se illegal violations have been determined by the courts to be so plainly anti-competitive that they are conclusively presumed

illegal and cannot under any circumstances be determined to be reasonable. Thus, if the court determines the restraint is a per-se violation a defendant cannot claim that the restraint was reasonable under the circumstances. Per-se violations are the most dangerous and must be avoided in all circumstances. The kinds of per-se violations that are common to association activities are as follows:

**1. Price Fixing.** An agreement among competitors about the price or the elements of pricing that they will charge competitors is price fixing. Price fixing may exist even if there is no specific agreement regarding the price to be charged. Any agreement among competitors that will affect the price to be charged can be price fixing. For example, agreements among competitors regarding credit terms, discounts, or shipping charges will affect the price charged to customers and fit into the price fixing, per-se violation, category. Competitors should scrupulously avoid discussing prices or the components of pricing and need to be aware that because any agreement affecting pricing is a per-se violation those charged will not be permitted to justify the agreement by showing that it benefited customers.

**2. Bid Rigging.** The object of bid rigging is to reduce competition and ensure that industry members get higher prices and a higher or guaranteed share of the market. The kind of activities that constitute bid-rigging are: sharing information with the understanding that one party will be the low bidder; submitting “complementary bids” at the request of a competitor with the understanding that this bid will be higher; agreeing with a competitor not to bid on a specific project.

**3. Customer Allocation.** Agreements to divide and allocate markets among various competitors are also a per-se violation. Agreements not to pursue a competitor’s customers, or an agreement not to pursue a category of customer commonly served by a competitor, also fit into the category of customer allocation schemes.

**4. Territorial Market Allocation.** Agreements to allocate customers on the basis of the geographic location of the customer or the market are a per-se violation. Agreements among competitors not to enter markets based on geographical boundaries also fit into this category and are strictly illegal.

**5. Group Boycotts.** A Group Boycott exists when competitors agree not to do business with, or agree to take some kind of joint action such as deny credit, against a competitor or a customer. Such actions are considered to be naked restraints of trade and are per-se violations.

#### **Rule of Reason Analysis:**

The rule of reason analysis applies to all alleged restraints that have not been labeled as per-se violations. This means that the alleged restraint may or may not be illegal depending on the circumstances. The rule of reason analysis requires that a court must consider the purpose for a restraint and its effect on competition in the relevant market in determining if the restraint is reasonable. It is important for PODS members to recognize the kinds of conduct that are subject to the rule of reason analysis and ensure that programs that may be subject to this rule are conducted properly. Some activities subject to the rule of reason analysis are as follows:

**1. Standards Setting.** Product standard setting and development refers to the process of identifying and agreeing upon a specific set of criteria to which a product should conform. Standard setting can create antitrust violations if the criteria have the effect of limiting or eliminating certain products or competitors from the marketplace. Standard setting is a legal activity that can be engaged in by an association provided that it is done in a way that provides interested parties with the opportunity to participate in the development and implementation of the standard.

**2. Certification.** If an association engages in the practice of certifying products or the expertise

and qualifications of members it must be aware that such certification activities must be conducted properly to avoid antitrust violations. Such activities will meet the rule of reason analysis if it can be shown that granting or denying certification is based upon legitimate criteria and does not have the effect of limiting or restraining competition.

**3. Information Exchanges.** Sharing non-public-domain information -- such as statistics, pricing information, marketing reports, raw material costs and employee compensation -- with fellow members can cause antitrust problems if not structured properly. Information-sharing programs must be structured in ways that do not disclose pricing strategies, market share or other areas that could create or provide the inference of creating illegal restraints.

**4. Government Relations Activities.** A very important role for most associations is to act as the liaison between the industry and legislatures and government regulators. Joint action by competitors to influence government action is immune from antitrust liability under the provisions of the Noerr-Pennington doctrine. There are certain kinds of lobbying activities by competitors that are exceptions to the Noerr-Pennington doctrine and legal advice should be obtained to properly structure lobbying campaigns to ensure compliance.

**PODS Antitrust Compliance Operating Procedures:**

1. PODS Board of Directors will adopt a formal Antitrust Compliance Guidelines that shall detail its intention to fully comply with the antitrust laws and indicate that it is pro-actively taking steps to ensure compliance.

2. PODS Antitrust Compliance Guidelines will be included as part of the "new member packet" that is mailed to new member companies. Each PODS member company will also be provided with a copy of the Antitrust Compliance Guidelines in conjunction with their annual membership renewal. Both new and existing member companies will be required to acknowledge receipt of the PODS Antitrust Compliance Guidelines.

3. The PODS Antitrust Compliance Guidelines will be posted on the PODS website.

4. Any action by PODS or its Board of Directors that has the effect of rejecting a membership application, or removing a party from membership, shall be sent to legal counsel for review before becoming final.